Corporate governance and institutionalization

Thesis submitted in accordance with the requirements of the University of Liverpool for the degree of Doctor in Philosophy by

Donald Edward Nordberg

University of Liverpool Management School

Submitted June 2012

Corporate governance and institutionalization

Abstract

This thesis concerns corporate governance, a field that has attracted attention from a wide range of academic disciplines and evoking the often competing interests of corporations and investors. Interest in the field grew over the past three decades in response to recurrent corporate and market failures, through which it became a focal point of public policy debate as well. The complexity makes analysis both difficult and deeply rewarding. Scholars approach it from a wide variety of often conflicting theoretical perspectives, which ironically results in a field that can seem under-theorized. Studies of the field take a number of directions, presenting a challenge to all those who study it. This thesis addresses that challenge by adopting three different stances and then bringing them together under a framework based in institutional theory. An introductory chapter outlines the work, while the concluding chapter then articulates the links further and points towards an agenda for further research.

Note: In accordance the guidelines of the University of Liverpool for a "PhD by published papers" (see Figure 1, page viii), it includes five published papers, an unpublished chapter and a paper currently under review at a journal.

Table of contents

Acknowledgements ..... **vii**

Part 1: Institutions and corporate governance **1**

1. The problems of corporate governance **3**

Introduction 3
Diagnoses in corporate governance 4
Remedies in corporate governance 6
Structure of the thesis 8

Part 2: Institutionalization and codification **13**

A note on methods 13

2. Creating better boards (under review) **19**

Creating better boards through codification: Possibilities and limitations in UK corporate governance 1992-2010 (2012) **21**

Introduction 21
Literature review 23
Institutions, language and methodology 27
Analysis 29
Logic, discourse and better boards 39
Possibilities and limitations 43
Conclusions 44
Appendix 1 46
Codification in UK corporate governance 46

3. Writing the code (new) **47**

Writing the code: Developing the UK corporate governance codes, 1992-2010 (2012) **49**

Introduction 49
Process steps in code development 50
Institutions and work 53
Methodology 56
Findings 58

Discussion 80
Conclusions 87
Appendix 1 88

Part 3: Power and politics in corporate governance 93

4. Waste makes haste (*JFRC*) 95

An institutional view of 'Waste makes haste' 95

Waste makes haste: Sarbanes-Oxley, competitiveness and the subprime crisis (2008) 99

Introduction 99
Waste makes haste 102
International reaction 105
Competitiveness of US exchanges 108
Sustainable competitive advantage 110
Exchanges as symbols of national advantage 111
Benefits from Sarbox 112
Failures of Sarbox and their impact 114
The subprime link 114
Conclusions and questions for further research 117
Postscript 119

5. Politics in shareholder relations (book chapter) 121

An institutional view of shareholders and activism 121

The politics of shareholder activism (2010) 123

Introduction 123
Issues in shareholder activism 125
Dimensions of shareholder politics 129
Shareholder politics and markets 135
Power and politics between shareholders 138
Summary and conclusions 139

Part 4: Ethics in corporate governance 143

6. Ethics (*JGM*) 145

An institutional view of ethics and corporate governance 145

The ethics of corporate governance (2008) 147

Introduction 147
Theories of corporate governance 150

An ethical framework for governance 156
Toward a new ethical stance in governance 162
Strategic value 164
Conclusions 166

7. Rules of the Game (accepted by *BEER*) 169

An institutional view of 'Rules of the game' 169

Rules of the game: Whose value is served when the board fires the owners? (2011) 171

Introduction 171
'You'll Never Walk Alone' 173
Corporate governance, in theory and practice 175
Ethics in corporate governance 178
Ethics at Liverpool FC 181
Conclusions and observations 184
Appendix 1: Liverpool FC governance arrangements 2010 186

8. News and corporate governance (*Journalism*) 189

An institutional view of corporate governance in news organizations 189

News and corporate governance: What Dow Jones and Reuters teach us about stewardship (2007) 193

The resignation 193
The story so far… 194
Corporate governance in the news 203
Conclusions 208

Part 5: Corporate governance as an institutionalized system 211

9. A system of corporate governance? 213

Introduction 213
Contributions 213
Implications and future research 219
Methods of research 224
Conclusions and directions 227

References 229

Acknowledgements

This thesis is the product of many people. As a PhD by published work, it reflects the views of editors and unnamed reviewers of the journals and book from which much of the material presented here is drawn. Moreover, I have had the benefit, over years of writing about corporate governance as a journalist, of insights from corporate directors, investment fund managers, investor relations officers, company secretaries, researchers at proxy voting agencies, and regulators. I heard their excitement, frustration, and even their boredom about how the debates about the field have developed in the last two decades. Some of their contributions are cited in the papers in this collection, but many are not. I am grateful to them all, but I shall select a few for special mention.

Professor Bernard Taylor, David Dando, Anthony Carey, Robert A.G. Monks and Professor Georges Selim provided sounding boards for ideas and eventually led to my decision to undertake the project. Lisa Day and Professors Luca Enriques, Roger Tooze and John Sedgwick gave encouragement in other ways. Professor Robin Holt, my second supervisor, read many of the words I have written during this study and gave crisp and encouraging advice. Thanks.

The shape and theoretical perspective of the thesis has much to do with the insights of Professor Terry McNulty, who supervised the project and jointly authored the paper "Creating Better Boards through Codification", included here. His first act of supervision was to point me towards institutional theory and suggested that we could view codes of corporate governance as institutions. That insight shaped the thesis and reshaped how I framed the arguments several of the papers present. I might have found my own way there, but not as quickly and perhaps not in a way that would so affect the approach I took.

Having acknowledged these contributions, I need to make one claim: Any mistakes here are my own.

This thesis, which is submitted in partial fulfilment of the conditions for a PhD by published papers. University of Liverpool regulations for such awards give the "key requirements for submission" as follows:

1. The thesis should take the form of a conventional thesis with common font/style throughout.

2. Papers should be called chapters and, where necessary, each will have an introductory section that explains how it links to preceding and following chapters.

3. The thesis may have one or more chapters represented by submitted/published papers as well as one or more conventional thesis chapters written in a format for publication but that have not yet been submitted and/or will not be.

4. There will be a conventional "Introduction" chapter that carefully explains and justifies the rationale for the approach. Critically, this chapter needs to explain the role of the other authors of any papers in the thesis, in terms of input to data collection, interpretation, etc....

5. There must be a conventional "Introduction" chapter that carefully explains and justifies the background and rationale for the approach taken.

6. This chapter **must** contain a section at the end which explains clearly the role of other authors of any papers in the thesis such as input of any additional data collection, interpretation, etc.

7. There must be a conventional "Conclusion" chapter and, where necessary, a discussion chapter that pulls together the different strands presented within the results chapters.

Figure 1 - Requirements for PhD by published work, University of Liverpool

Concerning Points 4 and 6, with one exception, the work presented here is my own. The exception is the paper "Creating better boards through codification", which was written in collaboration with my supervisor, Professor Terry McNulty. A further note detailing the working relationship precedes that chapter.

For ease of use, references for all papers are grouped at the end of the thesis.

Part 1: Institutions and corporate governance

This part provides an introduction to the themes of corporate governance and institutional theory. It also describes the shape of the thesis and in outline how the topics of the individual papers discuss may be viewed as part of a larger whole.

1. The problems of corporate governance

Introduction

Corporate governance is a complex field of study, one with few clear boundaries. Its practice involves a wide range of actors: directors and their advisers, investors and their advisers, regulators, public policymakers and all the interest groups that seek to advise them. Boards of directors sit at the apex of corporations, where all the strands of the organization come together. As a result, academic attention to corporate governance has come from a correspondingly wide variety of academic disciplines: accounting, finance, economics, financial economics, law, organizational studies and strategic management. The breadth of interest has fostered a literature in each and increasingly in studies seeking to create links between the differing perspectives.

Corporate governance is also a topical field of study, with impact on both public and business policy. Though it was little discussed before the mid-1970s, since then corporate governance has rarely been out of the public discourse. Early attention focused on US corporations and in particular on the linked issues of the escalation of executive pay (Balkin & Gomez-Mejia, 1990; Crystal, 1992; Monks & Minow, 1991), the power of social elites (Schmidt, 1977; Useem, 1979a) and shareholders' loss of influence (Eisenhardt, 1989; Fama & Jensen, 1983a, 1983b; Jensen & Meckling, 1976). More recently, other controversies have gained prominence in the public debate. Corporate failures have had an impact on the investment community as a whole but also directly on the pension savings of individuals – recall the collapses of the Maxwell enterprises in the early 1990s and Enron a decade later. Moreover, corporate governance failings have been identified as at least in part to blame in the recent threat to the stability of the financial system as a whole (M. Conyon, Judge, & Useem, 2011; Kirkpatrick, 2009). Corporate governance is not just topical; it is important.

This thesis is in part a response to both the complexity of the field and its significance. This introductory chapter describes the literature in outline, identifying within it several recurrent themes concerning the source of the problems in corporate governance and the proposed solutions to them. These diagnoses and remedies point

to three underlying ways of conceptualizing the field, which form the structure underpinning the individual studies.

Diagnoses in corporate governance

Because interest in the field arose in large part from important corporate failures, much of the literature involves the search for causes and solutions. Empirical studies seek out diagnoses, normative ones advocate remedies, and sometimes the two are linked. The problems can be grouped in at least three broad categories, a) the work of boards and their relations with managers, b) the relationship between corporations and investors, and c) the interaction of corporations with the wider society.

Boards and management

While corporate governance involves a wide range of actors, much emphasis is placed on the role of boards. Corporate boards have been described as social elites, who meet only episodically and in the setting of fairly large groups, complicating the processes of decision-making (Forbes & Milliken, 1999). In contrast to the high levels of remuneration associated with senior executives of listed companies, directors – in their roles a board members – work for relatively low pay (Zattoni & Cuomo, 2010). Among outside, "non-executive" directors, many are already powerful, highly paid executives at other corporations or have retired from executive life with comfortable finances. They are motivated less by money than by their personal reputations, a benefit, in theory, to investors who expect these directors to look after shareholder interests, but a condition that may have also a "dark side" (Fahlenbrach, Low, & Stulz, 2010) for the organizations they serve, when outside directors leave just when their services are most in need. These characteristics suggest that board members are probably strong willed and therefore reluctant to take instructions easily without good reason or without the force of legal sanctions. Indeed, theorists argue that the role of directors is in part to be professionally in disagreement (Amason, 1996; Forbes & Milliken, 1999).

The experience of corporate governance has proved somewhat different. Interest in the field of corporate governance started with concerns over managerial hegemony, a result of the development of what Berle and Means (1932/1991) called the modern corporation, in which remote owners ceded power to the managers of the business. The managerialism identified by Chandler (1977) can run to excess, development of the

agency problem (Fama, 1980), often focused on the escalation of executive pay (Bebchuk, Grinstein, & Peyer, 2009; Crystal, 1992). Some studies suggest that boards may be characterized by cronyism (Brick, Palmon, & Wald, 2006), and much of the corporate governance literature has examined potential remedies for these effects in market-based approaches on incentives aligned to shareholder interests (Gomez-Mejia, Tosi, & Hinkin, 1987) and the potential for perverse effects (Bebchuk & Fried, 2003; Lee, 2002).

In this view, corporate governance is a matter of social groups interacting in an economic field. The problems arise from the isolation of boards and the close interaction of boards and managers, which create the risk of expropriation of the company's resources to the private benefit of those in charge. This agency problem may be solved through a combination of economic incentives to give rational actors a reason to work in the shareholders' interests, using a combination of transparency, board structure and director independence as a way to reduce the impact of isolation. However, it may be argued that the remedies lie not in structures and transparency, but in character, behaviour and the relationships between the directors (McNulty, Roberts, & Stiles, 2005). These aspects of corporate governance remain relatively underexplored, in part because of the difficulty in studying the practical work of boards.

Corporations and shareholders

Because the agency problem arises from the separation of ownership and control, the relationship of corporations and shareholders has become an important focus of inquiry. The concentration on shareholder value (Rappaport, 1986) that developed in response to the first wave of interest in the field in the 1970s had at its roots the assumption that the interests of investors comes first, that is, the idea of shareholder primacy (Hansmann & Kraakman, 2004). Empirical studies have explored the impact of shareholders on corporate performance, seeking to determine, for example, whether family control (Bartholomeusz & Tanewski, 2006), blockholders (Laeven & Levine, 2008), dispersed shareholders (Fox & Hamilton, 1994), or other configurations of ownership affect performance or strategic decisions (Daily, Dalton, & Rajagopalan, 2003). While the literature of corporate governance may be dominated by US practice, with its presumption of wide share ownership identified by Berle and Means (1932/1991), questions have arisen whether that depiction is accurate (Holderness,

2009) and how the growth of institutional investment has altered the assumptions of the disempowered shareholder (Edmans, 2009).

Underlying these concerns is a theme of the balance of power between shareholders on the one hand and boards and management on the other, as much as how power is shared between executive and non-executive directors. Rather less attention has been given to another aspect of the problem, the differences between shareholders and how those affect the ability of boards to identify what shareholder interests are, even if they accept the notion of shareholder primacy.

Corporations and society

The claims of shareholders to primacy are often based not so much on ownership rights as on the notion of residual claims. This approach argues that shareholders are last in line for payment if the corporation fails, so the legitimate focus of boards is to protect shareholder interests (Fama & Jensen, 1983a). This notion has been challenged from a variety of directions, not least from the claim that employees might have based on their firm-specific investments (Brink, 2010), but also paradoxically that primacy might not be in shareholders' interests (Stout, 2011). This line of thinking is in line with considerations of boards as mediating hierarchies (Blair & Stout, 1999), which recognize the claim of other stakeholders and therefore the role of the corporation in society. Extensions of this approach see corporate governance as linked to the social licence to operate (Graafland, 2002) and a broader social contract (Sacconi, 2006, 2007).

While the literature on corporate social responsibility is in many ways distinct from that on corporate governance, there are overlaps, as when normative approaches based on duty- or rights-based ethics clash with the claims of shareholder primacy. Less well explored are how these interests may be viewed as part of the political contest over corporate resources and how that contest comes to inform the ways in which directors view their roles and choose which course of action to adopt.

Remedies in corporate governance

A brief overview of an extensive literature can provide only a glimpse into the range of ideas advanced to diagnose the problems in the field. The range of possible remedies is large as well, and they arise from various perspectives: the character and characteristics of individual actors and the dynamics of their interactions; the legal and

regulatory frameworks in which they operate, and the processes or political contestation through which they are formed; the conventions and practices, in particular the codes of practice that guide the decisions of directors. These perspectives have each developed a sizeable literature, drawing upon three interrelated themes.

Ethics: Some writers (e.g. du Plessis, 2008; Evan & Freeman, 1993; O'Neill, Saunders, & McCarthy, 1989; Orin, 2008) view corporate governance as a matter of ethics: The decisions of the directors of corporations that affect the lives of all those with whom it has contact. This approach draws upon themes in leadership, corporate social responsibility, and broader approaches to ethics. But ethical choices of individuals cannot be enacted in a straightforward fashion. Directors work together in a group – the board of directors – creating a need for negotiation of ethical claims, and opening issues of wider negotiation, creating a second avenue of exploration.

Politics: Writers on this theme see corporate governance as a political contest over the resources of the corporation, played out in relationships of power (e.g. Charny, 2004; Gourevitch & Shinn, 2005; Pagano & Volpin, 2005). Indeed, much of the literature examining mechanisms of corporate governance is based on the premise that the solution to the problem lies in changing relationships of power through law or in demonstrating (or not) how such mechanisms improve firm performance (e.g. Daily, Dalton, & Rajagopalan, 2003; Elsayed, 2007; C. Holm & Schøler, 2010; McKnight & Weir, 2009). Those contests often involve the struggle between managers, seeking to secure the greatest possible discretion over decisions, and investors, seeking to limit that discretion and keep managers focused on the production of shareholder value. Other actors also play roles in the contest, and all these parities appeal to public policymakers to adjudicate if not the specific claims then at least the rules of the game. The rules provide a third vantage point.

Institutions: The practice of boards is informed by both the formal institutions of law and regulation and the informal ones of custom and practice (Judge, Douglas, & Kutan, 2008; Ocasio & Joseph, 2005; Westphal & Zajac, 1997). Much of the early literature, in particular that written from legal or accountancy perspectives, uses approaches focused on compliance and disclosure regulations, for example, and some of the political literature – in particularly those writers working from a path-dependency perspective (Bebchuk & Roe, 1999; Roe, 2003) – see formal institutions as central. Important in the field of corporate governance is an intermediate level of institutional arrangements: voluntary codes of conduct, which have emerged over the

last 20 years (del Brio, Maia-Ramires, & Perote, 2006; Zattoni & Cuomo, 2008). They came to prominence first in the UK and became the benchmark of "good" governance in many jurisdictions around the world.

These three perspectives raise a series of research questions, which the chapters of this thesis address.

- On what ethical bases do directors decide on a course of action, and how do they relate to the theoretical approaches in the corporate governance literature?
- In view of the central role of investors in corporate governance, what is the shape of investor forces contesting for influence in corporate boardrooms?
- What political and social imperatives give rise to regulative action, and how can actors in the field – including investors – influence the outcome?
- In the specific case of codes of corporate governance, what processes give rise to their prescriptions, and how do the actors in the field give shape to their content?
- How do codes project the role of boards, and how does that understanding develop with time and experience?

Structure of the thesis

This thesis seeks answers to these questions in roughly the reverse order. As discrete papers, the chapters examine different cases and employ separate theoretical perspectives, providing specific insights. The final chapter, however, develops these sketches into an integrated picture, linking perspectives that point to a larger theoretical view and towards avenues of further research. The structure of the thesis is as follows:

Part 2 involves two long essays concerning codification viewed as an institutional phenomenon. The first examines the texts of the three main versions of the UK code, each written in response to concerns over corporate failures, drawing on theories of institutional logics to explain how perceptions of good governance has shifted over the years.[1] The second then uses the contributions of various actors from corporations, investors and other interested parties to explore how they sought to influence the codes' provisions over the same period, drawing on work in institutional logics and

[1] This paper, written with Professor Terry McNulty of the University of Liverpool (who supervised my studies), is currently under review at *Business History*. A fuller note on our collaboration appears as a preface to that section.

institutional work.[2] Together they examine the phenomenon of codification from an institutional perspective. The two chapters suggest a multi-level approach (D. R. Dalton & Dalton, 2011; A. J. Hillman, Shropshire, Certo, Dalton, & Dalton, 2011), as a regulatory process (codification) seeks to influence the structure and behaviour of corporate boards, and how actors in the field seek to influence the development of that process. To study these questions, the analysis applies some of the relatively underexploited aspects of institutional theory (Suddaby, 2010) to show how the text of codes and the way actors use language to create and revise codes to give meaning to certain practices of boards. By working across two decades of codes and focuses on the major versions written in response to crisis, we see how the code adapted to the changing context, and how embedded institutional agency permitted those changes and prevented others. The studies involves the role language and rhetoric (Suddaby & Greenwood, 2005) in establishing and giving legitimacy to institutional arrangements. The second also raises questions concerning the nature of institutional work (Battilana & D'Aunno, 2009; Lawrence & Suddaby, 2006).

Part 3 contains two published works that examine corporate governance as a contest of political will. The papers here – one a case analysis, the other conceptual – were not written from the perspective of institutional theory, though both can be interpreted in that light. The chapter "Waste makes haste" examines the regulatory response to the collapse of Enron Corp. in the US and how the gaps in that response suggest a public policy blind-spot that may have contributed to the subprime crisis that became evident in 2007.[3] That is, it involves what we can view as a radical change in formal institutional arrangements – the passage of the Sarbanes-Oxley Act in the US in 2002. The chapter "The politics of shareholder activism" develops a topology of investor-actors, showing how their interests may vary across three dimensions, creating a model it terms the "shareholder stance".[4] Much of the literature uses the perspective of shareholder value as the basis for evaluating mechanisms of corporate governance as a route to improved firm performance. But this paper raises conceptual

[2] This chapter is new to the thesis; a long analysis, it is the basis for two papers under review for the 2012 Academy of Management conference and the colloquium of the European Group for Organizational Studies; journals submissions will follow.

[3] Nordberg, D. (2008). Waste Makes Haste: Sarbanes-Oxley, Competitiveness and the Subprime Crisis. *Journal of Financial Regulation and Compliance, 16*(4), 365-383.

[4] This chapter appeared in a collection of essays: Baker, H. K., & Anderson, R. (2010). *Corporate Governance: A Synthesis of Theory, Research, and Practice,* part of the Robert W. Kolb Series on Finance. New York: John Wiley & Sons Inc.

and practical issues with using shareholder value as an organizing principle for board decision-making. Implicit in this is that the institutionalization of shareholder value is a problematic concept (Jensen, 2001; Lazonick & O'Sullivan, 2000), as evidenced in empirical studies of investor communication (e.g. Roberts, Sanderson, Barker, & Hendry, 2006). It thus lends support to work questioning shareholder primacy (Armour, Deakin, & Konzelmann, 2003; Sharfman, 2010; Stout, 2011).

Part 4 contains three papers that look at ethical issues in corporate governance. The first of these interprets the core theoretical perspectives in the field in the light of the divide in ethics between consequentialist and deontological approaches.[5] The second draws upon it to examine the case where the board of directors, in effect, dismissed the owners, an ironic reversal of roles that exposes the ethical basis for decision-making in a case where law and informal institutional norms gave little guidance.[6] The third paper examines two cases of takeover bids in the same industry, where conventional understandings of "good" governance – specifically, shareholders' presumed interest in having a free market for corporate control – were undermined by arrangements designed to protect the companies from predators that might endanger values only loosely connected to shareholder value.[7] These papers again do not invoke institutional theory directly, but a preface to each suggests links.

The single chapter in Part 5 then summarizes the contributions of the chapters and the thesis as a whole and then provides a reflective commentary on the field and the process of studying it in these papers. It also suggests avenue for further research, including what the analyses presented suggest may be overlapping institutional logics that may conflict or compete, with the promise of further evolution if not more radical change in the face of the MacAvoy and Millstein (2003) term the recurrent crisis in corporate governance.

The studies' contributions to the literature of corporate governance concern the role of codes and the process of codification, the tradeoffs and balances struck in policy formation and in boardrooms facing difficult decisions. Contributions to theory are particular to each paper, but together they suggest a mode of thinking about the field of corporate governance that integrates its ethical, political and institutional

[5] Nordberg, D. (2008). The Ethics of Corporate Governance. *Journal of General Management, 33*(6), 35-52.
[6] Nordberg, D. (accepted 2011). Rules of the Game: Whose value is served when the board fires the owners? *Business Ethics: A European Review*.
[7] Nordberg, D. (2007). News and Corporate Governance: What Dow Jones and Reuters Teach Us About Stewardship. *Journalism: Theory, Practice and Criticism, 8*(6), 718-735.

dimensions. The avenues of further research in the concluding chapter point to ways to develop that approach empirically and theoretically.

A note on the scripts: The papers in this collection were written and (where applicable) published during my research studies at the University of Liverpool, under the supervision of Professors Terry McNulty and Robin Holt. With the exception of one chapter, the work represented here is entirely my own. The chapter "Creating Better Boards" was written in close collaboration with Professor McNulty. For the convenience of the reader, a note preceding that section explains more fully how we worked on it.

Part 2: Institutionalization and codification

This part is made up of two related empirical studies, the first under review and the second original to this thesis.

The first, "Creating better boards", concerns issues of content of the three main versions of the UK code of corporate governance between 1992 and 2010. The second, "Writing the code", analyses the debates preceding those three versions.

A note on methods

Chapters 2 and 3 of the thesis were developed in parallel, using similar processes of data sources and analysis. While each chapter contains a section concerning the methodology, this note provides greater elaboration and comments on research philosophy.

Sources

The two chapters examine events in three time periods, 1992, 2003 and 2009-10, when the major versions of the UK code of corporate governance were formulated, but other changes to the code were excluded. The chapters examine the codes and the processes that led to their drafting for what they say about board effectiveness. The Greenbury Code of 1995, and both the Hampel Code and the first version of the so-called Combined Code in 1998 did not directly address that topic. Greenbury dealt with remuneration and disclosure without altering the core elements on boards in Cadbury (1992). Hampel concerned the relationship between boards and investors, and the first Combined Code combined the three individual ones. Revisions in 2006 and 2008 were excluded as well; while they altered the substance concerning boards in the 2003 version of the Combined Code, they did so only at the margins. Moreover, and importantly, none of these revisions arose against the backdrop of widespread dissatisfaction with current arrangements, let alone a "precipitating jolt", in the terms of Greenwood and colleagues (2002), which might have cast doubt on the legitimacy of

the code. The efforts in 1992, 2003 and 2009-10 were different. As Chapter 2 explains, these versions came in response to corporate collapses that led to widespread concern among policy-makers and the general public about the legitimacy of corporate governance, in 1992 as practiced in the UK and in both 2003 and 2009-10 on a global scale.

The volume and complexity of the data as well as differences in theoretical perspectives led to the decision to break the project into discrete parts. I might have structured the work chronologically, looking and processes and texts together, and each period separately. In consultation with Professor McNulty, I concluded that a split between code texts and processes provided a more promising analytic approach and one with practical significance. The code texts inform governance structures and activities at all listed companies, in many non-listed companies and organizations in the UK, and even the code development in other jurisdictions (see Chapter 2 for a summary). As such, and following Fairclough (1992), the discourse those texts create alters the social practice of boards. The texts, therefore, contain essential insights into the understanding of board effectiveness, which became the substance of Chapter 2. In institutional terms, they articulate the logic of corporate governance, presenting the argument and rhetoric that gives the code its cognitive and moral legitimacy, which then diffuses and becomes institutionalized (Greenwood et al., 2002).

The processes of code development, by contrast, concern episodes where institutional change may arise, when competing and conflicting logics get a public airing (Purdy & Gray, 2009) and institutional entrepreneurs and defenders can engage in what Lawrence and Suddaby (2006) call institutional work. These are the periods of political contestation (Zilber, 2007), when we can hear the new discourse taking shape, as proffered texts emerge and submerge and a new or modified language of corporate governance develops, which then does, or does not, affect practice. This, too, has practical significance for policy-making considering code development in fields other than corporate governance.

In all the consultations analysed in Chapter 3, each instance involved more than a hundred texts, often ones that were mutually supportive or just repetitious. The methodology section of that chapter explains the approach to sampling in some detail, which I will not repeat here. While the core samples for each period are listed in an appendix, it is worth noting the reasons why some of the analysis involved texts outside the samples. The core samples provided detailed comments on a wide variety

of points from the differing perspectives of their authors and organizations. But other contributors made salient comments on individual points, often in quite vivid language, occasionally in quite terse and concise documents. The force of these documents, on these narrow points, might well have resonated with the code's authors. Widening the sample to include them suited the theoretical sampling criterion of salience.

Analysis

Chapters 2 and 3 give outline-level introductions to the data analysis techniques. Here, I elaborate upon them before reflecting on the processes of qualitative research in generating narratives like these.

The discourse analyses were developed with the assistance of Nvivo software, a package designed for qualitative research and based on the principles of grounded theory development. In keeping with those principles, I approached the texts for both chapters with a fairly open mind, though as Glaser and Strauss (1967), and especially as Strauss (1987) accepted, one cannot have a completely open mind about a subject one has dealt with before. Chapter 9, in the reflections on my career as a journalist, reconsiders this issue in different terms.

In developing the paper that makes up Chapter 2, Professor McNulty and I each read the text of the 2010 code and saw in it changes in tone that signalled a departure from the past. That prompted us to look for certain categories of meaning in the prior texts as well as in the 2010 one. That is, the open coding was not entirely open, even at the outset. I would argue, I believe with Strauss's support, that it was ever thus. The initial categories of accountability, independence, structure and behaviour were soon joined about a hundred others, "nodes" in Nvivo's language, many of which became only lightly populated in the software as I analysed the texts in succession. But others became heavily populated, and some came to be articulated into trees of meaning, as the coding became more granular and complete.

In keeping with grounded theory and the way in which the software assists its users, the next phase involved identifying relationships between nodes, what grounded theorists describe as axial coding, in particular between the more abstract, second-level codes, including accountability, independence, structure and behaviour. For example, Cadbury's evocative metaphor of the "buttress", discussed in Chapter 2, became an example of how structure supports accountability, and one particular

understanding of it. The analysis then suggested how independence grew in its supporting role in 2003 and then in 2010 receded in terms of emphasis – in terms of force if not content (Fairclough, 1992).

The analysis for Chapter 3 started with considerably more analytic structure in place. The concepts identified in working on the code texts were already in the front of my mind, and no attempt to impose a veil of ignorance could eliminate that.[8] Moreover, the starting point for the analysis in Chapter 3 was a copy of the Nvivo database from Chapter 2 with all its nodes and relationships but empty of any data. Nonetheless the data suggested new categories in each time period studied, suggesting ideas that may have been discarded between consultation and code.

This discussion is, so far, very much according to standard qualitative research methods and the seminal texts in grounded theory. But what happened next in the analysis for both chapters – and what I believe happens next more generally – is that another method of understanding took over. In practical terms, the nodes in the software came to serve as buckets of phrases with handy links to the context in which the coded elements sat. At first the coding helped to group together all the things I had seen as, say, "structure" in one place. The nodes then became signposts pointing to a quick path to the texts in their contexts. As I came to know the texts better through iterative reading, I often bypassed the coding and went directly to the texts. Moreover, and importantly I believe, the meaning of texts emerged increasingly through the process of writing, that is, of explicating the texts, in much the form that they are presented in those two chapters. It is worth noting that the original drafts of the empirical sections of these two, long chapters were each originally more than twice as long. That is, understanding developed as much through the process of writing and reflecting as the process of coding.

Reflection

This experience reminded me of both literary criticism and the creative writing process that novelists and playwrights often discuss, in which the characters seem to take over and organize the action. The story unfolds and the meaning emerges more through the telling and less from formal plot development. It happens to actors in the theatre as well, when the performance one night reveals different meanings than the

[8] We return to the veil of ignorance, and Rawls, briefly in the reflections in Chapter 9

night before; the telling itself changes, not just the hearing. That meaning should thus unfold is well known in the field of business and management. We learned how to talk about this experience as "emergent strategy" through the work of Mintzberg (1987) or as "sensemaking" from Weick (1989) and their respective followers. The qualitative management studies literature embraces the use of narrative approaches for data collection (e.g. Maguire & Phillips, 2008). The themes of storytelling (Jørgensen & Boje, 2010; Ng & De Cock, 2002) and even fiction (Rhodes & Brown, 2005) as a mechanism for the creating of meaning are also important in organization studies. De Cock (2000, p. 591) even questions the distinction between narrative and scientific knowledge, stating: "The boundaries between narrative knowledge (in the form of myths and stories) and scientific knowledge (the 'facts') are artificial because scientific knowledge can only be represented through narrative knowledge". If we accept this view, even in part, it is not that great a leap to envisage that researchers themselves, whether writing on organizations, economics, literature or history, would discover meaning through telling the story of their data. Such a view is in sympathy with the view of Rorty (1989) on the ironist's constant urge to discover a new vocabulary in which to discuss her ideas and hopes.

Code-writing – as the following two chapters depict it – concerns the search of a new vocabulary of corporate governance, a vocabulary that is at once clear and then, in another circumstance, ambiguous, creating structure and then flexibility to inform the work of corporate boards. That is to say, the evolution of the code (Chapter 2) and the processes of code-writing (Chapter 3) are mirrored in the processes I went through in the data analysis and then the writing of the two chapters. The codes then demand from directors a narrative account of their approach to governance. As the next chapter details, in 2010 that demand comes with a plea for personal communication, in the hope perhaps that such telling will prove more revealing and provide more meaning.

2. Creating better boards (under review)

Status: Under review at *Business History* (2012)

The essay below, written with Professor Terry McNulty, arose from discussions we had around the time the Financial Reporting Council published the new UK Corporate Governance Code in May 2010. We independently came to the view that the code marked an interesting shift in direction and decided to analyse it paying close attention to the texts. In reflections on his work on the Higgs Review (in particular, McNulty et al., 2005) Professor McNulty had seen in that review a recognition of the importance of behaviour and relationships between directors, which concurred with my view from having met Higgs following its publication. We agreed these sentiments did not come across in the implementation of his review. We decided to examine the idea whether the shift in 2010 could be attributed to a tempering of the structural focus of Cadbury and the emphasis on formal definitions independence in post-Higgs version of the code, reflecting greater recognition that behaviour lies at the heart of board effectiveness.

Professor McNulty thus contributed to the formulation of the research question, wrote the initial draft of the section of the literature review on board effectiveness, and pointed to the issues in institutional theory raised in a recently published essay (Suddaby, 2010). I provided the rest of the literature review on corporate governance and institutional theory and chose the methodology. I conducted the data analysis, consulting with Professor McNulty over definitions of coding, and wrote a first draft. We then collaborated through several drafts, for which I took the lead in writing.

Creating better boards through codification: Possibilities and limitations in UK corporate governance 1992-2010 (2012)

Abstract: Since the beginnings of the global debate over corporate governance in the early 1990s, academics, practitioners and policymakers have focused on changing boards of directors to improve corporate governance. The financial crisis of 2007-09 arose despite two decades of codification of corporation governance, a process that continues in the light of concern about corporate performance and accountability: Codes have not eliminated the problems they set out to address. Analysing the three main versions of the UK code of corporate governance, we see a shifting discourse of "structures" in Cadbury (1992) to "independence" under the reforms in 2003, and then in the 2010 iteration towards "behaviour", as the code seeks to improve boards as mechanisms of corporate governance. The evolution in the language and recommendations of the code reveals growing understanding both of the practical challenge of board effectiveness and of the limitations to codification.

Keywords: Codification, corporate governance, discourse, institutional theory, board of directors.

Introduction

Codes of corporate governance have become an important worldwide phenomenon, affecting both how businesses set policy and governments weigh the need for regulation (Aguilera & Cuervo-Cazurra, 2004, 2009). A first wave started with the UK Cadbury Code (1992), a response to prominent corporate failures. A second wave, following the collapse of Enron and WorldCom in the US but also Parmalat and Ahold in Europe in the early 2000s, included the Higgs Review (2003) of non-executive directors, which led to changes to the UK Combined Code and new governance regulation elsewhere. But the financial crisis in 2007-09 demonstrated that problems of poor conduct and corporate collapse persist, prompting further reconsideration of what constitutes good corporate governance – around the world, and also in the UK.

Codes are studied by directors, memorised by their support staff, and shape parts of annual corporate reporting. They prescribe "good" or even "best" practices within the

boardroom – structures of board design, the shape of board leadership, balance between executives and outside directors and their independence. They do so despite inconclusive evidence that their key tenets lead to better performance (Bhagat & Bolton, 2008; D. R. Dalton & Dalton, 2011), and despite concern that the theory on which they are in part based may have perverse effects (Ghoshal, 2005). There is some evidence that compliance is rewarded by stock markets (Goncharov, Werner, & Zimmermann, 2006) and that good governance standards benefits whole markets (Newell & Wilson, 2002). Whatever their impact, as codes gain acceptance, they become institutionalised, placing constraints on action and providing legitimacy for corporations and directors who adhere to them. Yet the goal of better boards remains elusive.

This paper traces the development of the UK code from its inception in 1992 to the revision undertaken in 2010, showing how it reflects an evolving conception of board effectiveness. Codes set mechanisms to introduce structure to the unstructured work of boards and define characteristics that might make directors independent of management. But over time, the language of the codes evolves, revealing a growing recognition that codes are unable to prescribe all the elements of good governance and that board effectiveness depends on the behaviour of boards.

While the analysis is specific to the UK, it has wider implications: Corporate governance has become a global concern for corporations, investors, auditors, policymakers and the wider public. Early on the UK code became a model for other countries, informing the principles articulated by multilateral organisations, and providing the basis for codes in developed and emerging economies (Daily, Dalton, & Cannella, 2003).

The rest of this article is structured as follows: We examine corporate governance in the UK, focusing on the three main iterations of the code, the Cadbury Code in 1992, the 2003 version of the Combined Code, and the UK Corporate Governance Code issued in 2010. We then consider theory and empirical studies that seek to identify characteristics of board effectiveness. Against this theoretical and conceptual background, the paper analyses the development of the texts of the code over the past two decades, identifying how their understanding of board effectiveness has shifted, and how their content seeks to alter practices of boards and institutionalise them. This evolution, we argue, points to both a growing understanding of board effectiveness

and recognition of the limits to prescribing and institutionalising such board conditions and practices through codes.

Literature review

The oft-quoted phrase from the Cadbury Code (1992, Paragraph 2.5) defines corporate governance as the "the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies." Boards give a human face to the largely undefined legal person of the corporation; directors are the people within corporations to be held accountable.

As a key mechanism of corporate governance boards occupy a central place in the research literature. Berle and Means (1932/1991) described the risks of separating ownership of corporate assets in the modern corporation from their control by professional managers, the self-interested and self-serving agents in day-to-day control of the company's resources, which led to a type of managerial capitalism (Chandler, 1977). This agency problem (Fama & Jensen, 1983b; Jensen & Meckling, 1976) gave rise to emphasis on creating shareholder value (Rappaport, 1986) as the nature of corporate purpose. The board's role was mediating between management (the "agent") and shareholders (the "principals"), and monitoring and enforcing good governance (Shleifer & Vishny, 1997). Making a link to institutional theory in the context of US corporate governance, Westphal and Graebner (2010, p. 18) write that this "agency logic now dominates the financial community's view of corporate governance". At its heart is the belief that with the right incentives and controls, companies can align interests of managers with those of shareholders. A vast literature, particularly in the US, has developed on how remuneration links to shareholder returns (Bebchuk et al., 2009; Brick et al., 2006; M. J. Conyon, 1994; del Brio et al., 2006; Keasey, 2006; Kumar & Sivaramakrishnan, 2008).

Outside America, a different and significant approach took hold: codification, a new phenomenon within the history of corporate governance (cf. J. F. Wilson & Thomson, 2006). A handful of codes of practice for boards pre-date those in the UK. For example, a lobbying firm representing large US companies issued guidelines on the role of boards and their composition (Business Roundtable, 1978), but they lacked both monitoring and enforcement or standing beyond the organisation's membership. But

following the Cadbury Code in 1992 came a wave of official and semi-official codes around the world (see Appendix 1).

The literature on the codification of corporate governance can be grouped broadly in four categories. A first concerns the diffusion of codes globally (Aguilera & Cuervo-Cazurra, 2004; Collier & Zaman, 2005; Haxhi & van Ees, 2010). Second is a related theme tracking similarities and differences between countries (Hermes, Postma, & Zivkov, 2006; Weil Gotshal & Manges, 2002), while a third assesses compliance in individual regimes (Akkermans et al., 2007; Pass, 2006; von Werder & Talaulicar, 2009). The fourth seeks to assess the relationship of codes to corporate performance (MacNeil & Li, 2006; Shabbir, 2008) or reporting (Nowland, 2008). A few studies have pointed to the limitations of standardising such mechanisms, say, by type of company (Filatotchev, Toms, & Wright, 2006), and others have questioned whether "one size" can "fit all" (Arcot & Bruno, 2007). In a study that points towards issues arising from such standard approaches, Popp, Toms and Wilson (2003) link governance needs to a combination of individual companies' resource bases and resource dependency. But few if any studies have analysed how codes shape and then re-shape their understanding of good governance and specifically board effectiveness over time in light of questions about their efficacy.

Codification of UK corporate governance

Quail (2000) says that the UK had been marked by proprietorial capitalism, where founding families retained control even as their ownership became diluted. It gave way over time, however, as financial institutions grew to become the main source of capital. At first these investors enjoyed little voice; as large investors they had little practical chance to exit. But gradually the scales tipped. As the market for corporate control developed in the 1970s and 1980s (Franks, Mayer, & Rossi, 2005), managers started to pay greater attention to the demands of institutional investors on strategic decisions (Steve Toms & Wright, 2002). Some companies retained a managerial-proprietorial control and focus, however, notably when a dominant shareholder operated the reins of power. Then in rapid succession in the 1990 and 1991, a series of corporate failures brought different questions about the nature of corporate governance to the fore. The failure of the Bank of Credit and Commerce International resulted from weak oversight of a complex, multinational organisation whose business structures played one regulator off against others. Other cases, Coloroll, Polly Peck and

the listed enterprises controlled by Robert Maxwell, involved audit failure and allegations of fraud conducted by people who were both major shareholders and managers.

The impact of these cases, in particular on the pension savings of employees at Maxwell's companies, raised questions of the social legitimacy of corporations. One outcome was an effort that straddled private sector institution-building and public policy. Originally asked to devise remedies for the failings of accountancy and audit, Sir Adrian Cadbury went beyond his brief and, prompted in part by the Maxwell collapse, which occurred during his investigations, focused on the board of directors. Working with a panel of senior figures from accountancy, regulators (that is, the Bank of England and the London Stock Exchange) and the corporate world, Cadbury took evidence from more than 200 individuals and organisations in a variety of formal and informal settings. The result was the Cadbury Report and Code (1992), whose recommendations included separating the roles of chairman and chief executive officer, so no one person had "unfettered power" in the boardroom. It also urged boards to have committees for audit and other key functions and to engage outside, "non-executive" directors in sufficient numbers to have a strong voice on the board and in the committees. Over succeeding years the code would add other provisions but retaining a clause making it voluntary: Companies could choose not to comply, provided they published an explanation of their thinking. It called on the external authority of the Financial Reporting Council and the London Stock Exchange's UK Listing Authority, both at the time industry self-regulatory bodies, for monitoring and enforcement.

In 2001-02 with the collapse of Enron, WorldCom and other large US corporations came renewed global concern about corporate governance. New institutional arrangements came as well, some legislative, like the Sarbanes-Oxley Act (Library of Congress, 2002) in the US, others regulatory, like new listing rules from the New York Stock Exchange (2003) and Nasdaq (2002), as well as new or revised codes of conduct other countries. The UK revised its code after a review by Derek Higgs (2003), working on a mandate from government, recommended a wide range of measures to enhance the effectiveness of non-executive directors. Higgs concentrated more board functions in the hands of independent non-executives, a challenge to the authority and power of executive directors, of the chairman, and of any non-executives with other affiliations to the company. He urged regular evaluations of the performance of the board, its

members and the committees. Many of the recommendations of his review were incorporated into an extensive revision of the Combined Code, so called because it combined Cadbury with other reviews of executive pay (Greenbury, 1995) and institutional investment (Hampel, 1998). The FRC and UK Listing Authority were again involved as monitors, but now reconstituted as governmental entities.

The global financial crisis of 2007-09 demonstrated to many observers the continuing inadequacies of corporate governance, whether of the legislative type in the US or code-based versions. In the UK, the FRC ordered a fresh revision of the Combined Code in 2009, a year earlier than scheduled. In parallel, government commissioned a study of governance arrangements in financial services (Walker, 2009b). One outcome was an updated version of the code for all listed companies, with a new name: the UK Corporate Governance Code. Although many of its provisions are close or identical to the Higgs-inspired version, the new code is explicit in seeking to alter the "tone" (Financial Reporting Council, 2010, p. 3).

As we examine below, the "tone" signals important shifts in direction and emphasis in the quest for board effectiveness, revealing perceived limitations and as well as possibilities in codification. To analyse the continuities and changes in the UK code it is useful to explore the meaning of effectiveness found in theoretical and empirical studies of boards.

Board effectiveness

Boards are a crucial mechanism of corporate governance (Adams, Hermalin, & Weisbach, 2010; C. M. Dalton & Dalton, 2005; Nadler, 2004; Zahra & Pearce, 1989). But empirical studies suggest boards often lack the ability to exercise influence management and may be weak, minimalist and ineffectual (Pettigrew & McNulty, 1995). Other scholars point to the limited rationality of boards due to "pluralistic ignorance" (Westphal & Bednar, 2005), groupthink (Janis, 1972; Maharaj, 2008; Sundaramurthy & Lewis, 2003), and attention failures (Tuggle, Schnatterly, & Johnson, 2010). Boards appear to be influential when outside, non-executive directors create accountability through individual and collective behaviour that both challenges and encourages the executives. Effective behaviour requires that non-executives be "engaged but non-executive", "challenging but supportive" and "independent but involved" (Roberts, McNulty, & Stiles, 2005, p. S6). These modes of behaviour recall the two dimensions of accountability that Roberts (1991, 2001) calls "individualising" (the

conventional view of accountability creating hierarchical relationships) and "socialising" (involving a sense of duties to others that links people together in common purpose). Roberts (2001, p. 1554) describes "socialising" accountability as arising "where there is relatively frequent face-to-face contact between people and, secondly, where there is a relative absence of formal power differentials".

A key proposition that emerges is that while board structure and composition condition how boards operate, effectiveness depends on behavioural dynamics, including between non-executives and the executives (Roberts et al., 2005). These empirical findings resonate with an earlier theoretical model (Forbes & Milliken, 1999) emphasising the importance of group processes to board effectiveness.

Forbes and Milliken (1999) view boards as relatively large, elite workgroups of seasoned, high-level executives. They meet episodically but boards otherwise have minimal involvement with the organisation; yet they make significant, interdependent strategic decisions, working by consensus and using the collective wisdom, skills and experience of the group. Consequently, Forbes and Milliken suggest that effectiveness must also embrace the ability to keep working together ("cohesiveness") as the board conducts the competing tasks of "control" and "service". They suggest three processes of importance: "effort norms", "cognitive conflict", and "the use of knowledge and skills". Effort norms concern how directors prepare for board sessions and give attention to board tasks. Cognitive conflict refers to issue-related disagreement, a view supported by Amason (1996). The use of directors' knowledge and skills refers to how relevant expertise is coordinated and deployed (Zona & Zattoni, 2007).

Institutions, language and methodology

Codes provide the texts of corporate governance, and their language frames the perception of the work of boards. As Phillips, Lawrence and Hardy (2004) suggest, the language in which an institution is established influences and even controls how that institution will be accepted and evolve. Fairclough (1992) calls attention to the importance of texts, which set the language and intellectual parameters (or "discourse") in which discussions take place, which in turn shapes the social context and behaviour. Once established as social practice, these ideas provide legitimacy to the discourse and influence creation of future texts and how we think about issues. Clegg and his colleagues (2006, p. 303) endorse this view, saying that this "deceptively simple

framework" provides scope for analysis in linking texts to social practices. Fairclough (1992) argues that diction shapes what we can and may not think about. It frames the debate, focusing our attention on a part of the landscape, helping us to concentrate on certain aspects while eliminating others from view. Language thus gives shape to the discussion and sets boundaries. Seminal texts set terms of the debate, the logic.

Because the purpose of the paper is to understand what the code texts recommend as appropriate and legitimate ways for boards to operate, we have studied a mix of features in language – metaphor, diction, positioning, word order, among others – to determine how the texts set category boundaries. It is an interpretative study, involving analytical iterations that led to the identification of the elements reviewed in our discussion below.

We have sought to ground the analysis as firmly as possible in the texts, rather than preconceived or even normative ideas about them. We each read the 2010 code very soon after it was published and came independently to the view that its language contained a fascinating mix of continuities and breaks with the past, and an understanding and emphasis that was different to that reported in the press upon release of the code (e.g. Sanderson & Burgess, 2010; H. Wilson, 2010). Thereafter our analysis, assisted by Nvivo software, involved several iterations of coding and multiple readings of the texts in full and as coded. We started with a view that structure, independence and behaviour would feature as elements of the discourse within the texts, and that the concepts of compliance and accountability – a core principle in Cadbury – would be important. The coding process helped to identify relationships between them and to them from concepts including types of directors, board composition and director tenure. We then coded that data against the model and related concepts of board effectiveness in Forbes and Milliken (1999).

Cadbury started with a blank slate; successive authors did not. Terms and meanings legitimated by the code would carry forward their meanings unless noticeably changed in subsequent versions. Identification of change was made by analysing how the diction shifts between versions of the code or how the same expressions had different meanings based on their linguistic and, to some extent, their social context.

Although the language often demonstrated continuity and persistence, we made particular note of cases that make a strong use of rhetoric (Suddaby & Greenwood, 2005). We paid greater attention to introductory passages towards the start of the latter

two documents, where our experiences as researchers suggest that the codes' authors seek most to signal changes and to persuade.

Analysis

While corporate governance contains many potential units of analysis, we see three as having particular significance for the theory and practice of board effectiveness: the overarching logic of the codes, we examine categories of a) form, through board design; b) actors, through types of director roles; and c) activities, through that iconic element of UK corporate governance, the statement of compliance. We begin by examining the core logic of the codes: accountability.

Logic: accountability

The concept of a better board might have been defined in terms of financial performance (McDonald & Westphal, 2003). We see this in much of the US-based literature using agency theory, based on shareholder rights and what Westphal and Graebner (2010, p. 21) disparagingly call "the critical importance of control … to organizational effectiveness" which "reduces the complexity of governance to a single dimension – board control of management". It permits a simple view of a complex problem and leads to mechanisms like executive incentives presumed – wrongly, according to Bebchuk and Fried (2003) – to work in an automatic way to control management.

The UK code has roots in and resonance with agency theory, as we will see, but its logic arises and evolves through a broader concept of accountability. The codes, and in particular their use of forceful language (Fairclough, 1992), point to an evolution over the period 1992-2010 in how accountability is projected. In Cadbury (1992), the code's logic is articulated at the very start:

> The country's economy depends on the drive and efficiency of its companies. Thus the effectiveness with which their boards discharge their responsibilities determines Britain's competitive position. They must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability. This is the essence of any system of good corporate governance (Paragraph 1.1).

The effective board requires freedom of action its drive and efficiency and the good of the national economy, but constrained by a "framework of effective accountability". The purpose of the Cadbury Code is, therefore, to impose a framework on the invisible

and previously unstructured work of corporate boards. From the outset, the UK codes of corporate governance have sought to achieve twin challenges of securing external confidence and ensuring business enterprise. Early in the Cadbury Report, for example, we hear that

> By adhering to the Code, listed companies will strengthen both their control over their businesses and their public accountability. In so doing, they will be striking the right balance between meeting the standards of corporate governance now expected of them and retaining the essential spirit of enterprise (Paragraph 1.5).
>
> Bringing greater clarity to the respective responsibilities of directors, shareholders and auditors will also strengthen trust in the corporate system. Companies whose standards of corporate governance are high are the more likely to gain the confidence of investors and support for the development of their businesses (Paragraph 1.6).

In these sentences, the "essential spirit of enterprise" and "support for the development" work in parallel with better governance. Yet the weight of the language in these consecutive passages is on strengthening control by adherence to the "standards … expected of them". External confidence and "trust in the corporate system" arise from clear job definitions and adherence, again, to standards. The "public" to whom accountability is addressed are primarily shareholders. All three codes situate corporate governance mainly as a duty of boards to shareholders.

In language echoing the agency problem (Berle & Means, 1932/1991; Fama, 1980; Fama & Jensen, 1983b), Cadbury goes beyond statutory requirements:

> Given the separation of ownership from management, the directors are required to report on their stewardship by means of the annual report and financial statements sent to the shareholders…. The most direct method of ensuring that companies are accountable for their actions is through open disclosure by boards and through audits carried out against strict accounting standards…. Shareholders look to the audit committee to ensure that the relationship between the auditors and management remains objective (Paragraphs 5.1-5.2; 5.9).

The emphasis here is on a procedure – formal disclosures – as the starting point of accountability, and a board structure – the audit committee – as the channel for the board's oversight of management and the source of assurance to shareholders. At the distance of two decades, it is perhaps easy to forget that before Cadbury having an audit committee of solely independent non-executive directors was far from commonplace.

With this principle established, the Higgs-inspired 2003 code makes little direct reference to "accountability" in the section dealing with boards. But it brings a fresh emphasis on board and board-member independence, which supports the logic of accountability by widening the circle of directors to whom shareholders can turn:

> Whilst recognising that most shareholder contact is with the chief executive and finance director, the chairman (and the senior independent director and other directors as appropriate) should maintain sufficient contact with major shareholders to understand their issues and concerns. The board should keep in touch with shareholder opinion in whatever ways are most practical and efficient (Principle D.1).

Independence of the non-executives and the expanded role of the senior independent director enhance upwards accountability to shareholders. This form of accountability remains prominent in the 2010 code as well, but with two additional elements. First, there are fresh references to accountability within the board itself, between directors, to the chairman, from the chairman to others. For example, in the 2010 code the senior independent director becomes a "sounding board" for the chairman, a supportive role to the board itself and not just an alternative, even competing channel for shareholder concerns. Second, the 2010 code suggests in stronger terms than the earlier versions that shareholders need to be responsive to boards. In the Cadbury Report, shareholders have a part to play, but a largely unspecified one:

> Boards of directors are accountable to their shareholders and both have to play their part in making that accountability effective. Boards of directors need to do so through the quality of the information which they provide to shareholders, and shareholders through their willingness to exercise their responsibilities as owners (Paragraph 3.4).

Here, shareholders' primary role is to appoint directors; otherwise they are the point of accountability. In the 2003 code comes stronger emphasis on the need for shareholders to consider the explanations of non-compliance:

> Whilst shareholders have every right to challenge companies' explanations if they are unconvincing, they should not be evaluated in a mechanistic way and departures from the Code should not be automatically treated as breaches. Institutional shareholders and their agents should be careful to respond to the statements from companies in a manner that supports the "comply or explain" principle ("Preamble," Paragraph 7).

In the 2010 code directors still account to shareholders, but the code also states that

> … shareholders should pay due regard to companies' individual circumstances … Shareholders should be careful to respond to the statements from companies in a manner that supports the "comply or explain" process and bearing in mind the purpose of good corporate governance. They should put their views to the company and both parties should be prepared to discuss the position (Section "Comply or Explain," Paragraph 4).

Although these three passages are similar in *content*, their *force* is different (Fairclough, 1992). Gone in 2010 is the language of compliance with its "breaches" and "unconvincing" explanations; in their stead come words expressing personal characteristics and actions: "both parties", "discuss" and "bearing in mind". Moreover, the 2010 code states that "certainly there is also scope for an increase in trust which could generate a virtuous upward spiral in attitudes to the Code and in its constructive use" (Section "Comply or Explain," Paragraph 6). All three codes expect boards to be accountable to shareholders, but the 2010 language signals a greater need for dialogue, conversation and discussion.

All three versions stress the importance of good relationships between directors, but in 2010 there is a shift in emphasis. While the 2003 and 2010 versions use the expression "constructive challenge", the 2010 code adds another strand: "frankness and openness" within the boardroom. Cadbury uses the word "openness" in a very different sense:

> The principles on which the Code is based are those of openness, integrity and accountability. They go together. Openness on the part of companies, within the limits set by their competitive position, is the basis for the confidence which needs to exist between business and all those who have a stake in its success (Paragraph 3.2).

This "openness" is to shareholders and others through the transparency of its reporting, a form of upwards accountability. By contrast, the 2003 code did not use the word "openness" in the main body of the report. It appears twice in appendices, however: in both cases suggesting that managers should be open towards non-executives, signalling unidirectional and upward accountability. This is not the same "openness" we see in the 2010 code, with its emphasis of mutuality among directors and dialogue between the board and shareholders. The logic of accountability includes control, but unlike the agency logic described in Westphal and Graebner (2010), it also seeks knowledge and cooperation.

Form: board design

Often depicted as the apex of the corporation, boards are a distinctive feature of the corporate form. Boards are often populated by directors of other corporations. While they may develop through mimesis inspired by interlocking directors (Caswell, 1984; Shipilov, Greve, & Rowley, 2010), they can be constituted, in size, shape and composition, in a wide variety of ways. In absence of legal prescriptions, codes seek to describe which categories of board designs are legitimate.

Boards might be unitary (as in the UK or US) or dual (as in Germany and some other continental European countries). Boards can act as a collective or work through committees with a different mandates. Unitary boards can have a majority of executive directors or non-executives, a separate chairman or a dual chairman-CEO.

The UK codes either establish or give strong support to core elements of board design: structures like the balance between executives and non-executive directors; the separation of chairman and CEO; board committees and their composition; and the routines boards follow for reviewing accounts, nominating new directors, setting pay policy or evaluating the work of the board. Cadbury (1992) writes in occasionally vivid language about the importance of "structure" to corporate governance:

> Our proposals aim to strengthen the unitary board system and increase its effectiveness, not to replace it. (Paragraph 1.8).
>
> The effectiveness of a board is buttressed by its structure and procedures. One aspect of structure is the appointment of committees of the board, such as the audit, remuneration and nomination committees (Paragraph 4.21).
>
> Raising standards of corporate governance cannot be achieved by structures and rules alone. They are important because they provide a framework which will encourage and support good governance (Paragraph 3.13).

Cadbury goes on to say that "what counts is the way in which they are put to use," (also Paragraph 3.13) but this is in the context of the section labelled "Compliance", which then speaks of the role financial institutions and the media have in monitoring corporate performance and governance issues. With quiet symbolism, the use of "buttressed" links the proposed architecture of board design with normative

prescriptions.[9] The positioning and weight of the language here falls on companies adopting the structures and following the rules, and not just on saying they do.

The Cadbury Report did not invent board committees, but following its publication they became the rule rather than the exception on UK boards (M. J. Conyon, 1994; Stiles & Taylor, 1993). The text emphasises their importance as a means of challenging the power of the executive. It speaks of the frequency of board meetings, the need to provide information to non-executives in good time and other procedural matters. Committees should be "formally constituted" with specified terms of reference. The nomination committee should have a majority of non-executive directors and be chaired by either the chairman or a non-executive. The audit committee should have a minimum of three members, a majority of whom should be independent, and it should meet at least twice a year. Remuneration committees should consist "wholly or mainly" of non-executives, and executives should "play no part" in decisions on their own pay. Cadbury details who should attend committee meetings and states that committee chairmen should take questions at the annual shareholders meeting.

Selecting non-executives is important because of their "distinctive contribution" to the board, so there "should be a formal selection process" to "make it evident" they were not selected "through any form of patronage" (Paragraph 4.15). In the context of present board practices, these may seem far from revolutionary recommendations. But after the collapse of the Maxwell companies and Polly Peck, these were strong words of warning and rebuke. The importance of non-executives is also evident in Cadbury's recommendation that it is "highly desirable" that directors undertake training and "especially important" for new directors. Moreover they are "entitled to expect a proper process of induction" (Paragraph 4.19). Use of "entitlement" chastises even as it recommends. The 2003 code articulates these recommendations further, with greater emphasis on the role of independent non-executives on committees.

With the 2010 code, although these aspects of design remain largely intact, the language of the preface makes clearer than before that boards should not rely on them alone.

> The Code, however, is of necessity limited to being a guide only in general terms to principles, structure and processes. It cannot

[9] The normative quality of the symbol will be apparent to directors familiar with architecture, with the solid buttresses on Norman churches or flying buttresses on Gothic ones, or indeed those that support the walls of the UK Houses of Parliament.

> guarantee effective board behaviour because the range of situations in which it is applicable is much too great for it to attempt to mandate behaviour more specifically than it does. Boards therefore have a lot of room within the framework of the Code to decide for themselves how they should act (Preface, Paragraph 3).

That the "range of situations" is "too great" is an admission that codes and the committees that write them cannot anticipate what complexities companies will face. Implicit is that board design is an insufficient remedy. Boards "have a lot of room" because they need it.

Over time the codes endorse certain categories of board design: unitary not dual; separation of chair and CEO, rather than unified leadership, even though the empirical evidence is less than convincing (Carapeto, Lasfer, & Machera, 2005; Dahya & Travlos, 2000; Elsayed, 2007). More significantly, they endorse boards that are independent of management and denigrate boards with ties to management or major shareholders. But the understanding of what independence means and how it is to be judged has shifted in a subtle way, from structures as a proxy measure, to definitions of independence, and latterly towards the elusive notion of independence of mind evident in director and board behaviour that the code recognises it cannot witness or fully prescribe.

Actors: Types of directors

UK law draws no such distinctions between the types of directors: Boards have collective responsibility. The code, however, has developed quite clear distinctions between the role and work of directors: the chairman, executive directors (including the CEO), independent non-executives, and those non-executives deemed not to be independent, either of management or of a major shareholder, and two sometimes conflicting categories: *independence* and industry *expertise*. Central in all three versions is the chairman, though with a shifting emphasis.

Chairman: The chairman's role is to run the board rather than the day-to-day business. Cadbury says the chairman's role is "fundamental" (Paragraph 4.2) and "crucial" (Paragraph 4.7), justifying his principle that the chairman should not also be CEO, so that, in what became an iconic phrase in corporate governance, "no one individual has unfettered powers of decision" (Paragraph 4.9). While still important, the chairman's role dims somewhat in the Higgs-inspired version, with its detailed prescriptions for the work of committees and the dominant role on them of independent non-executives. Higgs added provisions that retiring CEOs should not

normally go on to become chairmen and that chairmen should meet the independence criteria at the time of appointment. In 2010 the chairman swells in prominence. An example comes in the preface, linking the chairman's role to the implementation of the code itself and effectiveness.

> To follow the spirit of the Code to good effect, boards must think deeply, thoroughly and on a continuing basis, about their overall tasks and the implications of these for the roles of their individual members. Absolutely key in this endeavour are the leadership of the chairman of a board, the support given to and by the CEO, and the frankness and openness of mind with which issues are discussed and tackled by all directors (Preface, Paragraph 4).

The 2010 preface then encourages chairmen to "report personally" on how the code has been applied, making the corporate governance section of the annual report the chair's *personal* responsibility, and not one of the task of, say, the company secretary. Such personal reporting should help companies "attack the fungus of 'boiler-plate'" (Paragraph 7), a powerfully mixed metaphor with diction previously unused in official documents on the subject. These words link the chairman even more tightly to external accountability.

Executive directors: These directors work every day in the business, though in law they are meant to set these roles aside in the boardroom. In contrast to the US, where commonly only the CEO and CFO sit on the board, UK practice has long involved widespread use of executive directors. All three codes recognise the value in the expertise executives bring to the board. But executive directors face curbs in all three versions. Cadbury requires at least three non-executives to review the work of the executives and to debate issues like takeovers where the executives' interest may diverge from those of the company: board composition and structure contribute to effectiveness. Higgs restricts the ability on executives to serve on committees, so independence contributes to accountability. In the 2010 code, however, the language shifts somewhat towards recognising the contribution of executives:

> Constraints on time and knowledge combine with the need to maintain mutual respect and openness between a cast of strong, able and busy directors dealing with each other across the different demands of executive and non-executive roles (Preface, Paragraph 5).

This passage, with its emphasis on mutuality and its recognition of "different demands", gives somewhat more weight to the contribution that executive directors

can make to the board than we see in the earlier versions, when the emphasis was on finding ways to constrain those with "unfettered" power.

Non-executive directors: Coming from outside the company and with no operational role, these directors are often seen as a check on the power of managers. In seeking to achieve Sir Adrian Cadbury's desired independence of mind in the boardroom, the Cadbury Code gives some special weight to those without personal or business relationships with executives and without links to specific shareholders. It suggests these independent non-executives should make up a majority of the non-executive contingent, a controversial recommendation at the time. Higgs, too, wanted independent judgement to prevail in the boardroom, and the version of the code he inspired articulated further criteria of independence and saw "affiliated" non-executives nearly vanish from view. Independent non-executives now should make up at least half of the board; affiliated non-executives lose permission to sit on audit and remuneration committees; their presence on nomination committees is not prohibited, but it is not mentioned, either. The detailed language of the 2010 code largely repeats the wording from 2003 and its scant reference to non-executives who are not independent. The 2010 code, however, draws inspiration from a government-sponsored review (Walker, 2009b) of corporate governance in banks, which explicitly endorses the category of *expertise* over *independence* on the boards of complex financial institutions, and with it a variety of measures that play down the letter of the Higgs-inspired Combined Code, if perhaps not its spirit. While not going as far as Walker does in stressing the importance of expertise, the 2010 code questions the emphasis on independence and thus somewhat reopens the question of which categories of directors are legitimate. Moreover, it does so in quite forceful language, as we discuss next, by urging boards to take greater advantage of the code's flexibility.

Activities: compliance and explanation

A legacy of the Cadbury Report is how its language has come to define corporate governance. Perhaps the phrase with the greatest impact, in the UK code and abroad, is "comply or explain", ironically an expression Cadbury did not use. The text instead places upon companies

> a continuing obligation of listing, to state whether they are complying with the Code and to give reasons for any areas of non-compliance (Cadbury, 1992, Paragraph 1.3).

Here the weight is on "complying"; the use of the word "and" before "to give reasons" places emphasis on the obligation of reporting, rather than on the opportunity to choose a different path. Consider an alternative wording in which Cadbury might have written "or" instead of "and": the imperative is diminished. These are grammatical forms with the same *content* but a different *force* (Fairclough, 1992). Later on, Cadbury states:

> The accountability of boards to shareholders will, therefore, be strengthened if shareholders require their companies to comply with the Code (Paragraph 6.6).

While "giving reasons" for "non-compliance" is nominally a form of compliance, these sentences suggests that such "non-compliance" should be the exception; practice under code suggests that many people understood it that way, too.

The Higgs-inspired version of the code reiterates the content of Cadbury's provision in its fourth paragraph, using different words but the same force. While it begins with an expression of choice ("companies should have a free hand to explain their governance policies"), the next paragraph makes clear that compliance takes precedence: "it is expected that listed companies will comply with the Code's provisions most of the time" (Financial Reporting Council, 2003, p. 1). Use of the passive voice, "it is expected that", deprives boards of a point of appeal. As both the code custodian (the FRC) and its enforcement agency (the UK Listing Authority) are at this point governmental bodies, not industry self-regulators, these words carry greater force.

In the 2010 revision, the Financial Reporting Council rejected suggestions that "apply or explain", as used, for example, in the 2003 Dutch code of corporate governance, would better capture the sentiment that Cadbury had voiced. Altering such an iconic reference would send too strong a signal, changing the symbolic meaning of the code. However, the 2010 UK amplifies the "spirit" of the code in a new section near the start called "Comply or Explain":

> The "comply or explain" approach is the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings and is the foundation of the Code's flexibility. It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally.
>
> The Code is not a rigid set of rules.… ("Comply or Explain," Paragraphs 1-2).

One alliteration, "foundation of the Code's flexibility", prepares the way for the next: this is "not a rigid set of rules". The roughly equivalent section in Cadbury is simply called "Compliance":

> Raising standards of corporate governance cannot be achieved by structures and rules alone. They are important because they provide a framework which will encourage and support good governance, but what counts is the way in which they are put to use (Paragraph 3.13).

While the content is similar, the emphasis in Cadbury falls on "standards", "structures", "rules" and a "framework": The rhetoric places its weight on compliance. Cadbury may not have intended that investors or the monitoring agencies they came to employ would adopt a rigid approach. Those that did, however, could find support in the text. The 2010 code explicitly seeks to change that impression with self-deprecating irony:

> Nearly two decades of constructive usage have enhanced the prestige of the Code. Indeed, it seems that there is almost a belief that complying with the Code in itself constitutes good governance (Preface, Paragraph 3).

The changes in the 2010 code are not exclusively about flexibility. The final paragraph of its preface adds a new constraint on boards: the annual election of directors for the top 350 companies, instead of every three years. However, it continues: "As with all other provisions of the Code, companies are free to explain rather than comply" (Paragraph 8). Both the tone in "free to explain" and the position of the phrase before "comply" bring a different emphasis from that of the opening section in Cadbury, with its "obligation" to comply and to "give reasons" for "non-compliance". The rhetorical effect comes with some irony: With increased force in 2010, the code legitimates non-compliance as a category of compliance.

Logic, discourse and better boards

Our analysis points towards three distinct if inter-related discourses on board effectiveness, reflected in the legitimated categories of board design, director roles and compliance, which adjust the understanding of the logic of accountability. Cadbury frames board effectiveness in terms of "structure" through its endorsement of externally verifiable configurations concerning the composition of boards, the organisation of work through committees and crucially the separation of roles on

chairman and CEO. With the Higgs-inspired code comes an additional layer of discourse concerning "independence". Most recently, in the 2010 version, which changes few of the norms of the code, comes an explicit and strongly verbalised change in tone, which shift the discourse towards "behaviour" characterised by "mutuality". Over the last two decades the shifts between versions of the code alter the meaning of accountability and how it may be achieved. Adopting Roberts' (1991, 2001) view, the focus of accountability has evolved to encourage socialising accountability as well as individualising accountability. The texts, discourses and logic are summarised in Table 1.

Table 1 – Logic, discourse and social context of UK corporate governance

	Cadbury Report and Code 1992	*Higgs-inspired Combined Code 2003*	*2010 UK Corporate Governance Code*
Social practice	Institutional change to restore legitimacy following crises in UK listed companies Corporations separated roles of chairman and CEO, created board committees	Institutional change to reinforce legitimacy following crises of non-UK corporate governance Corporations expanded number and roles of independent non-executives	Institutional change to enhance boardroom effectiveness following crisis in knowledge and skills in banking sector. Response remains to be seen
Logic	Accountability as path to effectiveness		
Discourse	Structure and procedures	Relationships of independence	Behaviour and mutuality
Examples from the text	The effectiveness of a board is buttressed by its structure and procedures We are encouraged by the degree to which boards are already reviewing their structures and systems in the light of our draft recommendations [Chairman's role] should in principle be separate from that of the chief executive … all boards will require a minimum of three non-executive directors, one of whom may be the	A chief executive should not go on to be chairman of the same company The chairman should on appointment meet the independence criteria … at least half the board, excluding the chairman, should comprise non-executive directors determined by the board to be independent Non-executive directors should scrutinise the performance of management … They should satisfy themselves on the	Chairmen are encouraged to report personally in their annual statements how the principles relating to the role and effectiveness of the board The Code is not a rigid set of rules Shareholders should be careful to respond to the statements from companies in a manner that supports the "comply or explain" process and bearing in mind the purpose of good corporate

	chairman of the company provided he or she is not also its executive head. Additionally, two of the three should be independent … the majority of nonexecutives on a board should be independent … boards should have a formal schedule of matters specifically reserved to them for their collective decision, to ensure that the direction and control of the company remains firmly in their hands and as a safeguard against misjudgements and possible illegal practices One aspect of structure is the appointment of committees of the board, such as the audit, remuneration and nomination committees … formal selection process Boards should lay down rules to determine materiality for any transaction	integrity of financial information…. They are responsible for determining appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary removing, executive directors, and in succession planning [Shareholders should speak to senior independent director] if they have concerns which contact through the normal channels of chairman, chief executive or finance director has failed to resolve or for which such contact is inappropriate	governance Nearly two decades of constructive usage have enhanced the prestige of the Code. Indeed, it seems that there is almost a belief that complying with the Code in itself constitutes good governance To follow the spirit of the Code to good effect, boards must think deeply, thoroughly and on a continuing basis … personal reporting on governance by chairmen as the leaders of boards might be a turning point in attacking the fungus of "boiler-plate" … frankness and openness of mind with which issues are discussed and tackled by all directors

In Cadbury, structures and procedures provide a foundation and framework upon which boards develop effectiveness. In UK corporate governance, the Enron crisis provided occasion to move beyond structure and focus on independence. In the Higgs-inspired 2003 code the definition of independence becomes more elaborate, with clear, externally verifiable norms. These are, however, only proxy measures for the internally important independence of mind that both Cadbury and the Higgs Review (2003) sought. In moving towards the inner workings of boards, the 2003 code gives weight to processes Forbes and Milliken (1999) call cognitive conflict and effort norms.

Independence brings potential for greater challenge. Articulation of committee procedures, board evaluation and other operations in the 2003 code defines the effort that board members should undertake to create effectiveness. The danger in a relationship focused on independence comes in the risks of either detachment from the work or a threat to board cohesiveness (Forbes & Milliken, 1999).

Mitigating those risks becomes the focus of the shift in the 2010 code, where board effectiveness more clearly depends on behaviour. This version loses none of the Higgs emphasis on independence. Indeed, one of its few formal changes – urging annual election of all directors – adds new structure and procedure to enhance independence through external, hierarchical accountability. But the definition of independence, especially of non-executive directors, is toned down in the 2010 code. The 2003 version links the intangible independence to the tangible tenure: "Serving more than nine years could be relevant to the determination of a non-executive director's independence" (Section A.7.2). Though the content of this prescription remains in the new version, it comes in much less forceful language in a section on process deep in the text. The stronger sentence quoted above, often disparagingly called the "nine-year rule", disappears from the 2010 code.

Another signal of change concerns "openness". In the 2010 code the concept is used to address the tense relationship Forbes and Milliken (1999) describe between cognitive conflict and board cohesiveness. The latter is needed for the long-term good of the company, but too cohesive a board, a board of yes-men and cronies, can damage performance. As discussed above, "openness" in the early versions was within a structure of upwards accountability to shareholders governed increasingly through independence. In the 2010 code, "openness" is signalled through behaviour between the directors operating in and around the board that is at once supportive and challenging. Accountability to shareholders is still hierarchical but with greater weight on dialogue; within the board, the shift towards mutuality is pronounced. The emphasis has evolved from what Roberts (1991, 2001) calls "individualising" accountability alone to include "socialising" accountability as well.

This logic of accountability, particularly as the thrust of the discourse shifts from structure to independence to behaviour, paints a different picture of corporate governance than that in agency theory. Remedies devised from an agency approach put weight on disclosure; its logic becomes one where the right incentives, backed by publicly available data, create an automatic response from directors to align the

interests of agents and principals. In the UK code, the logic of accountability starts with similar aspirations, as structure, and then formal definitions of independence create an expectation of better boards. But from the beginning and with increasing vigour over time, the UK codes become more engaged with behavioural and relational nuances of boards as collective decision-making entities. Such change may also be seen as recognition that there are practical limits to codification in respect of determining the attitudes and actions of corporate directors.

Possibilities and limitations

The codification of UK corporate governance has been of considerable practical significance, not "just" an exercise in language and rhetoric; this case supports the view of Suddaby (2010) and Green (2004; S. E. Green, Jr., Li, & Nohria, 2009) that language and rhetoric are central to processes of institutionalisation. The 1992 and 2003 versions of the code effected substantive change in board structure and composition (Arcot, Bruno, & Faure-Grimaud, 2010; Doble, 1997; MacNeil & Li, 2006; Pass, 2006; Seidl & Sanderson, 2009), demonstrating that texts set the terms of discourse and then shape the social context (Fairclough, 1992). The 2010 version makes clear its hope for major changes in practice by asserting that "much more attention need[s] to be paid to following the spirit of the Code as well as its letter" (Financial Reporting Council, 2010, p. 2).

Concerning board effectiveness, this article shows how the language of the UK codes has defined key concepts in corporate governance and then redefined them, adjusting the understanding of board effectiveness. By legitimating certain categories of board design and director roles to create accountability, the code texts seek to institutionalise aspects of board practice. Moreover, that memorable expression, "comply or explain", itself calls attention to the view that codification alone is not the answer. There are limits to what can come from institutionalising practices of what Forbes and Milliken (1999) call these elite workgroups and their informal, egalitarian leadership. This point gains emphasis in the 2010 code, which makes explicit its concern at what empirical studies (e.g. Arcot & Bruno, 2006; MacNeil & Li, 2006; Pass, 2006) had suggested: that explanations of non-compliance have been less than informative. In its most forceful phrase, the 2010 code seeks to end the "fungus" of "boiler-plate" of such explanations. The code now declares explicitly: Complying with

the code is not enough, the appearance of good governance should not triumph over substance (McNulty et al., 2005), and substance is locally determined within the context of behaviour in and around boards.

Following the failures of Maxwell and Polly Peck, Cadbury's externally imposed structures and procedures became a helpful first step towards identifying effort norms for boards. Following the failures of Enron and many others, however, such norms needed more support, through relationships of cognitive conflict between independently minded individuals with the right knowledge and skills for the job. In Higgs, though, we see a continuing and even increased emphasis on externally verifiable characteristics of directors by which to judge that independence, with the effect of taking the emphasis off the characteristics of "mind".

This solution, too, proves less than complete: The financial crisis engulfed three major UK banks, Royal Bank of Scotland, HBOS and Northern Rock, each of which had nominally complied with the Higgs-inspired version of the code. While maintaining the structure and procedures introduced by Cadbury and the independence emphasised in Higgs, the 2010 code looks more deeply inside the boardroom for the source of board effectiveness. It seeks to change the discourse to one in which the "use" of the knowledge and skills becomes more important than the "presence" the codes had previously prescribed. This development, therefore, covers much of the ground surveyed by Forbes and Milliken (1999) in their model of board effectiveness, though with greater roles for structures and external verification to re-establish the legitimacy of boards. The 2010 code applies stronger language to a prescription for corporate governance that all three versions contain: that directors, not codes, are the only real guarantors of board effectiveness, and that their choices, not the prescriptions of institutionalised arrangements, make the difference.

Conclusions

With time, experience and disappointment have come gradual adjustments and refinements to the code through a nuanced shift in the discourse. The 2010 version puts it this way: "The Code has been enduring, but it is not immutable. Its fitness for purpose in a permanently changing economic and social business environment requires its evaluation at appropriate intervals" (Paragraph 5 of the introduction). This paper has shown that codes define and then redefine the terms. Those redefinitions

seek to incorporate the learning from the practice of directors, an evolution, therefore, effected through language and discourse, through the use of rhetoric to persuade and ambiguity to create flexibility, in the knowledge that change will need to come again.

The understanding of board effectiveness projected by the codes has evolved to emphasise supporting enterprise and controlling the use of resources through a fuller sense of accountability achieved by informed and engaged behaviour of directors and shareholders. Such evolution also suggests a growing recognition that the prescriptions of all such texts have limitations. Codes of corporate governance may identify structures, define independence and allude to key relationships, but they can only take a board so far along the path to effectiveness. In the end, it's a local matter.

Appendix 1

Codification in UK corporate governance

Year	*Events and code development (*key non-UK events in *italics)*
1990	BCCI, Coloroll, Polly Peck failures
1991	Maxwell failures
1992	Cadbury Code recommends board design, roles of directors, introduces "comply-or-explain"
1993	
1994	*King Review (South Africa) modeled on UK*
1995	Greenbury Report recommends procedure for disclosure of director pay; *Vienot Code (France) modeled in part on UK*
1996	
1997	
1998	Hampel Report recommends procedures to deal with institutional investors; "Combined Code" joins Cadbury, Greenbury, Hampel
1999	Turnbull Report recommends board procedures on risk management; *OECD Principles published, incorporating lessons from UK; codes of corporate governance begin to proliferate in other countries*
2000	*End of dot-com and technology boom*
2001	*Collapse of Enron*
2002	*Collapse of WorldCom; US passes Sarbanes-Oxley Act; Nasdaq listing rules emphasise board independence*
2003	Higgs Review of non-executive directors; Smith Review of audit; Tyson Review of board composition; major revision to Combined Code incorporates Higgs recommendation on independence; *New York Stock Exchange listing rules emphasise role of independent directors*
2004	Turnbull guidance revised to expand disclosure of risk judgments; *OECD Principles revised to emphasise disclosure, board independence*
2005	
2006	Minor revision to Combined Code reduces constraints on chairman
2007	*Difficulties at German banks, others signal start to subprime crisis*
2008	Minor revision to Combined Code; *collapse of Lehman Brothers triggers global financial crisis*
2009	Nationalisation of Northern Rock in UK and government rescue of Royal Bank of Scotland, Lloyds Banking Group, and parts of other UK banks; Walker Review of governance in financial firms
2010	UK Corporate Governance Code focuses on internal board relationships and behaviour; Stewardship Code links corporate and investor codes
2011	Financial Reporting Council publishes Guidance for Board Effectiveness, updating the recommendation of the Higgs Review

3. Writing the code (new)

Status: Original to this thesis.

This chapter presents an empirical analysis of the debates that led to the three main versions of the UK Corporate Governance Code, and it builds on the analysis of the content of those codes examined in the previous chapter ("Creating Better Boards"), examining the arguments that contributed to development of the three discourses identified as structure and procedures, independence and board behaviour. It explores the language used in the text of contributions across the spectrum of actors with interest in the field of corporate governance and board effectiveness.

Writing the code: Developing the UK corporate governance codes, 1992-2010 (2012)

Abstract: Codes of conduct seek to institutionalize certain practices and govern the actions of those who accept the regime. As they arise and seek to displace establish ways of life in organizations, they provide examples institutional change in motion. This paper examines the processes through which the UK code of corporate governance arose and then developed over time and the actors who contributed to them. Through a close reading of the texts of responses to the consultations that informed the 1992, 2003 and 2010 versions of the code, it sheds light on the actors and the arguments they raised or raised only in part, revealing assumptions about what constitutes board effectiveness and "good" corporate governance. The paper also uncovers evidence of the institutional work underway during the process, raising new questions about how ideas enter and re-enter a field in flux.

Keywords: corporate governance, institutional work, codes of conduct, UK

Introduction

Codes of conduct exist within companies and industries and across countries and multilateral groupings of countries, with increasingly widespread use (Paine, Deshpandé, Margolis, & Bettcher, 2005). They produce guidance for the actions of individuals and organizations, without the force or the inflexibility of law but also without the political cost (O'Rourke, 2003). They seek to gain followers through demonstrating the legitimacy of their recommendations, and gain legitimacy by the followers they collect. Codes have institutional characteristics, but they do not automatically become institutions. This paper explores the processes through which one such proto-institution (Lawrence, Hardy, & Phillips, 2002; Zietsma & McKnight, 2009), the UK code of corporate governance, gains adherents and confers legitimacy on those who adopt its provisions.

Over two decades, the content of the various versions of the UK's code of corporate governance have shown considerable continuity, despite recurring shocks to the

system. But they have seen a shift in emphasis, projecting an evolving understanding about the nature of board effectiveness. The previous paper in this collection ("Creating Better Boards") showed that the weight of the discourse on board effectiveness in the main versions of the UK code of corporate governance has moved from a focus on structure in Cadbury, to independence in the Higgs-inspired 2003 version, to recognition in 2010 of the importance of behaviour, and in particular supportive yet challenging relationships between directors.

This paper seeks to answer two related questions: First, in the search for board effectiveness, through what processes – involving which actors, arguments and actions – did this change of discourse arise? Second, what do those processes tell us about how codes of conduct can come to be institutionalized while remaining flexible concerning the types of actors and the activities and organizational forms they endorse?

The rest of the paper is structured as follows. To set the context, we describe the steps taken in writing the first code in 1992 and those involved in the major revisions of 2003 and 2010. Then we examine institutional theory and in particular ideas concerning institutional work. After a description of methodological considerations, the paper presents key findings from the analysis, which suggests a model for the analysis of codification as institutionalization. The chapter concludes with implications for the understanding of codification in corporate governance and suggestions for further research into the role of authors in codes, institutional logics, organizational and institutional fields, and power.

Process steps in code development

The drafting of the three main codes involved somewhat different processes with the same aim: forging a consensus on how to a) improve the relationship between corporations and investors and b) achieve greater effectiveness of corporate boards.

Process in 1991-92

The Cadbury Code emerged after 18 months of public and private discussion and debate. The Financial Reporting Council and the London Stock Exchange asked Sir Adrian Cadbury, scion of a Quaker family of industrialists, to lead an inquiry starting in May 1991. Both organizations were, at the time, industry self-regulatory bodies

overseeing the accounting and audit professions (FRC) and the equity markets (LSE and its UK Listing Authority), so the initiative was largely a private-sector affair.

The work had public backing as well. With support of staff seconded by the Bank of England and the Department of Trade and Industry, Sir Adrian empanelled a committee drawn from industry, the financial community and the accounting profession. They interviewed dozens of people, received contributions by post and fax, and attended public meetings. In May 1992 the committee produced a draft code and discussion paper and then undertook a formal consultation before publishing the code in December 1992. Many of the documents from that inquiry are digitized and available online (Cadbury Archive, 2010),[10] drawn from more 200 from before the committee's draft text was issued in May 1992 and almost as many in response to the July draft.

Process in 2002-03

The crisis at Enron, other US companies and a number of continental European companies led the UK government to commission three studies relating to corporate governance. The Higgs Review (2003) looked into the effectiveness of non-executive directors and was published on the same January day as the Smith Review (2003) on audit. The third, the Tyson Report (2003) on widening the pool of directors, was published six months later. The centrality of Higgs to the revision of the Combined Code[11] that July means we will focus here on the responses to its contributions.

Higgs, working on a mandate from the Department of Trade and Industry, commissioned three research studies: a statistical analysis of board composition; a survey profiling more than 600 directors (MORI, 2002); and qualitative research involving in-depth interviews with 40 corporate chairmen and directors (McNulty, Roberts, & Stiles, 2003). The review proved controversial. The FRC chairman later recalled the "media noise level and the hostility … by company Chairmen" (Nicholson, 2008, p. 110). What the FRC, now a government-directed agency, had intended as a quick, "fatal flaws only" review received more than 180 responses (Financial Reporting

[10] References below with the notation "CAD-" and a digit refer to documents in the Cadbury Archive at the University of Cambridge.
[11] The "Combined Code" is the 1998 consolidation of the Cadbury Code with the Greenbury Report (1995) on executive pay and the Hampel Report (1998) on institutional investment.

Council, 2004).[12] In addition, numerous public and private gatherings discussed the implications for companies, and institutional shareholders.

Process in 2009-10

Despite the controversy surrounding the Higgs Review, the recommended practices took hold and further revisions in 2006 and 2008 made only modest changes. But the financial crisis led to the collapse of one UK bank in 2007; the near-global meltdown forced part-nationalization of two more large British banks in 2008. As a consequence came a two-fold response: First, the UK government commissioned an inquiry into the corporate governance at financial institutions (Walker, 2009a, 2009b). Second and roughly in parallel, the FRC pulled forward a planned review of the Combined Code by one year. For the former, the investment banker Sir David Walker undertook a two-stage consultation. His draft appeared in July and the final report in November.

While Walker focused only on financial firms,[13] the Combined Code had broader application, affecting all listed enterprises. The FRC conducted a three-stage consultation coordinated by its chairman, Sir Christopher Hogg.[14] First came an open consultation, about what had worked well and less well in the Combined Code. The second sought views on the extent to which the July draft of the Walker recommendations for financial institutions applied to the wider field of corporations. The third sought comments on a new draft text, published a week after the final Walker Review. Each phase also prompted public and private meetings to discuss the issues, some of which were attended by those tasked drafting the new code.

The FRC received more than 100 written submissions to each consultation. As we will see, the contributions in 2009-10 had many echoes from the debate two decades earlier. Some individuals and groups felt that corporate governance had taken the wrong turn – in one direction or another – and wanted to steer the code towards a different goal. For others, the code had become symbolic of what they valued in

[12] Documents retrieved for this study from non-indexed pages on the FRC website numbered 64; in addition, the FRC made available for this study a further 44 documents in hard copy. Some confidential documents were withheld; others have gone missing. Citations from these documents are by organization or author and date.

[13] Initially asked to look at banking, Walker widened the remit to include insurance companies and other important financial institutions.

[14] Personal communication with the researcher. Sir Christopher had been CEO and then chairman of Courtaulds and chairman of Reuters Holdings; he had served as an adviser to the Cadbury commission in 1992.

corporate governance, something to be defended against those who would dilute its aims or tighten its constraints.

The contributions to consultations concerning all three versions of the code shared a purpose: the development of a common understanding of good corporate governance. For many, though not all, participants, they involved another aim: the avoidance of legislative or regulatory action that would constrain more forcibly the freedom of action enjoyed by boards and the ability of shareholders to influence how corporate affairs were organized. The crisis that led to the Cadbury Report probably meant that change was inevitable. New institutional arrangements would supplant largely undefined, informal arrangements, mimetic isomorphism giving way to a normative variety (P. J. DiMaggio & Powell, 1983). Some participants wanted to go further, enacting binding rules and coercing compliance. These voices, as well as the actions of the authors of the code version, may be viewed as engaging in what scholars know as institutional work.

Institutions and work

Institutions are such because they persist over time, and yet institutions change. This paradox of embedded agency (P. Holm, 1995; Seo & Creed, 2002) has stimulated much recent work in institutional theory as it seeks to overcome objections that it is only a partial theory (Clegg, 2010; Kraatz, 2011). In seeking to understand how this paradox is resolved, theorists have turned to a variety of explanations.

DiMaggio (1988) introduced the term institutional entrepreneurship to explain how actors use ideas from outside to dislodge incumbent practices and create opportunities for change. Oliver (1992, p. 564) argues that deinstitutionalization represents "the delegitimation of an established organizational practice or procedure" in response to challenges facing the organization of or the failure of organization to perform as expected. Greenwood and Hinings (1996) see dissatisfaction with a changing market context and discrepancies between the values of actors and institutional arrangements as antecedents for institutional change. But what starts the process? Greenwood and colleagues (2002) theorize that a "precipitating jolt" from changes in the environment would make embedded actors perceive the inadequacy of current arrangements. Greenwood and Suddaby (2006) see institutional change as

coming from elites who recognize the contradictions in the institutional field and initiate change. But Rao and Giorgi (2006) contend that actors on the periphery of a social system can effect change as well. These depictions suggest that change arises from the choices initiated by actors but largely in response to environmental issues that undermine the institution's legitimacy.

Extending the concept of institutional entrepreneurship for more general explanation, Lawrence and Suddaby (2006, p. 215) introduce the term institutional work to encompass "purposive action of individuals or organizations aimed at creating, maintaining and disrupting institutions". Work is therefore intentional, not simply routinized behaviour, the effort of agency rather than the product of structure, even when undertaken to maintain an institution in its current form. Lawrence, Suddaby and Leca (2011, p. 56) argue that concept of institutional work provides a "bridge" between critical and institutional views of organization by focusing attention on actors, their intentions and the "emphasis on disorder and hidden voices" in critical theory.[15]

Institutional work depends on agency. Emirbayer and Mische (1998) introduce a temporal dimension and thus a dynamic quality into the concept of agency. Building on structuration theory (Giddens, 1984), which sees structure and agency as inextricably linked, and Bourdieu's (1990) notion of the centrality of practice, they assert that actors "are always living simultaneously in the past, future, and present". They adjust to one another and their circumstances continually "in more or less imaginative or reflective ways" (Emirbayer & Mische, 1998, p. 1012).

Emirbayer and Mische draw a distinction between three types of agency: a backward-oriented approach they call iterative; the present-oriented, practical-evaluative type; and a forward-looking form they call projective. Iterative action involves "selective reactivation by actors of past patterns of thought and action", which incorporated into practical action helps to sustain identities and interactions and thus institutions. The practical-evaluative type involves the "capacity of actors to make judgments among alternative possible trajectories of action, in response to the emerging demands, dilemmas, and ambiguities". Projective agency involves

[15] Lawrence et al. (2011) attribute this quote to Cooper et al. (2008) without page reference. I could not locate that quote, but it may come from a draft version. The chapter starts by promising a discussion of the "emphasis on power, domination and emancipation" (Cooper et al., 2008, p. 673). Nonetheless it is fair to attribute phrase to Lawrence et al., as they endorse the evocative diction, whatever its source.

"imaginative generation by actors of possible future trajectories of action", in which actors creatively reconfigure thought and action to reflect hopes, fears and desires (Emirbayer & Mische, 1998, p. 971, emphases removed),

Battilana and D'Aunno (2009) use these categories to elaborate the understanding of institutional work, setting them against categories of actions in Lawrence and Suddaby (2006) involved in creating, maintaining and disrupting institutions. Iterative agency involves repeated steps to emphasize persistence; the practical-evaluative type demonstrates the (in)efficacy of the logics they support or wish to disrupt; projective agency involves imagining a different future state. Battilana and D'Aunno (2009) speculate that, owing to the actor's backward-oriented temporal orientation, iterative agency is less likely to be seen in creating or disrupting institutions than projective-evaluative or projective types would be. Projective agency, because of its future orientation, is more likely to appear in work to create new institutions. The 20 types of institutional work they articulate overlaps with the 18 in Lawrence and Suddaby (2006). It also offers some new forms of work, including two they see as work involved in creating institutions in present-oriented, practical-evaluative agency. Actors interpret institutional arrangements (translation) or assemble elements from different mechanisms (bricolage) to fit their particular settings. As we shall see, both have resonances in the way individual companies respond to corporate governance arrangements under a comply-or-explain regime, particularly in face of growing internationalization of capital markets. Moreover, translation suggests that ideas often do not diffuse intact through a field but instead are interpreted as they pass from one actor to another (Czarniawska, 2007; Czarniawska & Joerges, 1996).

Institutional work can take the form of individuals identifying with the institution or with alternative arrangements. Creed and colleagues (2010, p. 1337) describe the "identity work" of marginalized actors who reinvigorate "institutionally available narratives and meanings in identity constructions" through a process that can be both "conservative and disruptive". This depiction suggests that institutional work need not sit firmly within the categories of "creating", "maintaining" or "disrupting" identified by Lawrence and Suddaby (2006). In a study closely related to the present paper, Lok (2010) found that both investors and corporate managers invoked conflicting logics, differing identities and contrasting associated practices in their approach to corporate governance, and suggested that these contradictions can persist over long periods. He notes that "self-identity can continue to be fractured and inconsistent, invoking

different contradictory practices under different circumstances and at different times" (Lok, 2010, p. 1326). We will use these views of institutional work in analysing the process of codification in UK corporate governance. With this background in mind we look at what sort of institutional work happened during those consultations, following a description of the methodology in use.

Methodology

The analysis presented here involved an iterative reading of texts of submissions to the debates concerned the three code versions, paying close attention to the features in the language and argument. Discourse analysis has developed over the last few decades from a more general study of themes that arise from texts into specialized disciplines using techniques drawn from fields as disparate as linguistics, literary theory, critical theory in politics, sociology and psychology (Alvesson & Kärreman, 2000; Chia, 2000). While some studies explore these approaches in isolation to determine their methodological significance, this paper seeks to interpret texts. It requires, therefore, that we look at a variety of aspects of language, including diction, word order, metaphor, stated and unstated allusions, as well as the use of forceful rhetoric to identify meanings and assumptions.

The documents come from the consultations that took place during the drafting of the three key versions of the code. While they necessarily present an incomplete view of events, they provide the opportunity to explore the arguments and rhetoric of officials of listed companies, financial institutions, their advisers and the general public. Formal responses to consultation papers may lack the spontaneity and vibrant language of face-to-face communications. Nonetheless, the submissions represent a considered distillation of views, ones that a committee or a thoughtful author would give weight to in setting policy. There is evidence of this in the data, in particular in the summaries in the Cadbury Archive, which interpret those submissions to guide committee members' thinking.

Work began by reading a large proportion of the available documents. Because of the volume of the data, detailed analysis was undertaken on a sample of papers and a subset of the issues. This study used theoretical sampling based on two criteria: First, following Greenwood and Suddaby (2006) and Rao and Giorgi (2006), was the position of actors in the field, in this case the investment supply chain. Details of the samples for

each time period are included in Appendix 1, at the end of this chapter. Second, was the salience of issues for the actors (R. K. Mitchell, Agle, & Wood, 1997), which led to consideration of topics based on the controversy they aroused.

Documents were coded in Nvivo software to categories including first-order concepts like chairman, institutional investors, second-order ones like compliance, board design, independence and behaviour. As new ideas came to the fore, additional open codes were added for emerging categories, and then the papers were read again to identify axial dimensions (Strauss, 1987; Strauss & Corbin, 1998). As an illustration, consider "board design", a core category in the discussion of structure. While there are many types of boards across organization-types, two featured prominently in the debate: unitary and two-tier boards. They are then valourized or demonized in different ways by different actors as "our" or "alien", "flexible" or "rigid", "service-oriented" or "controlling", "effective" or "weak", by the different actors seeking to influence policy recommendations in the code. The texts were then read against categories of institutional work developed from perspectives in Lawrence and Suddaby (2006) and Battilana and D'Aunno (2009). The data-coding presented numerous opportunities to read and re-read the source material, in their entirety and as coded.

Although the initial reading for this study ranged widely, data analysis concentrated on contributions made during public consultations: 1) after the Cadbury Committee had issued its draft in May 1992 and before the final code in December; 2) after publication of the Higgs Review in January 2003 and before the July publication of the Combined Code; and 3) all three consultation phases concerning the 2010 code.

The work proceeded in a non-chronological order. The reason was in part a matter of convenience, in part inescapable. The 2009-10 data were immediately available from the FRC website, while only parts of the Cadbury Archive had been digitized, requiring a visit to Cambridge for a full view, and the 2003 documentation has been removed from public view to the archive of the FRC. Moreover, my own engagement with the debate during 2009-10 meant that the arguments raised then were fresh in my mind, which might have distorted any attempt I might make to build or assess theory chronologically. Through iterative reading, of whole documents and as coded pieces, distortion arising from the sequencing was reduced.

Findings

The three versions of the code show concern about issues that may be characterized as affecting mainly structure, independence, and behaviour. But contributors from across the spectrum viewed these themes as interlocking: For example, structures like board committees serve the purpose of empowering the non-executive directors at the expense of the executives, thus contributing to board independence and potentially influencing behaviour.

The three rounds of consultations considered issues including separation of the roles of chairman and CEO (1992 only; taken for granted in subsequent revisions); creating a senior independent director (1992) and giving that person a specific role with investors (2003); the creation of committees (1992), then placed under the control of independent directors (2003); limiting the tenure of non-executives' deemed independence (2003 and 2010); frequency of director elections (all three versions); giving non-executive directors the right to hire external professional advice (1992 only). In both 2003 and 2010 controversy arose about whether, when and how to conduct board evaluation. In all three periods, contributors, particularly from the corporate side, raised concerns on a more elusive subject: relationships between directors.

The arguments on one side of these largely structural or procedural disputes focused on the need to strengthen board independence to induce behaviour of challenge, expanding the board's ability to exercise its "control" function. The arguments on the other side focused on how these measures would prove divisive, pitting directors against each other and splitting the board between its executive and non-executive members.

Contributors in each time period invoked a similar emblem, rich in symbolic as well as practical significance: the dispute over which is better, a unitary or a two-tier board. Many of the same disputes over structures and procedures and the definition of independence at the granular level evoked a related theme concerning the nature of accountability. On one side was the need for boardroom challenge, constraining corporate excess and managerial discretion; on the other for collegiality and contributions to strategic direction. Taken together they concern the ethos of the boardroom. We examine each of this in detail in the following sections.

Shape of the board

The unitary board has been a feature of British corporate governance for as long as anyone involved in the consultations could remember. Nonetheless, a debate emerged in all three periods: Should the UK retain its unitary boards or move towards a two-tier board arising in a particular form in Germany and favoured by the European Commission? Germany's superior economic performance lent legitimacy to the claim that two-tier boards are a "better" instrument of corporate governance. The argument for a two-tier approach was that supervisory boards increase independence and that challenge to the executives might prevent the next shock. [16] The argument against, often subtextual in this debate, concerns Germany's use of *Mitbestimmung*, or co-determination, which involves labour unions in corporate policy.[17] The German system is often viewed as the principal contrast to Anglo-American approach (Charkham, 1994, 2005; Franks et al., 2005; Goergen, Manjon, & Renneboog, 2008; C. Lane, 2003).

Board design in the Cadbury debate

One reason for the sensitivity on this issue was a longstanding dispute over the European Commission's campaign for a Fifth Company Law Directive. The fight lasted for nearly two decades and was resolved only by a decision not to decide (Winter, 2002). The third attempt to pass it, starting in 1988, was opposed strongly by UK business people and the Conservative Party government of Margaret Thatcher (Montgomery, 1989). It sought two politically charged measures, the use of two-tier corporate boards, and some degree of worker co-determination.

A general election was due by the spring of 1992, however, and the opposition Labour party might well have taken a different stance. In a meeting with Sir Adrian Cadbury in September 1991, Marjorie Mowlam, the opposition Labour Party's spokesman on "City" affairs, made clear the party's intention to legislate unless the Cadbury Committee made substantive changes, though without mentioned directly the issue of board design (CAD-01239). Other Labour party members, however, saw value in two-tier boards in submissions to the committee's early deliberations (CAD-

[16] The failures of Herstatt Bank in the 1970s, the construction equipment maker IBH in the 1980s and the metals trading company Metallgesellschaft in the 1990s find surprising little resonance in discussions of corporate governance outside Germany. The first bank failures in the financial crisis of 2007-09 were in Germany: Industrie-Kredit Bank and Sachsen LB, both of which invested heavily in US subprime mortgage securities.

[17] In contrast to the Dutch or Swiss practice, half the members of German supervisory boards, are drawn from the workforce, a feature of German law since the time of Bismarck (Fear, 1997).

01145, CAD-01148), reflected in related articles in academic journals (Cousins & Sikka, 1993; A. Mitchell & Sikka, 1993).

Even after the election in April 1992 had unexpectedly given the Conservatives another term in power, the Liberal Democrats' response to the draft code (CAD-02443) urged two-tier boards with employee representation on the lower tier and suggested that worker votes be counted alongside shareholder votes at the annual meeting. That was an extreme position from a peripheral voice, a party with little realistic chance of coming to power soon. But the papers in the Cadbury Archive suggest there was some sympathy for the topic within the committee. Jonathan Charkham, the Bank of England adviser attached to the committee, wrote to Cadbury during comment period on the draft assessing a proposal[18] to give specific powers to non-executives as "three-quarters of the way to a two-tier board". He continued:

> There is much logic in what they propose but I have no doubt that it would arouse the fiercest wrath among our critics who can see only too clearly this kind of development coming and are thoroughly scared of real accountability (CAD-01073).

This note shows an important voice argued that radical change of some sort was needed. Two years after the code was published, when the committee was conducting its first planned review, Sir Adrian sought legal clarification from the Department of Trade and Industry, an indication he the issue important. Nigel Peace, the DTI official who had been secretary to the Cadbury Committee, responded that company law did not prohibit two-tier boards (CAD-01363).

The Cadbury Committee took special note of three groups of responses from companies, investors and advisors in the accountancy profession, an analytic device we follow here. They are summarized in CAD-02255, CAC-02257, CAD-02259, respectively, though references here are made, where possible, to the texts of the original submissions.

Investor reactions: Fund management organizations wrote mainly dispassionately but expressed concern over steps that might split corporate boards into opposing camps of executives and non-executives. One contributor sees something "dangerous" in the draft, but "in one or two places"; another says draft makes "too great a distinction" but adds director interests are only "somehow opposed"; a comment on the

[18] The "Merrett-Sykes" paper he refers to is not recorded in the Cadbury Archive, although Alan Sykes, managing director of Consolidated Gold Fields, mentions it in a separate comment on the draft report (CAD-02141). Anthony Merrett, a London Business School professor, and Sykes made a second proposal concerning the accountability of auditors (CAD-02185).

"different roles but equal responsibilities" accepts division even as it affirms unity; changes "may bring a distinction" between classes of directors; the report "undermines" the concept of the unitary board, but only "to some extent". (For the fuller context of these remarks, see Table 2.)

Table 2 - Responses of investors to Cadbury draft on board design

Source	*Comment*
Postel Investment Management[19] (CAD-02195)	… the report in one or two places comes dangerously close to undermining the concept of the unitary board.
Institutional Fund Managers Association (CAD-02397)	The Report draws too great a distinction between the responsibilities of executive and non-executive directors and could be taken to imply that their interests are somehow opposed. We believe that the Code should place greater emphasis on the need for each director to recognise his responsibility for corporate governance, however the Board is constituted, and for the Board as a whole to recognise its responsibility and that of each of its members.
Legal & General (CAD-02353)	We are however concerned that Board balance between executive and non executive should not be translated into a separation into supervisory and non supervisory functions with the two-tier implication that that would suggest. We see the directors as having different roles but equal responsibilities, with all of them ultimately being responsible to those who elect them – the shareholders.
British Rail Pension Fund (CAD-02453)	The additional duties proposed for non-executive directors (together with the previously mentioned head of non-executives) may bring a division into the board if non-executives are to take on a more supervisory role. It is probably more important for companies to describe their internal monitoring procedures and formally report on their operation in the annual report than for a general duty to monitor being ascribed to particular members of a unitary board.
National Association of Pension Funds (CAD-02449)	So far as reporting to shareholders is concerned, your suggestion that the chairman of the remuneration committee be responsible for answering questions at the Annual General Meeting may well undermine, to some extent, the concept of the unitary board.

An important voice in the debate was that of the Association of British Insurers, whose members included fund managers that collectively owned about 25 per cent of the value of the stock market at the time; many were themselves listed companies. The ABI eschewed emotive language on this issue, with the exception of the ambiguously placed word "disappointing" in the following passage:

> It is perhaps disappointing that there are some who clearly feel that the recommendations undermine the concept of the unitary board, and it might be helpful if the final report emphasised rather more forcefully the support for the unitary board (ABI, CAD-02467).

[19] Postel was reincorporated as Hermes Investment Management in 1995.

At first its disappointment seems to be with the "some" who criticize the draft report, suggested by the proximity of the two words. But the ABI is not in substance disappointed with those who defend the unitary boards. It is disappointed, rather, with the Cadbury Committee for not being more firmly in favour of them, though that point comes clear only after the friendly offer of something "helpful". The word order and diction thus seek to accommodate sensitivities to criticism on this point. That this voice needed to be accommodated becomes clear from the committee's own minutes (e.g. CAD-01303).

The Pensions Investment Research Consultants, a proxy voting advisory firm representing mainly local authority pension plans, took a stronger line than mainstream fund managers in favour of unitary boards, but with a different aim:

> At present many companies insulate some or all of the executive directors from the need to retire and seek election by shareholders. We think this is a serious infringement of shareholder rights and reduces directors' accountability. It also strikes at the heart of the unitary board in which all directors are equally accountable under law (PIRC[20]).

As these sentences make clear, PIRC is concerned about increasing accountability through elections and wants to ensure that executive directors face re-election to the board just as often as non-executives. This seeks a different type of board unity than other respondents had in mind, one seeking stronger control over directors, not stronger cooperation in the boardroom.

Accountancy reactions: Generally though not entirely, the accountants' contributions on board design objected to the draft and defended the corporate status quo. The first two of the responses in Table 3 ameliorate the critique with phrases like "tends to imply" and "understand and accept". But the more forceful language of the third quote ("unrealistic", "inimical") suggests that feelings were strong. In a handwritten note (CAD-02475), Sir Adrian commented that he was "a bit shaken by the Ernst & Young demolition job".[21]

[20] The PIRC submission itself is not recorded in the Cadbury Archive, but the firm provided a late draft of the document for this study, which is what I quote here. The Cadbury Committee's summary of investor reactions cites long passages from the PIRC submission on other matters but only notes that PIRC supported a unitary board. It does not quote this passage.
[21] The comment referred to the E&Y submission in general, which was also critical of the report in other matters.

Table 3 - Accountants' responses to Cadbury draft on board design

Source	*Comment*
Coopers & Lybrand (CAD-02363)	… the language of the draft report as it stands tends to imply a sharper division between the roles of non-executives and executives than the Committee probably intends. We do not believe there is a satisfactory half way house between the two tier board and the collegiate board.
Pannell Kerr Forster (CAD-02373)	We understand and accept that there is a need for a division of responsibilities within a board and that no large listed company should be capable of being dominated by one individual but we are concerned about the apparent belief that within a board there should be two leaders. We feel very strongly that the duty of the Board (within the constraints of the law) as a whole is to create wealth for the investors. The Board has, therefore, to work as a team, and not to be put in a position where half the Board's main purpose appears to be to police the activities of the other half. We are concerned that whilst the report makes this point … the overall impression of the report, because it deals with controls is one where the vision of the non-executive is that he is there to dismiss the chief executive should this prove necessary rather than provide positive input to the future direction and success of the company. We believe non executive directors have an important role to play in bringing their broader experience to bear on the board's discussions.
Ernst & Young (CAD-02447)	We acknowledge the important contribution which non-executive directors can and should make in this direction but believe that the Committee's expectations of non-executive directors are unrealistic. We also believe that certain aspects of the role which the Committee proposes for non-executive directors are inimical to the concept of the unitary board…. The Committee's proposals would create a two-tier board within the legal structure of a unitary board. We do not regard this as tenable.

The Institute of Chartered Accountants in England and Wales, an important professional association whose members included many company chairmen and finance directors, commented more gently than the accountancy firms:

> Many have commented, too, that the report appears to recommend structures and systems which bring about the existence of something close to a two-tier board, in everything but name. The recommendation in favour of a leader for the independent element on the board, where the chairman and chief executive role is combined, and for the use of outside advisers by non-executives are examples in support of this perception. We believe that the truth or otherwise of this assessment should be more fully addressed in the final report and that it would be valuable if a discussion of the comparative merits of unitary and two-tier boards in the UK environment could be included, additionally. We do not, incidentally, favour the appointment of a leader for the non-executive directors (ICAEW, CAD-02181).

The mild phrasing of "it would be valuable" can be read as a quiet taunt to the Cadbury Committee to justify its position; the word "incidentally" undermines with

irony the neutral reference earlier in the passage to the idea of a leader of the non-executives (cf. Economist, 2011 on euphenisms in British speech).

Corporate reactions: Corporate critiques were unequivocal in advocating a unitary board and opposing European approaches, including two the committee saw in its summary document (CAD-02255):

> This risks appearing to encourage a two tier board system, and detracts from the fundamental concept of collective board responsibility. Any change in this approach should be statutory. Assuming the Committee supports the UK's unitary system, it should explicitly state this, and the reasons why it prefers this system (Sir Patrick Sheehy, chairman of BAT[22]).
>
> The whole thrust of the report is to retain the unitary board but to attempt to engraft a two-tier structure on to it. This is not a workable arrangement (The General Electric Co. plc; also in CAD-02115).

The summary did not, however, record some of the stronger sentiments received from the corporate side, excluding the emotive words "danger", "resist", "erode", "poachers" and "sham", nor an appeal to more rationalist considerations (from Sir Adrian's old family company) concerning possible loss of "commercial advantage". These remarks are summarized in Table 4:

Table 4 - Corporate reaction to Cadbury draft on board design

Source	*Comment*
Lord Tombs, chairman, Rolls-Royce plc (CAD-02377).	In our view distinctions between the responsibilities of executive and non-executive directors, save in relation to remuneration, are both divisive and, for example, in the case of decision making through a two tier board, a sham.
Confederation of British Industry (CAD-02349).	In that setting it is for the board to distribute functions to its members; attempts to reserve tasks as a rule to one class of directors will create the danger of opening the way to a two-tier system…. We oppose the words "monitor the executive management" as imparting a supervisory role inappropriate to a unitary board.
Institute of Directors (CAD-02423)	Whilst the presence of such a system of checks and balances is an integral element of effective corporate governance, it should not way be allowed to erode the principle of a unitary board.
J.F. Mahony, Group Finance Director and Vice-Chairman, Ladbroke Group	I would resist any movement towards a two-tier system. I believe that paragraph 4.3 is unhelpful as the role of the non-executive directors outlined in it appears to conflict with the principle of a unitary board in so far as it implies that the purpose of the non-executive directors is to

[22] Sheehy's submission itself is not recorded in the Cadbury Archive; this excerpt comes from the committee's summary CAD-02255.

(CAD-02441)	monitor the performance of the board. In this context, the non-executive directors must be monitoring the performance of the executive members of the board, not the board as a whole. The draft report should be amended to make it clear that the principle of a unitary board is upheld in all respects.
Alick Rankin, Chairman, Scottish & Newcastle (CAD-02455)	The code, as proposed, appears to identify non-executive directors as 'the gamekeepers' and executives as 'the poachers'. Clearly, this must be quite wrong. It is both divisive and intrusive and damaging to the positive partnership spirit essential in a unitary board. Non-executives have a strong requirement to encourage, to support and to enthuse – this concept is lacking and severely threatened by the proposals.
Peter Jinks, Company Secretary, Cadbury-Schweppes (CAD-02385)	The emphasis on more involvement and accountability of Non-Executive Directors emerging from Corporate Governance must not result in or encourage two tier Boards, which would be of considerable commercial disadvantage to the company and its investors.

Perhaps the most forceful statement came not from a submission to the committee, but instead an opinion column published in the *Financial Times* newspaper, written by Sir Owen Green, chairman of BTR and an emblematic executive of the era.[23] The article was provocatively titled "Why Cadbury leaves a bitter taste". He criticized many aspects of the draft report, including the idea of a "leader" of the non-executives, and asserted that

> A more divisive aspect … is the way it strikes at the heart of the unitary board. It begins by restating the legal position that all directors are equally responsible for the board's decisions. But the committee immediately reveals its view of the real purpose of non-executive directors. They are there to monitor the performance of the board (including themselves?) and that of the chief executive (O. Green, 1992).

The phrase "reveals its real purpose" signals a conspiracy exposed, while "divisive" warns of adverse consequences and "strikes at the heart" points metaphorically at murderous intent towards the British way of organizing boards. The forcefulness of its sentiment and the impact of its argument is indicated by how Green's column was quoted in the committee's summary of contributions, in notes between committee staff, and by various letters that favourably cited Green's remarks.

Support for two-tier boards: Only a few voices supported the idea of two-tier boards, none with the fervour of the Liberal Democrats. The accountancy firm Arthur

[23] The respect Green achieved is made clear in a recent case study of his long career at BTR (Kerr, 2006).

Andersen, in a detailed and closely argued analysis of corporate governance, said the committee had paid insufficient attention to the three roles of boards, in supervision, control and management:

> We believe the Report should be more forthright with respect to the supervisory function of the board. It should clarify the objectives and procedures that fall within the supervisory function and recommend that in all circumstances, the supervisory role should be led by a specific non-executive director.
>
> The Report is predicated on the view that the unitary system is appropriate and the unitary board is itself capable of fulfilling the supervisory function. While we accept that the recommendations in the Report will facilitate supervision, it is disappointing that the Report does not discuss the advantages and disadvantages of alternative forms of governance and encourage experimentation (Arthur Andersen, CAD-02361).

This language falls short of advocacy of two-tier boards. The phrase "predicated on the view" embeds less critique than other expressions of similar content might. But scepticism echoes in the use of "itself", an otherwise redundant reflexive, as well as in the "disappointing" choice not to "encourage experimentation". That Arthur Andersen would encourage such experiments suggests a position more nearly aligned with concerns of more peripheral players about the need for radical change in board design than with actors at the core of the debate or some other intermediaries.[24] The committee's summary (CAD-02259) quoted the Arthur Andersen view at far greater length than those from other firms. Sir Adrian made the notation "experimentation" alongside "unitary board" in his handwritten aide memoire concerning possible revisions to the draft (CAD-01267), suggesting he took these comments seriously.

Most of these texts involve assertions of unspecified virtues of unitary boards and warnings of unspecified dangers in two-tier boards. A subtext came to the surface, however, in several contributions. Richard Lloyd, chairman of Vickers, argued that UK board practice was "more genuinely unitary in its nature" than what happened in the United States or Canada (CAD-01357). J.B.H. Jackson, a self-described "professional chairman", also worried about importing US practice. Sir Owen Green (1992) was more scathing, attacking the idea of an audit committee entirely composed of non-executives

[24] Arthur Andersen was at the time a highly respected voice in the accountancy profession. Its disintegration a decade later after the collapse of clients Enron, WorldCom and others may be traced in part to what we might term governance "experimentation", but not perhaps experiments in enhanced supervision.

as the "least meritorious" in the draft, "notwithstanding the practice in the US". He then added venom: "The arrogance of this imported proposal is communicated through the committee's own words" as the draft proposes limits to auditors' responsibility while it "blandly describes the unlimited liability of the board".

The foreignness of this element of board design perceived in the Cadbury draft came in complaints from several others about "continental" or "German" practices, as well as some oblique and occasionally direct references to European legislation (e.g. CBI, CAD-02349). Ernst & Young linked the two themes in warning that the "failure to implement a more effective regulatory regime in the UK now may well deprive the UK of the ability to influence future proposals which, we believe, will emerge from the European Commission for a European Securities and Exchange Commission" (CAD-02447), a contribution noted in the committee summary as well (CAD-02259).

The "jolt" the UK system had received from the failures of Polly Peck, Colorall and especially the Maxwell companies[25] forced a debate over the appropriate of an aspect of corporate governance that industry had long defended. Opposition was based on economic and political considerations but in particularly on the social aspects of board dynamics. The voices from the twin centres of the debate – corporations and investors – as well as much of the intermediaries argued with varying degrees of force against foreign encroachment in the issue of board design, even though the Cadbury draft report did not explicitly advocate either a German-style supervisory board or an American-style board dominated by outside directors. The strength of opposition is evident in the language of these contributions. Several complained that the changes the draft report sought would demand much effort from companies already well governed, and fail to address the rogues. Green's column in the FT put it this way:

> The report's subliminal message is of the need for total integrity and a healthy objectivity in company affairs. This is strongly to be supported. But the need for a code in addition to existing rules and regulations is doubtful – as is its likely effectiveness in reducing the relatively few instances of misbehaviour (O. Green, 1992).

His use of "subliminal message" evokes symbolically the spectre of manipulative advertising techniques, which had entered public discourse over in previous decades through critiques of technologies to project images interstitially in television signals.

[25] Sir Adrian notes to the committee considering the responses to the draft (CAD-01265) speak of recommendations needing to pass the "Maxwell test", so called because Robert Maxwell would have signed off his companies as having complied with the code, and neither his directors nor auditors would have challenged that view.

In his briefing to the committee, Sir Adrian worried about the tone: "We are said to be 'long on accountability and short on drive and efficiency' and to take a negative view of governance"; the code risked "dividing the board". He then added remarks that imply the code could damage the unity of a board with a weak chairman:

> Do we stay with these? Minor changes … are no problem. I accept that there is a fundamental issue here and that there could come a point when logic would point to a two-tier board. I do not believe we are at that point yet, (although those who advocate distinct legal duties for ned's[26] would pass it), and that the unity of boards need not be undermined by our proposals, given a competent chairman (Sir Adrian Cadbury, CAD-01265).

The tone of the code changed as a result of the comments and criticism, but these notes from the Cadbury Archive suggest the issue was still alive under the surface, even after the final version's support for the unitary board. That Sir Adrian thought "there could come a point when logic would point to a two-tier board" suggests that the issue was still open, even though hostility had closed it for now.

Board design in the post-Higgs debate

In his covering letter to the report, Higgs (2003, p. 3) wrote: "The brittleness and rigidity of legislation cannot dictate the behaviour, or foster the trust, I believe is fundamental to the effective unitary board and to superior corporate performance." Moreover, he expressed the view that the "architecture" of corporate governance, defined as structure and processes inside companies "in itself does not deliver good outcomes" (Higgs, 2003, Paragraph 1.3). Yet his 53 recommendations, summarized at the beginning of the document, dealt overwhelmingly with externally verifiable procedures and structures. We examine next how these issues revived concerns about two-tier boards and dominated the consultation the Financial Reporting Council held to translate those recommendations into the text of a new Combined Code (2003).

The passage from Higgs quoted above considers a unitary board to be an implicit good, and in one of the introductory paragraphs he elaborates that view:

> Some have argued that the increasing complexity of business life – whether globalisation or fast changing product and capital markets – is such that the whole structure of the board needs to be re-considered. But the majority view, which I share, sees considerable benefits continuing to flow from the unitary approach (Higgs, 2003, Paragraph 1.7)

[26] ned's (lower case) is Sir Adrian's personal short notation for non-executive directors.

As if to emphasize that point, he later adds:

> Increasing the effectiveness of non-executive directors, while preserving the benefits of the unitary board, is a principal objective of the Review…. In contrast, the European system of corporate governance typically separates legal responsibility for running the company between a management and a supervisory board. In the US, the board is composed largely of non-executive ("outside") directors with only a few executives. Evidence collected during the Review has not convinced me of the merits of moving away from the unitary board structure in the UK (Higgs, 2003, Paragraph 4.2, 4.3).

This language shows, however, that the debate over board design was not over. It shows that the primary objective of his review is to improve the effectiveness of non-executives. The uses of "unitary" here are defensive: the "whole structure" needs to be reviewed, he is just "not convinced" about two-tier boards. He shares the "majority" view, simultaneously acknowledging the minority and demonstrating an open mind. He has considered other systems ("European" and US) but concludes that the evidence in their favour is not convincing, a subtext that those legitimates views nonetheless. Evidence in favour of the UK system is not mentioned, an indication that he and the respondents to his consultation and research study took those advantages as understood, but the word "unitary" does not appear in Higgs's proposed text of a revised Combined Code. Whether intended or not, taken together these uses and omissions seemed to give respondents reasons to think Higgs had taken a position somewhat short of a ringing endorsement of the unitary boards.

In response to the FRC's limited, "fatal flaws only" consultation, the Association of British Insurers, a mainstream investor voice, saw a "potential danger to the unitary board" if the code had a "formal requirement" that non-executive directors meet periodically without the executives or the chairman present (April 2003).[27] In a literal sense, this is arguing against a case Higgs did not make. Higgs did not *require* such a move in what is a voluntary code; the text of his draft was that of recommendation: "should meet regularly as a group without the executives present and at least once a year without the chairman present" (Higgs, 2003, Provision A.1.5), where "should" invokes the code's "comply or explain" principle.

The Confederation of British Industry, representing the interests of large corporations, used more forceful language to make a similar point. It expressed "deep

[27] Owing to the circumstances concerning the source material, references to submissions to the post-Higgs consultation are given only to the respondent and the date of the response.

reservations" about provisions that "concern or affect the chairman", whose role is "pivotal in the UK's tried and tested unitary board system". The choice of "pivotal" here echoes with irony Higgs's own language (2003, Paragraph 5.1). The CBI's next sentence elaborates this concern relating it to separate meetings of non-executives, suggesting the provision "could be misunderstood and could lead to a two-tier board in practice" (16 April 2003). The use of "could be misunderstood" is an example of language aimed at repairing unintended damage in drafting to maintain the core values of the code. The word might also be seen as a diplomatic way of disrupting a feared change in direction. As in the ABI submission, the value in a unitary board does not receive, or seem to require, explanation or articulation; neither does the "danger" or "risk" in a two-tier board.

Sentiment on this point was even stronger among company chairmen. For example, Sir Brian Moffat, chairman of the steelmaker Corus, wrote (20 March 2003) in his capacity as senior independent director of the banking group HSBC not to the FRC, but to its perceived political master: Secretary of State for Trade and Industry Patricia Hewitt. He began by stating discomfort about writing separately from the rest of the board, lest it be viewed "undermining the unitary board principle or the Chairman's position". Such was the "strength of feeling and support in the Board" that he needed to add his voice to that of the HSBC chairman, Sir John Bond, who also wrote to Hewitt on this point (17 March 2003), and later to the FRC (11 April 2003). Moffat wrote under Corus letterhead, making a symbolic claim of legitimacy in his identity as a company chairman, as well.

Board design in the post-financial crisis debate

The issue of overall board structure came up again in the debate leading up to the 2010 code. In the initial consultation in early 2009, with its open invitation to raise matters of interest, several mainstream investors and companies alike chose to emphasize the need for a unitary board.

> We consider that the unitary board model still represents the most appropriate way forward in the UK context. We also fully support the continued separation of the roles of chairman and chief executive, and an appropriately balanced board (ABI, May 2009, p. 2).

> In assessing the merits of these various proposals we have been mindful of the need to … [p]reserve unitary board structures, with both executive and non-executive directors contributing effectively to the operation of the board (CBI, May 2009, p. 2).

Sentiments like these might have appeared like boilerplate, language dusted off and reused from a previous consultation paper and not of import, except that the issue was still alive among other actors in the field. Some of them were fringe actors, but others, like the Association of Chartered Certified Accountants, were not. A trade organization with a longstanding engagement in corporate governance and many of its accountant-members working in corporations, the ACCA would not normally be seen as peripheral to the field, but its first submission stated:

> As a first step, the FRC should consider the implications of introducing as an option a two-tier board structure and should consider the changes to the Code that would need to be articulated (ACCA, May 2009, p. 3).

Its argument was that the financial crisis demonstrated that current arrangements had failed. It laid the blame on the failure of non-executive directors to control managers, and on the custodians of the code for permitting an "untimely" (p. 2) relaxation in 2008 of the constraints on board chairmen and audit committee membership. Boards needed greater independence, not less:

> To draw attention to the failure of independent directors is not to say that less reliance should be placed upon them in the future. But consideration needs to be given to addressing the causes of their ineffectiveness.
>
> While two-tier board structures have not always been notably successful, they can contribute to ensuring that the supervisory board directs and oversees, while the management board manages. In practice, much depends on the composition and powers of the two boards in a two-tier structure (ACCA, May 2009, p. 2).

The early mention in and (albeit limited) support for two-tier boards through the debate signals that the idea has legitimacy among at least some actors in the field, even though it remains a largely alien concept.

Contributors on the other side, however, affirm the counter-argument but leave it largely unarticulated. The CBI, for example, states that its members, "including investor members, strongly uphold the UK's unitary board system"; it later states: "there is also a need to avoid proposals that tend towards two tier boards" (CBI, October 2009). Use of the passive voice here sweeps away any actor, as if the reader – that is the authors of the code – took the matter for granted and needed no explanation.

Over the course of the three periods, those supporting two-tier boards in their texts draw upon a discourse of high performance, secure investments and long-term orientation, characteristics of German corporate performance. Their texts, mainly tacitly though from some peripheral actors explicitly, invoke employee rights, stakeholder theory and the associated curbs on behaviour seen in rapacious Anglo-American capitalism. That these associations are not explicit in many of the texts does not mean they are not there. They featured prominently in the discourse in news media at the time.[28]

Boardroom ethos

How directors behave – that is, behaviour within boards and between boards and shareholders – has been an important aim of the code since its inception, but one where the authors have always accepted the code could have little direct impact. As a result, the code has largely sought to deal with behavioural issues by proxy. Structures and procedures seek to limit the discretion of board and, thus, the range of possible behaviour. Independence of mind aims to encourage constructive boardroom challenge; lacking a mechanism to ensure it, the code has settled for formal definitions of independence. Some provisions, including the controversial ones of board evaluation, may prescribe activities of the board in the hope they will lead to changes in behaviour. With the financial crisis of 2007-09, however, came acknowledgement that these proxy approaches were insufficient. In this section we examine how contributors to code development perceived the issue of the ethos of boards.

Board ethos in the Cadbury debate

Documents in the Cadbury Archive clear show the presence of a concern that the code might miss the target. A hint comes from the chairman's document (CAD-01265) prepared for the committee as it reviewed all the responses to its May 1992 draft report on September 17, where the committee would agree the thrust and some of the detail of changes for final report. A note in an appendix called "Table of Points for Discussion" includes item 12 on "The Board", where the note-writer, presumably Sir Adrian, writes: "More emphasis on behaviour needed, less on structure?"

[28] In 2009, for example, The *Financial Times* newspaper produced a long series of articles from high profile contributors, later issued as a monograph, "The Future of Capitalism" (May 12, 2009).

That question does not appear in document detailing the conclusions of the committee's deliberations, but several of the changes agreed that day came in response to concerns about excessive prescription and the "tone" of the draft report, matters that link structure and behaviour. This debate suggests recognition by the committee of the tension between structure and agency in achieving board effectiveness. Richard Lloyd, the Vickers chairman, put it this way:

> … your Report perhaps should pay more heed in your final version to certain behavioural aspects which are, in our view, central to a Board's effectiveness…. most U.K. Boards, anyway those of medium-size companies, are probably more intimately involved in the knowledge, understanding and direction of the business than is the case with counterparts across the Atlantic (CAD-01357).

These "behavioural aspects" echo the need for the "presence" and "use" of knowledge and skills in the Forbes and Milliken (1999) model of board effectiveness. Lloyd links them to the "genuinely unitary" nature of UK boards, as opposed to the more supervisory approach in the US. Paul Girolami, the Glaxo chairman, worried that the draft cast non-executives as "watchdogs or guardians" of interests of shareholder or even "the public":

> We do not see this as the only — or even primary — role of the non-executive directors. They bring to the boardroom independence and outside experience which cannot be provided by the executive directors, and those qualities are (or ought to be) deployed to enhance the general decision-making of the Board on all the aspects of corporate affairs with which it has to deal. The constructive harnessing of this spectrum of experience requires the creation of a team ethos (CAD-02105).

The equine metaphor of "constructive harnessing", coupled with the electromagnetic and colourful metaphor in "spectrum", invokes images the sense of abundant and unruly force channelled to good purpose. Use of "team ethos" is valued as a "creation".

The "professional chairman" J.B.H. Jackson said he puts "a lot of effort into keeping boards united and am nervous of external interventions which could run against this"; he was "particularly nervous of cultivating the notion that the standards of behaviour anticipated by 'the City' differ between executive and non-executive directors" (CAD-02143). Here "the City" – the financiers in the City of London – is a distant, alien force seeking to divide those "united" on the board.

Stanley Kalms, chairman of Dixons, wrote about the "unique cultures" of companies as justifying the assertion that there was "little benefit in absolute uniformity for its own sake" in warnings against a code that "did not recognise individuality" (CAD-02167). Sir Richard Greenbury, the chairman of Marks & Spencer, said companies "must act as a cohesive unit"; the context makes clear this refers in particular to boards.[29] Moreover, "whatever Code or Regulation may be in place, the issue [of power in the boardroom] will be decided by the mix of personalities" (CAD-02343).

These comments emphasize simultaneously singularity of companies and the unity boards. They perceive a threat in a one-size-fits-all code; the individuality of personalities within the boardroom contributes to the unity of the unitary board. The purpose this unity-in-individuality served was expressed by the Confederation of British Industry in arguing that the draft

> understates the contribution which the non-executives can make to the growth of a business: their different experience brings a fresh eye to problems and the development of strategy (CAD-02349).

Non-executives contribute scarce resources ("experience", "a fresh eye") for the sake of developing strategy and promoting growth. These views paint a picture in which the board is an exciting place to be, a place where structures enable more than they constrain, a place alive with contradictions and uncertainties, and a place the draft code threatened to disrupt.

Such considerations are largely absent from the submissions from investors, their advisors and the accountancy firms. One of the few that remarked on it from the investor side was Legal & General. It welcomed the draft's formal definition of differing roles for executives and non-executives, but put emphasis not on the *control* function of non-executives but their *service*: "balance is provided between executive responsibility for day to day management and non-executive strategic input" (CAD-02353). The investment company 3i went further, noting that it was worried the draft wanted non-executives to act as "corporate policeman" when they were needed to contribute to policy development. It installed directors on the companies in which it invested "to benefit the business not to police our investment" (CAD-02387). It is worth

[29] Greenbury would later author the 1995 review of executive remuneration, which would form part of the Combined Code in 1998.

noting that L&G and 3i were and still are themselves both major listed companies as well as important investors.

Board ethos in the post-Higgs debate

The Higgs Review of the effectiveness of non-executive directors sought to emphasize the importance of behaviour for the effectiveness of boards. In the body of his report, Higgs added: "The key to non-executive director effectiveness lies as much in behaviours and relationships as in structures and processes" (2003, Paragraph 6.3), before outlining the "behaviours and personal attributes" of non-executives (Paragraphs 6.9-6.19). He also provided guidance on the behaviour of effective chairmen in an annex. He used "behaviour" and "behaviours" almost interchangeably, leaving readers to interpret to what extent they mean the general depiction of the interaction of directors or observable phenomena. Respondents, particularly but not exclusively from the corporate side, worried that proposed prescriptions would require specific behaviours, leading to divisions within unitary board, harming performance, rather than giving weight to the need to foster trust. We look next at those general concerns and at a specific case of their impact: the role of the senior independent director and how it would divide the board.

Higgs recommended that the SID[30] have a direct relationship with investors. Other non-executive directors meet investors, too, but they should "rely on the chairman and the senior independent director to ensure a balanced view is taken" (Higgs, 2003, Paragraph 15.16). The SID, by contrast, "should attend sufficient of the regular meetings of management with a range of major shareholders to develop a balanced understanding of the themes, issues and concerns of shareholders" (2003, Paragraph 15.15). Moreover, he proposed the SID be available to shareholders "if they have reason for concern that contact through the normal channels of chairman or chief executive has failed to resolve" (2003, Paragraph 7.5). For many respondents, and especially company chairmen, this was a challenge to the authority of the chairman. The CBI responded in these terms:

> Business is concerned that the proposed Code inadvertently undermines the role of the chairman of a company. It is in no one's interests that this happens (CBI, 16 April 2003, Paragraph 10).

[30] This is one and now the most common of several designations used in the consultation responses. Others include SNED (senior non-executive director), SNEX (senior non-executive) and SINED (senior independent non-executive director).

> We are also very concerned about the proposed role of the senior independent director. Business believes that this could inadvertently create three separate forces in a board whereas boards need to be a united force. The Cadbury Report identified the danger of a CEO dominating the board. What the Report says on the senior independent director actually does increase the potential risk of a CEO playing off the senior independent against the chairman and thereby weakening the chairman. This very much undermines the Cadbury philosophy (CBI, 16 April 2003, Paragraph 12).

Here the trade association seeks to assert authority by identifying its view with that of "Business", claiming through a *totum pro parte* authority somewhat beyond the scope of its (already powerful) membership. That the "undermining" is "inadvertent" seeks to prevent damage without provoking retaliation. Moreover, by suggesting that Higgs might undermine the aims of the Cadbury Code and thus strengthen the hand of the chief executive, the CBI attacks Higgs by invoking the logic of greater independence that runs through his review.

Baroness Hogg, chairman of the listed private equity group 3i and one of only very few women respondents, said Higgs did "not sufficiently distinguish between the 'backstop' role of the Senior Independent Director, and the day-to-day responsibilities of the Chairman" (02 April 2003). This is language that defends ("backstop") and thus maintains the status quo and her own role, while seeking to disrupt the changes Higgs planned. Lord Weir, chairman of the construction group Balfour Beatty, argued that the "promotion" of the SID would "undermine the role of the Chairman". His company had not seen the need to follow Cadbury's guidance on designated a senior non-executive in view of the independence of the chairman. Martin Broughton, chairman of BAT, said investors "rarely avail themselves" of the existing opportunity for contact with other directors. Moreover, he called another of the Higgs recommendations – that the chairman not chair the nominations committee or even sit on the audit and remuneration committees – "constitutionally unsound".

These and other expressions of concern from the corporate side might be seen as chairmen protecting their own positions. But their reasoning invokes corporate benefit arising from trust and collegial behaviour. Moreover, similar sentiments appear in the submission from mainstream investors and their representatives, though in less forceful language. It was a shared issue, if perhaps with different salience to these two core groups in the centre of the field.

Board ethos in the post-financial crisis debate

As the debate got underway in 2009, the Association of British Insurers called attention to a relatively new aspect of terminology in the field: behavioural governance. The ABI's first submission urged the code-writers to recognize that how people relate is more important than compliance. It did so by drawing a distinction between substance and form:

> In our view the Code, which represents form, can only be effective if the subjects (in most cases the non-executives) apply its principles properly, thereby creating the substance. This application may be termed behavioural governance. Behavioural governance will be affected by such attributes as skills and experience of the individuals, but the two most important attributes a non-executive must have is personal integrity and good judgement. The ABI recognises that it is highly difficult to demonstrate such attributes through a Code, we therefore believe that the most effective way to assess this is through interaction and dialogue between non-executives and investors (ABI, May 2009, pp. 2-3).

The value descriptors here are "integrity" and "judgement" not compliance. The mechanisms are "interaction" and "dialogue", though crucially these terms refer to the relationship between directors and investors, placing emphasis on hierarchical accountability rather than mutuality and trust in the boardroom. It asserts shareholder primacy while at the same time seeking to move directors' actions away from narrow compliance with the code.

The ABI's submission returned to the theme two pages later when discussing risk management:

> The ability to understand the risks includes an element of judgement. This therefore is an aspect of behavioural governance that investors, as outsiders, will always to a degree struggle to fully grasp. One method of addressing this is to look to "expert" directors to provide comfort. However, whilst we support the concept of a financial expert on an Audit Committee and relevant expertise being present on the board, we would counsel against over reliance on "experts". It is our experience that whilst experts are useful they also have a tendency to be more easily "captured" as they will naturally see things in a similar manner to other experts, usually management. As important as expert knowledge is, it must be coupled with keen skills of critical analysis, the ability to constructively challenge and question assumptions. Also, other directors may tend to rely too much on the views of the 'expert' rather than bringing their own judgement to bear (ABI, May 2009, p. 5, punctuation inconsistencies in the original).

The section is worth quoting at length because, unlike other submissions from central actors or its own submissions on other point, the ABI here elaborated its argument, rather than relying upon assumed meanings. Much of the debate preceding the consultation was about how the independent non-executives on bank boards had failed to understand the nature of risk. One solution, the one the Walker Review would suggest two months later, was greater expertise. But here the ABI, a trade association for risk experts, argued against expertise, and in rather forceful terms. Experts were "more easily 'captured'", so other directors must bring "judgement to bear". The experts themselves must be more than expert; they must also have "keen skills of critical analysis", and then "constructively challenge" and "question assumptions". This is an argument to maintain the institution of the code with its emphasis on independence even as it seeks to push it along the path of relying more on behaviour that investors like the ABI "struggle to fully grasp". That the language here is much more vivid than in much of the rest of its submission suggests that its author(s) saw this as a crucial issue. The institutional work is moving in two directions, disrupting the code's reliance on structure and independence while maintaining them as well.

Other submissions also placed emphasis on behaviour more than compliance. The CBI's first submission spoke of the importance of the more general importance of having a "culture of challenge" in the boardroom, arising from having a "broad talent pool" of non-executive directors, before adding:

> The effective application of the Code's principles is largely reliant on the behavior [sic] of individuals and their interactions. This is not something that can sensibly be legislated for or regulated (CBI, May 2009, p. 2).

In contrast to the ABI, this behaviour and these interactions are discussed as purely internal to the board, not also in relation to shareholders. Moreover, neither the code-writers nor government can "sensibly" contribute much to improve it. The CBI's language affirms the code's value while undermining readings of it the emphasize structure. It denigrates legislation and regulation, implicitly also denigrating the more regulatory approaches to the code implicit in the compliance mentality other contributors, particularly peripheral actors, had stressed.

The submission from GC100, an association of corporate counsel from the largest companies, made a similar point, in suggesting best practice guidance, a non-regulatory approach, rather than a revision of the code's principles, which would fall under the comply-or-explain regime and its associated enforcement:

> The Code will only provide a framework for good governance but will not alleviate the issues caused by bad management within a company. These behavioural issues can certainly be influenced through a robust board/committee evaluation process and possibly through guidance on best practice from the FRC (GC100, May 2009, p. 4).

This view affirms the value of the code even as it challenges it: the code is "only" a framework, though the committees it has legitimated can influence behaviour through "robust" process of evaluation, thus affirming while simultaneously questioning the effectiveness of code. SABMiller identified with the GC100 stance in its submission, before adding:

> If there were governance weaknesses that contributed to the current crisis, it was in the application of the Code rather than a lack of prescription within the Code itself. Adding extra governance requirements is likely to lead to more box ticking and hamper effective scrutiny by non executive directors by occupying time with form rather than looking at substance. Key to the effectiveness of corporate governance is the calibre of the individuals involved, and that they have a clear understanding of their role and responsibilities and the tools necessary to discharge their responsibilities effectively (SABMiller, May 2009, p. 1).

The contrast between "form" and "substance" returns, as do the limitations of codes in dealing with behaviour. Articulation of code leads to "more box ticking", one of many uses of the derogatory phrase made in the submissions from actors in central positions in of the field. Emphasis is placed, instead on the "calibre of the individuals" with the "necessary" tools. That could be read as a request for more tools, had not the passage already warned that extra requirements would "hamper effective scrutiny" and thus be counterproductive. This is language aimed at maintaining the code, and the logic of corporate governance as SABMiller interprets it, but also to disrupt the plans of others to assert their interpretation of codes as defining acceptable behaviour, not merely providing structures within which agents can act.

As the three consultations progressed, the topic returns from a large number of actors. The CBI's October 2009 submission suggested: "Promoting a culture of respect, trust and challenge is the most important issue, and ultimately the job of the chairman. The CBI believes that there is only so far you can codify all of this" (p. 3). A few pages later in discussing board evaluation, it added:

> The key aspect of board performance is behavioural, and therefore much less amenable to formal "testing". External evaluation should not be a substitute for open debate and robust challenge between the

> Executive and the NEDs, nor effective communication and engagement with shareholders (CBI, October 2009, p. 6).

Not all respondents agreed. The second submission by Fair Pensions, an advisory firm to pension funds, responded to the FRC assertion that "There is a recognition that the quality of corporate governance ultimately depends on behaviour not process" in the following terms:

> Everyone accepts that good governance depends on behaviour and that regulation alone is not enough. The practical question, however, is what form of regulation will best promote the required behaviour (Fair Pensions, October 2009, p. 2).

The word "however" does the rhetorical change of direction and one that invokes a different, regulatory logic of behaviour more akin to agency than stewardship theory in corporate governance, emphasizing more the structure in an institutional approach to the field than the concept of embedded agency. This form of institutional work is both maintaining the code and disrupting the attempts of those in more central positions to maintain their understandings of what the code means.

Discussion

This analysis points to new insights concerning the nature of institutional work and the process of codification. It also has implications for further research concerning the practice and theoretical perspective of corporate governance as a field.

Institutional work

Writing the code was in general a conservative process throughout the period. Despite the crises of legitimacy that prompted these three events, these efforts arose largely outside the political process. As a consequence, the actors engaged in them were largely those with vested interests in incumbent practices as much as in future outcomes. Those conditions suggest processes where little institutional change would emerge and the work done would be mainly of the "maintaining" varieties in Lawrence and Suddaby (2006).

This analysis shows, however, that more radical ideas did come to the fore. The Cadbury Commission heard arguments in favour of a transformation of UK corporate governance arrangements and seemingly gave them serious consideration. That those ideas, rejected by the code-writers in the face of strong, conservative pressure from

directors and investors, maintained alive during the 20 years under review, suggests that what MacAvoy and Millstein (2003) call the "recurrent crisis" in corporate governance has prevented any ideas from truly coming to be taken for granted, that is, deeply institutionalized. That the code left the door open to defiance as well as compliance, to experimentation as well as avoidance, suggests that the codes' authors recognized the limitations of the process in which they engaged.

Cadbury's work was something institutional scholars would recognize as entrepreneurship, seizing an opportunity when legitimacy of established practices had come into question and creating new arrangements. The process, including both the consultation this paper has used as its source material and the informal meetings, fact gathering and media coverage that surrounded it, provided repeated opportunities for the work Lawrence and Suddaby (2006) educating, theorizing, defining and vesting. The consultation worked by constructing normative networks and changing normative associations by connecting intended practices with a moral basis related to the quiet but well established association of the Quaker faith of the Cadbury family over generations with practice we now call social responsibility. Cadbury was the moral face of capitalism, where Maxwell was the opposite.

Enlisting important industrialists to the committee and then soliciting views from others brought key potential opponents to change into a position where they needed to articulate their position and frame a discourse that sat largely within the frame Cadbury's draft had set. In contributing to the debate opponents construct identities that lie not too far removed from the terms the draft had given and the code was establish as its new mechanisms, which then facilitates diffusion of the new practices, or at least their translation (Czarniawska & Joerges, 1996) by actors less than thoroughly convinced by the arguments they have heard. This echoes the projective agency in the version of institutional work in Battilana and D'Aunno (2009). But holding open competing logics through the comply-or-explain regime, the code that emerged allows actors in the field to keep multiple identities following different logics in a kind of suspended animation even as they accepted and incorporate the code in their own practice. This identity work (Creed et al., 2010; Lok, 2010) suggests a need to add another type of practical-evaluation agency to Battilana and D'Aunno's phase of creating institutions.

The subsequent major versions of the code paint a more complex picture of institutional work. With a formal code in place, the canvas that Higgs and then the FRC

used in 2003 was not blank. The existing practices from Cadbury had been institutionalized over a decade and mythologized, a form of "maintaining" work in Lawrence and Suddaby (2006). Through the iconic status of the code around the world, those practices had won over many of the critics from 1992 . Contributions to the "fatal flaws only" review in 2003 suggest that many had come to identify with Cadbury precepts, which they had learned to adapt through translation and bricolage to suit their companies' circumstances. They praised the Higgs Review (2003) and its insights into non-executive directors, a form of "valourizing", but disputed the resulting recommendations, "demonizing" as alien in their attempt to split the board along German and European lines. This is work by these actors that Lawrence and Suddaby would call "maintaining" incumbent institutional arrangements but it is also disrupting the institutional entrepreneurship in Higgs. At the FRC, Nicholson faced that fury with a fudge. He converted Higgs's recommendation of a definition of independence involving a six-year tenure into what came to be called the "nine-year rule" (see previous chapter for details). That was work that Battilana and D'Aunno (2009) would call "repairing" or a change Lawrence and Suddaby (2006) would see as "enabling", both of the "maintaining" variety, but maintaining entrepreneurial ideas, while disrupting existing arrangements.

In 2010, Sir Christopher Hogg's changes to the code recognized many of the issues left untreated in both the Cadbury and Higgs inquiries, that the ethos in the boardroom was more important than the structures of board design or the formal definitions of independence. Contributions to that consultation nonetheless brought up old ideas and issues up for reconsideration, ideas that sought again to address questions of structure and definitions of independence. The institutional work was a repeat of prior attempts by some to repair and others to undermine the moral associations of a code that had failed to prevent a recurrent wave of governance failings. What emerged from the consultations, however, was advocacy of translation and bricolage, advocacy of deinstitutionalizations within institutional arrangements by the liberal application of explanations rather than compliance. The 2010 code picked up and amplified the subtext of the discourse that spoke of the limitations of code and the need for a combination of trust and challenge, respect within critique, that corporate actors and some others had advocated since the earliest days, but which previous authors of the code had reflected only in part. Was this work disrupting existing

arrangements, maintaining the spirit by repairing the language, or creating something rather different?

Actors from different parts of the broader field of corporate governance would view these examples of work differently. Those that start with a logic of control as the purpose of boards could find the advocacy from corporations and the actions of the author in the 2010 process as disrupting to the central purpose corporate governance. Those that start from a logic of service, of the board as a solution to resource constraints, could see in the 2010 process invention and advocacy of a new and welcome set of arrangements that simultaneously undermined incumbent ones.

This discussion suggests that the concept of institutional work is contingent on the position of the actors in the broader field: work one actors might view as maintaining an institution they cherish is one that disrupts the diffusion of institutional arrangement that others advocate. This is true particularly for this case, because the field is unsettled. The increasingly international nature of capital markets and the mobility of corporate executives and directors creates pressure for convergence (Aguilera & Cuervo-Cazurra, 2009; Goergen et al., 2008; Steven Toms & Wright, 2005), while the path-dependent development of different governance regimes keeps alternatives and overlapping logics alive and under discussion (Roe, 2003).

Codification

This paper also suggests that the process of writing contributes to the successful development and diffusion of codes of conduct. In these examples, codification arose through a process with the following stages: An existing set of practices, widely if not universally accepted, is unsettled by a shock to the system widely seen as internal to the system if perhaps external to many actors within it. That jolt places the equilibrium of current arrangements in question. Through services of a (more or less) trusted intermediary, views from both the centre and the most distant parts of the field are aired and definitions of accepted terms questioned. In those circumstances, authorship matters. Through one or more iterations, the author decides the terms in which the debate takes place, that is, the language in use. That language creates the discourse that legitimates certain categories of actors, activities and forms of organizing, ready for codification. Enactment of those forms and activities by multiple actors across the field alters social practice, legitimating the discourse and reinforcing the texts, as Fairclough (1992) suggests.

This study suggests that central to the success of codification are three factors: a) the opening of the terms of the debate, b) the services of a trusted mediator/author, and c) the sense of broadly shared values among participants, which prevent the debate becoming reduced to narrowly self-interested negotiations. In so doing, they avoid the interest dissatisfaction and clash of value commitments Greenwood and Hinings (1996) see as prior conditions for institutional change. Further research could help to establish this. The process is summarized in the map seen in Figure 2. Central to the success in this example of codification, which involves powerful elites agreeing to cede discretion, seem to be two further factors this paper has analysed only tangentially: d) the promise of an iterative cycle, with or without a fresh jolt to the system; and e) the "escape clause" of comply-or-explain, which permits differentiation with a unified response.

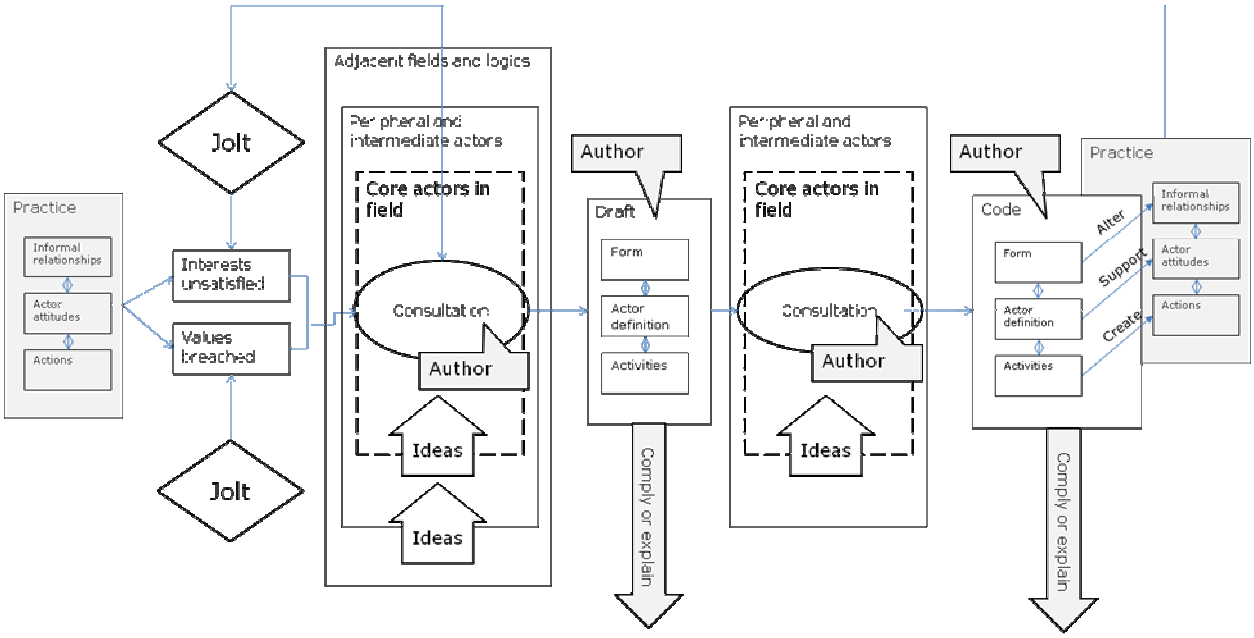

Figure 2 - Codification process

In the case of the UK codes of corporate governance, the jolts leading to the versions of 1992 and 2010 were in many ways home-grown and of considerable magnitude, increasing their force and injecting urgency into the need for change and thus the salience of the calls from change from more peripheral voices. Ideas from what we might call adjacent organizational fields – from the German model of corporate governance or the European Union's deliberations – get a hearing. The version of 2003 is somewhat different, in that the jolt was clearly from outside. The problems at Enron, WorldCom and other in the US were based in a governance system that made little use

of executive directors and much use of rules-based regulation of corporate affairs and accountancy. Contributions to the Cadbury inquiry suggest UK directors saw these as alien. Even the problems that affected European companies at the time came from alien systems: Ahold had a two-tier board; Parmalat had a governance system seemingly modelled on the Maxwell empire of pre-Cadbury days. That corporate actors rejected the specific Higgs provisions, sometimes in quite forceful language, suggests insufficient interest dissatisfaction or conflict of values to evoke change (Greenwood & Hinings, 1996). But changes happened nonetheless, suggesting the shared values about the greater purpose of corporate governance overcame the inertia of an institutionalized field.

The discussions of board design and boardroom ethos show roots in the experience of individual actors, and not just corporate entities responding abstractly to the issues the consultations raised. As we have seen in these examples of the debate from a limited sample of contributors, respondents came from a variety parts of the investment supply chain, bringing with them both a range of views roughly corresponding to their economic interests and a large degree of shared values about the nature of corporate governance and the importance of finding better ways of making it work.

Analysis of the range of views shows that voices central to the debate had considerable impact on shaping the content of the codes, at least in part through advocating changes practice and in code, in keeping with the expectations of Greenwood and Suddaby (2006). Their positions held greater salience (R. K. Mitchell et al., 1997) with the codes' authors, in that they more urgent in terms of the impact on their activities, more legitimate if judged from the perspective of invested funds and effort, and certainly more powerful. As Sir Adrian Cadbury's notes show in several places, had the code authors not won commitment from associations like the ABI and CBI, from key institutional investors and from the chairmen of influential companies, their efforts might have been stillborn, despite strong "precipitating jolts" (Greenwood et al., 2002) in the field.

On occasion, single voices, like those of Sir Owen Green during the Cadbury inquiry, provided a rallying point for others, crystallizing their own thinking in language that exercises force over those tasked with writing the code and changing the terms of the debate and possibly its direction. Voices from the periphery of the field, however, contributed ideas that forced reconsideration of positions by those in the

centre, in keeping with the expectations of Rao and Giorgi (2006). Those in intermediate positions in the investment supply chain, the large accountancy firms and other advisers, may have less urgency and power, but their expertise dealing with boards gives them salience, even when their legitimacy, post-Enron, comes into question. Their position allows them to bring new and occasionally challenging ideas into the debate, with authority arising from their independence, even when that independence is based on professionalism brought into question by their own actions.

The shared values of the participants are perhaps the greater surprise of this study. Across the spectrum of opinion, what is evident in the Cadbury inquiry is acknowledgement of the need for change towards more formalized and normative institutional arrangements to supplement or replace the informal ways that boards operated and distilled each others' ideas of best practice. In the post-Higgs and post-financial crisis debates we see acceptance among actors of the need for renewing legitimacy if not about the changes needed to achieve that. Nonetheless, that institutional investors and corporate chairmen frequently spoke in the same terms suggests that more than narrow self-interest is at work. The contributions of even the more distant actors show adherence to many of the same principles, such as the need to balance the control functions of the board against it service roles, and perhaps the sense that those two functions cannot easily be distinguished from each other. Only the most distant of actors lacked a common language of governance with those in the centre; others shared the same terms, if sometimes only through ambiguous definitions. Most adhered to logics that – even when competing for attention during the process of writing the code – contained overlapping meanings for the participants. That the values were shared, if unevenly and with variation, has implications for the process of codification and the nature of the institutional work involved in their authorship.

Implications for further research

This paper suggests a number of avenues for further research into the field of corporate governance, with broader implications for institutional theory. They include a) authorship, the role the authors play in writing the code; b) absent voices, the foreign investors and hedge funds who did not contribution to a debate in which they clearly had an interest; c) logics, the several competing, conflicting but also overlapping logics at work here; d) fields, and what the blurred boundaries in

corporate governance say about institutional change; and e) power, how does the process of codification assist or disadvantage certain parties. The final section of this thesis (Chapter 9) offers some preliminary thoughts.

Conclusions

This paper demonstrates how the processes of writing the code of corporate governance in the UK contributed to its institutionalization through the negotiation of the language of its texts mediated by a trusted authored in a safe environment. In listening to ideas from the periphery as well as the centre and intermediate positions in the field, the authors confer legitimacy on ideas they do not incorporate, allowing those ideas to stay alive in the discourse even when marginalized, ready to resurface when the next occasion arises. The codes remained open, subject to periodic review, with or without new jolts to the system; they were also voluntary, through the comply-or-explain regime. Those factors allowed them to win commitment from the powerful actors who might otherwise have refused to participate or engaged in mere surface isomorphism (Zucker, 1987). These processes have practical as well as theoretical importance. The lessons from the Cadbury experience were reflected in other national codes of corporate governance but also in the processes used to create them. Moreover, the processes discussed in this paper inform and were informed by the mechanisms used by the European Commission in formulating policy for the reform of financial services regulation (the so-called Lamfalussy process) and in its decisions at various stages whether (or indeed not) to pursue a harmonization of corporate governance across the European Union.

This paper also contributes to the literature on institutional theory in examining the way the use of language influences the development and promulgation of a proto-institution as it diffuses or perhaps translates through a field. The language of the texts and the contributions that lead to their development inform a discourse that comes to dominate the way we talk about corporate governance, both in the UK and abroad. That discourse gives legitimacy to certain ideas while placing others in a state of suspended animation. The open nature of the processes allows ideas to resurface another time, sometimes from other actors, in a semi-legitimated state, half-ready for when the next jolt hits the system.

Appendix 1

The contributions to which this analysis pays closest attention were selected on the basis of theoretical sampling based on the centrality or otherwise to the issues of boards and owners, and on the salience of their claims and arguments. Asset management firms are likely to have different interests from corporate directors. Agency theory suggests the former would seek to use code-writing to assert greater control over boards and managements, while boards and individual directors would seek wider discretion and freedom of choice. These also reflect the split in theories of corporate governance between agency theory (Fama, 1980) and stewardship approach (J. H. Davis, Schoorman, & Donaldson, 1997) and highlight issues in resource dependency (A. J. Hillman, Cannella, & Paetzold, 2000).

For each of the time periods, the core samples and the justification for their selection are provided in the following tables.

1991-92

Table 5 – 1991-92 core sample and justification

Actor	*Sector/interest*	*Comments*
Association of British Insurers (ABI)	Insurance industry trade association; mainstream investment orientation; often organizes collective engagement with companies over corporate governance concerns	Many ABI members are also listed companies, so the ABI view can be seen as straddling the divide between corporations and shareholders. At the time of Cadbury, ABI members held about a quarter of the value of the shares listed on the London Stock Exchange.
Confederation of British Industry (CBI)	Trade association for companies, especially large corporations	Notes from Sir Adrian and the committee secretary Nigel Peace show that the CBI was seen as an important and possibly hostile voice, one whose views needed to be taken into consideration.
Ernst & Young	Accountancy firm, one of the Big Five, Seven, Eight, depending on the year	E&Y submitted what Adrian Cadbury's notes (CAD-02475) say he was "a bit shaken by Ernst & Young's demolition job" on the draft code.
Anthony Merrett and Alan Sykes	Accounting academics and corporate practitioners	Their joint paper on boards and audit is referred to several times in various committee notes; including by Jonathan Charkham, the Bank of England adviser who worked with Cadbury. Charkham wrote of the M-S paper: "There is much logic in what they propose but I have no doubt that it would arouse the fiercest wrath among our critics who can see only too clearly this kind of development coming and are thoroughly scared of real accountability" (CAD-01073).
Glaxo Holdings plc	Corporate	Sir Paul Girolami was chairman of Glaxo and comments at some length on the proposals.

Bodycote International plc	Corporate	Joseph C. Dwek, chairman and CEO, responded on behalf of the company, a manufacturer of coatings and advanced materials that had once been a textile and packaging maker and before 1969 part of Slater Walker plc, a company involved in earlier corporate governance issues. Dwek had been chairman since 1972, shortly after it was spun out of Slater Walker, and retired in 1998. He was later chairman and CEO of Worthington Industries Plc, leaving after a management buy-in in 2010. The firm subsequently ran into financial difficulties. Nigel Peace, secretary to the committee, called particular attention to his comments on resigning auditors.
Sir Owen Green, BTR	Corporate	The contribution to the committee from Green, then chairman of BTR, doesn't appear among the papers in the archive. He wrote a "Personal View" column in the Financial Times of June 9, 1992, attacking the draft report. Its critical and public stance meant that others referred to it as well. Green is cited at some length in the committee's summaries of contributions, however, suggesting there might have been another document. This study looked at the FT piece and the excerpts in the summary. (NB: Green subsequently wrote to Cadbury still criticizing the code but also apologizing, as the archive documents. He was chairman and managing director of BTR from 1984-86, although his contribution discusses the differences between the roles and advocates separation.)
Sir Richard Greenbury	Corporate	Greenbury was chairman and chief executive of Marks & Spencer. Although using private letterhead, he writes in the first person plural, as if speaking for the board; the letter is signed "Chairman". He chaired the 1996 inquiry into executive pay, part of what became the Combined Code.
Legal & General	Insurer; investor	Maureen Howe, in the government and investor affairs office, responded on behalf of the company with a strong nod to its engagement as an investor.
Arthur Anderson	Accountancy	The then-highly regarded firm made a long and detailed commentary on the draft.
3i	Corporate/investor	3i is a listed private equity company that grew out of a government initiative to foster capital formation for new, growth businesses. 3i stood for Investors In Industry, and the submission still used that expression as a strap line.
J.B.H. Jackson	Corporate	A self-described professional chairman
Kingfisher	Corporate	Geoffrey Mulcahy, chairman and CEO, had a maverick reputation in the City and opposed various elements of corporate governance reform over two decades.
PIRC	Advisers	Pensions Investments Research Centre is a proxy voting service whose clients come overwhelmingly from local authority retirement funds. Although many of its clients are significant investors, the firm has long taken a stakeholder-aware stance to its recommendations. Its contribution wasn't among the papers in the Cadbury Archive, but it is mentioned and quoted at some length in the summary documents. PIRC supplied directly a late draft of the submission for this study, with some phrases missing in the introductory part.

2002-03

Table 6 – 2002-03 core sample and justification

Actor	*Sector/interest*	*Comments*
3i	Corporate, also investment management (a specialist financial group/private equity)	A thoughtful commentary submitted by Baroness Hogg, who was to go on to become chairman of the Financial Reporting Council just as the 2010 code was published. This submission shows her thinking at an earlier stage in code development.
Association of British Insurers (ABI)	Insurance industry trade association.	Many ABI members are also listed companies, so the ABI view can be seen as straddling the divide between corporations and shareholders and a core player. Shareholdings of its members now made up a fifth of UK equities, down from a quarter in 1992, but it remained an important voice in the debate.
Confederation of British Industry (CBI)	Trade association for companies, especially large corporations	As at the time of Cadbury, the CBI served as a focal point of opposition to the more prescriptive elements of the code. It also made one of the most detailed and closely argued submissions, of more than 17,000 words, to the "fatal flaws only" consultation that followed the Higgs Review, 8,500 of which were new comments, the balance an attachments giving the FRC a copy of the document sent to Higgs six months earlier. Its submission makes clear that Higgs chose not to follow many of its suggestions.
AVECO	A trade association of CEOs of charities and "third-sector" organizations	A peripheral actor in corporate governance, its submission focused on a single issue, the suitability of voluntary-sector CEOs to be non-executives of listed companies. It otherwise supported adopting the Higgs recommendations "in full".
Balfour Beatty	Corporate; construction, engineering, a central player	Lord Weir's letter, in a mocking way, questioned his own competence; he "must have learned something" in 37 man-years of chairing four listed companies.
BAT	Corporate; tobacco	Martin Broughton writes as chairman in forceful and occasionally ironic tones.
British Airways	Corporate; aviation	The letter to the FRC, retrieved from its website, comes without letterhead, name or signature. There are reasons from the text, however, to surmise it was signed by the chairman.
Corus (HSBC)	Corporate; steel (banking)	Brian Moffat, chairman of Corus, writes on Corus letterhead in his capacity as senior non-executive director at HSBC. He levels his critique of Higgs using HSBC as a special case that shows the weakness of the approach. Moreover, the letter is addressed to Patricia Hewitt, Secretary of State for Trade and Industry and the political power behind the Higgs Review, not to the FRC, which is writing the code.
Emap	Corporate; media	Adam Broadbent, chairman, tried to keep his comments as short as possible because he had no doubt the FRC was receiving a lot of response.

Hermes	Investment management	Colin Melvin was director of corporate governance at this activist pension fund management company owned by BT and also representing Royal Mail pension plans with £35 billion under management. This concise note opposes any "any significant watering down" of the Higgs recommendations.
ISIS	Investment management	ISIS governance director Richard Singleton notes that the firm was majority owned at the time by Friends Provident plc, a listed asset manager. He voiced concern over the absence of specific mention of the governance issues in companies with a dominant shareholder.
Gartmore	Investment management	A mainstream investor owned at this time by the National Mutual Association and therefore linked to a major mutual building society.

2009-10

Table 7 – 2009-10 core sample and justification

Actor	*Sector/interest*	*Comments*
Association of British Insurers (ABI)	Insurance industry trade association; mainstream investment orientation; often organizes collective engagement with companies over corporate governance concerns	ABI members have holdings in UK equities equal to about 15 per cent of market capitalization, following a further diminution of its investment power in the face of the growth of hedge funds and international investment. ABI is an active participant in the International Corporate Governance Network; some ABI member companies are also listed companies subject to the corporate governance code. Responded to all three consultations.
Association of Chartered Certified Accountants (ACCA)	Trade association for accountants and auditors; frequently publishes guidance on corporate governance for members	ACCA is less mainstream than the Institute of Chartered Accountants in England and Wales; members tend to be accountants working in companies more than in private practice; less influenced than ICAEW by Big Four accountancy firms. Responded to all three consultations.
Confederation of British Industry (CBI)	Trade association for companies, especially large corporations	Often cited as voice of British employers, its membership includes mainly large and medium-sized corporations and therefore those most affected by the code's prescriptions. Responded to all three consultations.
SABMiller plc	Corporation; FTSE 100 constituent	Manufacturer of alcoholic drinks, based in the UK but from South African origins and with governance arrangements affected by a large US acquisition in the recent past. Its heritage makes it less mainstream than other companies and sensitive to corporate governance practices in other jurisdictions, especially South Africa, which moved beyond many of the prescriptions in had initially adopted from UK practice. Responded to all three consultations.

Fair Pensions	Pension consulting firm	As a representative of pension interests, its view is generally oriented to long-term corporate success rather than immediate performance. It has an orientation toward ethical investments and advocates of stakeholder interest and environmental sustainability. Responded to all three consultations.
GC100	An association of general counsel and company secretaries from among the largest company.	Adopts both a legal-profession stance and represents corporate (though not director-level) interests. Responded to all three consultations.

Part 3: Power and politics in corporate governance

This part contains two chapters of published work: "Waste makes haste: Sarbanes-Oxley, competitiveness and the subprime crisis," from the *Journal of Financial Regulation and Compliance* (2008), and "The politics of shareholder activism," one of my chapters in the Wiley book, *Corporate Governance: A Synthesis of Theory, Research, and Practice* (2010), edited by H. Kent Baker and Ronald Anderson. Each essay has introductory remarks relating them to institutional theory.

4. Waste makes haste (*JFRC*)

Status: Published in November 2008 by *Journal of Financial Regulation and Compliance* (Emerald). It was accepted on first submission in June 2008 and given accelerated publication owing to its topicality.

An institutional view of 'Waste makes haste'

Passage of the Sarbanes-Oxley Act in 2002 was what some commentators have called the most important piece of corporate governance legislation in the US since the Securities Act of 1933 and the Securities and Exchange Act of 1934 (e.g. Kipperman, McAfee, & Vakkur, 2008). In some ways, Sarbox, one of the names by which the act is known, was more far-reaching. It made supervision of the accounting and audit professions a direct federal government responsibility. Moreover, owing to the integration of international capital markets in the 1980s and 1990s, Sarbox had considerable extraterritorial impact. For example, auditors outside the United States might be required to register with and become subject to US inspections, even though they did no work for US companies. The requirement applied to all firms that audited even some of the accounts of a foreign company that had, at some time in the past, listed bonds on the New York Stock Exchange.

The following paper arose from a request I received to talk about Sarbanes-Oxley and corporate governance in the context of a debate over financial regulation following the collapse of Northern Rock in August 2007 and the problems at Bear Stearns in the early months of 2008. In preparing for the talk, I started to see parallels between Enron and the subprime crisis, which I elaborated through a literature review and analysis of contemporary news reporting of the subprime crisis. What emerged was a polemical paper, intended to provoke a fresh line of thinking about the current problems.

As the paper makes clear, Sarbox was a direct response to a series of corporate failures in the US, in particular that of Enron Corp. towards the end of 2001 and WorldCom a few months later. These problems, compounded by the actions (and subsequent implosion) of its auditors, Arthur Andersen, can be seen as what Greenwood and colleagues (2002) call a "precipitating jolt" that dislodges current institutional arrangements, opening the way for radical change. While sometimes

called a "law of unintended consequences" (Fletcher & Miles, 2004), Sarbox has persisted and both US corporations and the foreign ones with securities listed on US markets have come to adapt their practices to it. This essay suggests that the changes Sarbox imposed did not address many of the key issues in the Enron cases, and that the problems that arose in the financial crisis of 2007-08 had analogies to them.

While that arguments stands, the paper does not take into account some studies that argue or seek to show empirically how Sarbox may have beneficial effects. An article published contemporaneously with my paper argues that Sarbanes-Oxley arose from a "perfect storm" of forces that swept the bill into law. The authors nonetheless saw Sarbox as "legislation that almost by accident created one of the greatest protections in history for the public interest" (Canada, Kuhn, & Sutton, 2008, p. 987). Time will tell.

Coates (2007, p. 92) argues that Sarbanes-Oxley should bring net long-term benefits by increasing spending on internal control and audit, adding: "If auditing before Sarbanes-Oxley was as poor as widely believed, or if incentives for public firms to spend money preventing fraud and theft were inadequate, raising the resources spent on auditing will bring social gains." Chhaochharia and Grinstein (2007), in a study based on synthetic share portfolios, found in general that companies that complied with Sarbanes-Oxley and the new exchange listing rules produced an abnormal return to investors of 6–20 per cent. But the results showed variation across company types, with small firms disadvantaged by some of the changes, a finding in keeping with an earlier assertion concerning the venture capital industry (Fletcher & Miles, 2004).

A working paper by researchers at Boston College and Boston University (Qian, Strahan, & Zhu, 2009), which was issued after my paper had been published, demonstrated through a natural experiment that companies complying with Sarbox and especially Section 404 enjoyed the benefit of longer duration debt issuance, which can reduce the cost of capital or make it more stable.

Whether this benefit offsets the costs to directors in time and cognitive effort would be difficult to establish. Put somewhat provocatively, in view of their bounded rationality (Eisenhardt & Zbaracki, 1992; Simon, 1959) and social standing as elites (Forbes & Milliken, 1999; Useem, 1979b), directors may assign greater value to time for thoughtful consideration of strategy than they do to longer duration borrowing or the insurance value of time spent in the audit committee. Value is subjective.

Put less provocatively, institutional rearrangements in Sarbox constrained managerial discretion (Finkelstein & Hambrick, 1990; Hambrick & Mason, 1984) by imposing on top management new structures and procedures that arise from both the task environment and internal organization, and do so with serious potential sanctions for misconduct. While these constraints may account for corporate antipathy to Sarbox, the outcomes on board practice could be counterintuitive. Finkelstein, Hambrick and Cannella (2009), for example, speculate that the Sarbanes-Oxley Act, combined with the business climate, might spur boards and in particular non-executive directors to greater activism in general, including on strategy formation. They suggest, however, such activism would be contingent on the power of boards. If so, then an important avenue for future research lies in assessing the distribution of discretion between executives, non-executives and shareholders, and what activities the new institutional arrangements enable, as well as what they constrain. To this end, adapting the model of managerial discretion of Hambrick and Finkelstein (1987) to the work of boards could be a fruitful area for theory development.

Sarbox was a speedy response to a crisis that had sapped the legitimacy of corporations, as evidenced in the public outcry at the time. It passed just one month after WorldCom failed. That it persisted despite its weaknesses is a testimony to institutionalization, in this case coercive isomorphism (P. J. DiMaggio & Powell, 1983), imposed when there was no alternative available for discussion.

A personal postscript: When this article was published, a friend who read it commented that Sen. Paul Sarbanes, one of the act's authors, had told him that legislation had been drafted several years earlier, but could not get traction in Congress in the face of strong lobbying against tighter corporate governance legislation. Argued in institutional terms, the jolt had indeed precipitated a reconfiguration of arrangements, through what Lawrence (2008) calls a "dominance" form of institutional power.

Waste makes haste: Sarbanes-Oxley, competitiveness and the subprime crisis (2008)

Purpose – Passage of the Sarbanes-Oxley Act of 2002 followed hard on the collapses of Enron and WorldCom. Waste makes haste. Official reports for US government agencies worried that the legislation may have impaired New York's competitiveness as a venue for international capital transactions. But a threat from a seemingly different direction – the subprime shakeout – exposed bigger issues. This paper raises questions about many of the assumptions made in the discourse about the relative competitiveness of US and European capital markets.

Design/methodology/approach – Building on Healy and Palepu's analysis of Enron (2003), it compares the root issues at Enron with a preliminary view of the sources of the subprime crisis to build a outline for regulatory response.

Findings – Remedies in Sarbanes-Oxley failed to address several of the ailments in evidence in Enron. The haste of making Sarbox may have lead to us to waste an opportunity to prevent or reduce the impact of the subprime debacle.

Originality/value – The comparison of the seemingly unrelated cases reveals similar ethical gaps and regulatory lapses, suggesting a different type of legislative and regulatory response may be needed. It makes suggestions for further research to guide future policymaking.

Keywords Corporate governance, Sarbanes-Oxley, subprime, capital markets, competitiveness

Introduction

US Senator Charles Schumer of New York State and Mayor Michael Bloomberg of New York City saw the situation like this: "Traditionally, London was our chief competitor in the financial services industry," they wrote in the introduction to a report from the consultants McKinsey & Co., challenging the competitiveness of New York as a global financial hub. "But as technology has virtually eliminated barriers to the flow of capital, it now freely flows to the most efficient markets, in all corners of the globe. Today, in addition to London, we're increasingly competing with cities like Dubai,

Hong Kong, and Tokyo." They claimed that New York is still – in some sense – in the lead, whatever that means, but warned not to take the lead for granted. "In fact, the report contains a chilling fact that if we do nothing, within ten years while we will remain a leading regional financial center; we will no longer be the financial capital of the world," they said (McKinsey & Co., 2007, p. i).

The main body of the report said that the declining position of the US went beyond "natural market evolution to more controllable, intrinsic issues of US competitiveness". Why? Part of the answer lies in the Sarbanes-Oxley Act of 2002, which Schumer, a Democrat, might well want to use this report to alter now that his party has won control of both houses of Congress. But there's more than that: "The more lenient immigration environment London also makes it easier to recruit and retain international professionals with the requisite quantitative skills," McKinsey wrote. "Finally, the FSA's [the UK Financial Services Authority's] greater historical willingness to net outstanding derivatives positions before applying capital charges has also yielded a major competitive advantage for London" (McKinsey & Co., 2007, p. 13).

The McKinsey report for New York State and City was one of three reports that raised issues about the competitiveness of America's capital markets, including another commissioned by US Treasury Secretary Hank Paulson, and a third giving a blueprint for a new regulatory environment, penned in part by the Treasury Secretary himself (Paulson, Steel, & Nason, 2008). They traced the roots of the problems to HR.3762 The Corporate Responsibility Act (Library of Congress, 2002).

An interim report commissioned by the US Treasury Department, entitled "The Competitive Position of the U.S. Public Equity Market", was published about the same time as McKinsey's. The final version, completed towards the end of 2007, said the first had stimulated much discussion, but added: "Not nearly enough has been done. What is still lacking is commitment and political leadership. This Report, therefore, is a second wake-up call" (Committee on Capital Markets Regulation, 2007, p. v). "By any meaningful measure, the competitiveness of the U.S. public equity market has deteriorated significantly in recent years," it added (2007, p. 1). Since 1996, the US share of global initial public offerings had "dramatically dropped". Between January and September 2007, only just over 10 per cent of new international equity offerings were made on US-based exchanges. The level had been 44.5 per cent in 1996 and averaged 21.2 per cent for the decade from then until 2005, it said. The picture was even more dire if you looked at the value of those new issues. US exchanges raised just 7.7 per

cent of the total value of global IPOs through the first nine months of 2007, compared to 58.8 per cent in 1996 and an average of 30.9 per cent in the period from 1996 to 2005. It was small consolation that the US share in 2007 was a bit higher than in 2006, when US exchanges captured 8.9 per cent of global IPOs by number and 6.6 per cent, measured by value. In 1996, eight of the 20 largest global IPOs were conducted in the US. A decade later only one was. To make matters worse, US companies in increasing numbers were going overseas to raise capital, eschewing US exchange listings (Committee on Capital Markets Regulation, 2007, p. 2).

The message was loud and clear: The Sarbanes-Oxley Act was too much of a straightjacket. A lighter-touch regime would make American equity capital markets more competitive. But towards the end of 2007, US capital markets weren't really listening. Credit markets had seized up in fear of defaults and insolvencies that might arise from distressed selling of mortgage-backed securities issued by US investment banks on the back of lending in what had been fierce competition for customers in Florida, California and a few others states where household incomes weren't really high enough to afford the houses they aspired to hold. Unlike previous property booms, this one had been conducted increasingly by mortgage brokers. The originators might have been banks themselves, but they were working under the guidance of the big investment banks on Wall Street, which, under guidance of the credit rating agencies, then packaged the mortgages into tranches, and using derivatives built credit default protection around them, making the new "collateralised debt obligations" worthy of Triple A credit ratings and investment-grade status. These instruments found their way in the billions into the portfolio of banks and investment institutions around the world. "Originate to distribute" became the buzzword to easy money.

Moreover, the "originate-to-distribute" model created what some bankers called a "third bite at the cherry". Not only were there fees for originating and a second set for distributing. By getting the loans off their balance sheets, they had freed up capital to lend even more. It is easy to see, in hindsight, how the bubble inflated almost all by itself. US capital markets had begun to look worse than merely accident-prone. They began to feel lethal.

Waste makes haste

The roots of the problem can be traced to the dot-com bubble of the second half of the 1990s, when technology stocks pushed higher on a speculative wave looking for new methods of consumption and new economies in operations from the productivity advances offered by fast computing and cheap telecommunications. Combined with hyperactive investment banking, the mix grew toxic.

Enron Corp. became an unlikely emblem of the boom. With its core business in gas transmission networks, it didn't look like a dot-com technology stock. But with the acquisition of gas pipelines in the American northwest came fibre-optic telecommunications capacity. Enron had already leveraged its gas network into a resource for trading natural gas futures and options, becoming in effect an investment bank with a small gas distribution business attached. With the addition of telecommunications capacity and the prospect that derivatives markets in bandwidth would develop soon, it was well placed to ride the dot-com wave further into bank-like activities, using its position in physical market to originate a source of supply to distribute through derivatives. Moreover, closer scrutiny of the accounts showed that bad business had been pushed off the balance sheet into special purposes entities in which the chief financial officer of Enron was a principal, with quiet guarantees of assistance. The bad business was forgotten but not gone. Towards the end of 2001, Enron went spectacularly bust (Wearing, 2005 gives a good account of the case).

Several months later, accounting fraud brought down WorldCom, an even bigger player in the US telecommunications market (see Wearing, 2005 for details). Both firms had been advised and audited by Arthur Andersen. As lawsuits mounted – and other financial problems came to light, especially among Andersen clients – the firm imploded, leaving just four major accounting practices with an obvious capability of auditing the accounts of major multinational corporations. The outrage, including from among the workforce of Enron who had been encouraged to invest their pensions in Enron stock, led to swift government action.

The Sarbanes-Oxley Act was introduced in Congress in June 2002, within days of discovery of the problems at WorldCom. It passed swiftly and was signed into law in early August. A short, clear and remarkably jargon-free piece of legislation, it set in motion the latest change in law affecting US corporations since the Securities Act of 1933 and the Securities and Exchange Act of 1934. Those Acts arose – after four years and a change in President – from the ashes of the Wall Street Crash of 1929, the

resulting Great Depression and the loss of confidence in American capital markets and, for many, in capitalism itself.

The provisions of Sarbox[31] brought greater accountability for corporate officers and greater supervision for auditors. Under Section 302 chief executive and chief financial officers were required, under threat of criminal prosecution, to attest to the accuracy of their financial statements, both audited annual accounts and quarterly, unaudited reports to shareholders. Section 201 forbade the audit firm from engaging in a number of activities, including installing financial reporting systems, advising on asset valuations or provided internal audit assistance, things that might compromise the integrity of the external audit. The act also created a new government agency, the Public Company Accounting Oversight Board, working under the direction of the Securities and Exchange Commission to oversee the accounting and audit professions.

New listing rules introduced in parallel by the New York Stock Exchange (New York Stock Exchange, 2003) and Nasdaq (Nasdaq, 2008) demanded greater board independence, financial expertise independent of the CFO on the audit committee, and an independent chairman or senior outside director to whom investors could vent their issues with senior management.

The biggest changes came, somewhat surprisingly, from the short, concise part of the Act known as Section 404. It demanded that issuer create and report on their systems of internal control. Top management would be held accountable for them and would have to report on their effectiveness. Accounting firms conducting audits of financial statements would have to attest to those assessments.

The rush to do something after Enron, WorldCom, Adelphia, Tyco and the other cases of corporate governance failures was understandable but not without critics. Even inside the SEC doubts emerged. Paul Atkins, one of its five commissioners and its longest serving one, said: "The experience with Section 404 is a reminder that it is better to get things right the first time around. In the face of uncertainty, the SEC too often has exhibited a determination to move forward with extreme haste. Not surprisingly, this course of action only invites trouble." Look at all the work the SEC did on corporate governance: "All the SEC has to show for its efforts in this area are two adverse court decisions and considerable uncertainty in the industry" (Atkins, 2007).

[31] The Sarbanes-Oxley Act has acquired a number of nicknames; "Sarbox" was quickly joined by "SOx" and "SOX" in the Washington nomenclature. We will use the first of these, except in direct citations from other writers.

Academic studies also found the measures off-target. Roberta Romano, in two provocatively titled reviews, called Sarbox "quack" governance, saying that mandates passed in Sarbox were not likely to improve audit quality or otherwise enhance firm performance (Romano, 2005a, 2005b). She proposed instead that many of its provisions could be made voluntary, on a basis akin to the comply-or-explain regime of corporate governance in the UK and elsewhere:

> The alternative of treating SOX as a set of default rules could be implemented by the SEC under its general exemptive authority, but it is improbable that the agency will do so in a comprehensive way, in part because it is still stinging from being perceived as lagging behind state regulators in finding and prosecuting entire financial industry sectors for alleged misconduct. It is therefore important to work to educate the media, the public, political leaders, and agency personnel regarding the reality that Congress committed a public policy blunder in enacting SOX's corporate governance mandates and that there is a need to rectify the error (Romano, 2005a, p. 44).

Lawrence Brown and Marcus Caylor (2006) reviewed the Sarbox reforms from the vantage point of the governance metrics developed by Paul Gompers and his colleagues (2003). Brown and Caylor found that between them, Sarbox and the governance reforms at NYSE and Nasdaq addressed only one of the seven measures considered important for corporate valuation. Nor did the Sarbox measures address directly the six factors identified by Lucian Bebchuk and his colleagues as signifying entrenchment of a board and management that would prevent shareholders achieving the greatest possible valuation (Bebchuk, Cohen, & Ferrell, 2004).

The political imperative that led to Sarbox was intended as a way to protect both investors and employees, not just to support corporate valuations. Sarbox was designed as a series of mechanisms to prevent abuse, to put obstacles in the way of management caprice, and to reduce the dangers associated with the conflicts of interest inherent especially in the relationship between auditors and management.

Paul Healy and Krishna Palepu's account of the problems at Enron (Healy & Palepu, 2003) shows how the company was able to attract large sums of capital for what they termed a questionable business model and then use accounting and financial manoeuvres to hype its share price, which then fed the incentive plans to which senior management were entitled. One Enron audit committee meeting during the crucial period lasted just 85 minutes and dealt with an agenda of nine items including internal controls, adequacy of reserves, litigation risks, credit risks, communication with investors and analysts, and management use of company aircraft. Despite a high

degree of financial expertise among its members, the audit committee did not challenge several important transactions that were motivated principally by financial reporting rather than business reasons (Healy & Palepu, 2003).

Drawing in part on their analysis and on other accounts of Enron's issues, we can construct a comparison (see Table 8) with the Sarbox provisions that suggests that the legislation swept a variety of governance concerns into the legislation and left outside elements that were central to the company's governance failure.

To be fair, internal controls were laxer in the other cases of accounting and governance malfeasance at the time, and especially at WorldCom, which was the case that led Congress to "step on the gas" of governance reform in the middle of 2002. But apart from these, this analysis suggests, albeit tentatively, that Congress rather missed the mark. Having left so many of the issues unaddressed or only indirectly treated, Congress may well have been inviting the devious to try again to shoot at the centre of the target while everyone was distracted by repairs to those elements of corporate life perforated by the misdirected blast from Section 404.

International reaction

Sarbanes-Oxley mandated that the new rules should apply to all issuers of securities in US capital markets, not just issuers domiciled in the United States. Moreover, audit firms based outside the US would have to register with the PCAOB if they worked on the accounts of any companies with securities listed in the US. The reaction was intense. Looking at his 2002 accounts, the finance director of the German-American carmaker DaimlerChrysler said compliance with Sarbox would cost the company at least $10 million, and that was even before the full implications of Section 404 came to be understood (Nordberg, 2003). Daimler would have faced something on the scale even if it had not acquired Chrysler Corp. in 1998, as it had listed on the New York Stock Exchange as Daimler-Benz AG four years earlier. His was only one in a wave of protests about the heavy-handed and extraterritorial nature of the legislation and resulting regulatory changes. Shortly thereafter, a group of eleven business organizations, led by the European Association of Listed Companies, appealed to the SEC to modify its rules and make it easier for companies to delist their securities and deregister with the SEC (EALIC, 2004). The rules, designed for a period when US institutional investors had much less ability to invest using overseas exchanges,

seemed anachronistic in increasingly global capital markets. Indeed, any companies that might manage to comply with the letter of the law could still run afoul of the rules accidentally – merely because a few more US-based investors had purchased some stock (Nordberg, 2004). The SEC, chastened by such a huge market failure under its watch, became uncharacteristically open to suggestions from beyond US shores. The process took time, but eventually the SEC agreed to accept most of the EALIC suggestions with effect from mid-2007 (SEC, 2007a).

Table 8 - Enron and Sarbox, comparison of issues

Enron issue	*Importance* (least 1, greatest 4)	*Sarbox response*	*Match* (- , 0, +)
Stock options-based remuneration	4	Silent (accounting rules later changed to require option expensing)	0
Marking trading assets to market prices, based on management valuation of price trends, often as far as 20 years into the future	4	Silent (accounting rules now make even wider use of marking-to-market)	-
Use of derivatives to create structured products	4	Silent	-
Creation of special purpose vehicles to take structured products off-balance sheet	4	Indirectly through PCOAB actions	0
Conventions between Enron and SPEs created a divergence between economic reality and accounting numbers	4	Silent	-
Deceptive reporting of ownership of SPEs, allowing it to avoid consolidation of accounts	4	Silent (but legal action against managers set precedent in law)	0
Use by SPEs of Enron stock and financial guarantees as collateral for hedges on illiquid investments, thus defeating the purpose of the hedge	4	Silent (but action from PCAOB and FASB)	0
CFO role as partner in SPEs, raising questions over his fiduciary duties to Enron shareholders	4	Indirectly through Section 302 (legal action against managers also set precedent in law)	0
Write-downs of other assets, including telecommunications networks	3	Silent (this was a business issue and was disclosed)	0
Top management's close involvement with auditors	4	Section 201 addressed auditor independence	+
Audit committee's infrequent and short meetings	4	Silent (but best practice and exchange listing rules address)	0
Audit committee expertise	1	Silent (but best practice and exchange listing rules address)	0
Related party transactions	4	Silent	-
Auditor dependence on consulting fees	4	Section 201 addresses conflicts	+
Fund managers misled by financial statements	2	Silent on fund manager obligations	-

Fund managers misled by self-serving sell-side analyst reports	2	Silent (addressed obliquely through unrelated cases brought against banks by New York State's Attorney)	-
Fund managers lacked incentives to seek out high-quality information about the company (including index-trackers)	3	Silent	-
Close ties between sell-side analysts and corporate finance departments of investment banks	2	Silent (addressed obliquely through unrelated cases brought against banks by New York State's Attorney)	-
Peer pressure among sell-side analysts	3	Silent	-
Financial Accounting Standards Board inaction over SPE accounting rules	3	Indirectly through PCAOB action	0
Credit rating agencies' failure	2	Silent (addressed indirectly by SEC action on agency recognition and IOSCO code of conduct)	-
Fear of reprisal for whistleblowing	3	Indirectly through SEC action	+
Weakness of internal controls	1, perhaps even 0	Section 404	Sledgehammer to crack nut?

The result was a move by some foreign issuers to delist in the US and thus escape the obligation to comply with the strictures of Sarbanes-Oxley. The New York Stock Exchange reported in its 10-K filing for 2007 that 49 companies from abroad had either delisted or announced their intention to do so (NYSE, 2008). This outcome – much anticipated as the SEC slowly moved towards its decision – lay at the core of the fears about the future competitiveness of US capital markets, as evidenced in the Schumer-Bloomberg statement (McKinsey & Co., 2007) and the US Treasury Department report (Committee on Capital Markets Regulation, 2007).

Delisting obviously saves costs and aggravation, as well as the need for companies to reconcile their accounts to US generally accepted accounting principles. But in parallel, the SEC had invited comment on a proposal to end the reconciliation requirement for issuers using international financial reporting standards (SEC, 2007b), as European firms were, another sign of the changes in the financial climate in the US. Convergence of US accounting rules and IFRS was also underway with the aim of achieving a common standard that went beyond the mere mutual recognition of equivalence.

The change raises several questions, however:

- To what extent were US exchanges themselves made less competitive by the measured that cascaded from Sarbanes-Oxley?

- To what extent was the advantage that other markets may have achieved sustainable and of real value?
- To what extent did the perceived lack of competitiveness of US exchanges reflect a lack of competitiveness of US capital markets generally?
- In what ways might Sarbanes-Oxley have brought benefits to US competitiveness and the foreign issuers who choose to stay, or indeed to join?
- To what extent was the failure of Sarbanes-Oxley to deal with the real issues in Enron a factor in the perceived loss of competitiveness of US capital markets?

Competitiveness of US exchanges

Exchanges have long been symbols of capital markets. "Wall Street" means the US; "The City" means the UK; the "Frankfurt Bourse" (almost) means Germany, and so on. In a time of immobile capital and domestic markets, this was entirely appropriate. But as capital markets integrate, how much sense does that still make? Moreover, demutualization of stock exchanges stripped most of them of their regulatory and therefore policymaking roles, making them less symbolic of the country in which they happen to reside. One consequence that faced these newly listed corporations whose business happened to be running stock exchanges was the need to make profits through innovation and the type of cost reductions that would arise from consolidating the increasingly technology-led back offices.

If the measure is, then, the competitiveness of the exchange, perhaps it would help to look at the exchange's business model. The viability of, say, the New York Stock Exchange depends less on its foreign listings than on 1) the total number of listed entities (ongoing fees from listed entities), 2) the number of new listings (the joining fees, which are one-offs and bring with them a temporary surge in trading), and 3) the volume of transactions. Transactions income is the largest, which in turn depends on liquidity and depth of the order book.

As the issues over the competitiveness of US capital markets have been couched by the reports in terms of number of listings, however, let's consider NYSE's performance. According to its 10-K filing for 2007, NYSE Euronext reported a surge of new listings in 2007, both in terms of number of issues and volume of money raised (see Table 9). The NYSE figures include listed operating companies, closed-end funds, and exchange

traded funds, but do not include NYSE Arca or structured products listed on the NYSE. These figures include but are not exclusively foreign issuers, of course.

Table 9 - New listings on NYSE

	2007	*2006*	*2005*
Number	282	199	192
Capital raised ($m)	$34,231	$25,853	$21,305

But if the strength of the *exchange* is the indicator of the strength of competitiveness of US capital markets, then NYSE doesn't seem to be in particular trouble on the new issues side. One might argue that having liquid, sought-after ETFs would auger better for NYSE's future profitability than an equal number of illiquid foreign stocks where the bulk of trading occurs on the company's home-market exchange.

How is Europe faring by comparison? What better place to look than in same document, for Euronext's performance on the same criteria? Euronext, which merged with NYSE in 2007, embraces the stock exchanges in France, Belgium, the Netherlands and Portugal, as well as the derivatives exchange in London known as Euronext-Liffe.

Table 10 - New listings on Euronext

	2007	*2006*	*2005*
Number	140	142	178
Capital raised ($m)	$13,286	$26,862	$21,438

Table 10 shows us that Euronext's share of the new issues business was quite lacklustre, perhaps even pathetic in 2007. Perhaps the people at Euronext's branches were distracted more than their US counterparts by the convulsions associated with the merger. This shows the NYSE Euronext *company* facing operational issues, but it also underscores perhaps how the health of the exchange company is losing its symbolism for the strength of a domestic capital market.

London was, along with Hong Kong, the major beneficiary of the supposed exodus from New York and wariness about new listings in US. Comparable figures aren't published routinely by the London Stock Exchange, but its annual report for the year ended March 31, 2007 indicates a sizeable volume and number of new issues. Its fiscal year 2007 saw 503 new issues come to market, and the total number of companies quoted either on the Main Market or on the "junior" platform known as AIM rise to 3,245. The capital raised in new and secondary placements jumped 57 per cent to £53.7 billion. The exchange was especially proud to trumpet that 26 US companies had

chosen to use the AIM market to raise funds, raising the total to 67. Twenty-five Chinese joined AIM as well, for a total of 46.

Sustainable competitive advantage

What these figures mask, however, is the shift in composition of the London exchange's mix of listed companies. The number of shares listed on the Main Market has now fallen five years in a row to 1,608, down by 464 or more than a fifth in that period. The Main Market is where the larger and more liquid shares trade, the ones that are targets of the large asset management firms that trade large blocks. AIM, by contrast, has much wider bid-ask spreads and many stocks simply don't trade because of the lack of liquidity, the absence of investment research coverage, and their narrow appeal. For the future profitability of the exchange company, this shift in balance from the Main Market towards AIM may prove counterproductive. The decline in Main Market listings can be attributed to takeover activity, through both mergers and private-equity-driven withdrawals of companies from the market. The latter take companies away for extended purposes, after which they may return to listing, as the retailer Debenhams did in the exchange's 2007 fiscal year, raising £950 million. But the former have recently involved bids from foreign companies with their primary listings on other exchanges. These can involve a long-term impairment to trading volumes in London, and therefore to transaction-fee revenue.

The principal differences between AIM and the Main Market underscore another potential source of future problems. AIM is a lightly regulated market. It is not recognized as an exchange by the European Union, and its trading isn't overseen by the Financial Services Authority in the UK. Instead, the London Stock Exchange acts as regulator as well as exchange owner. It works through investment banks and brokers to enforce standards, which sponsor and are supposed to guide companies in their disclosure and reporting practice.

Moreover, companies quoted on AIM are not expected to meet the even the comply-or-explain strictures of the standards Combined Code of corporate governance that form part of the listing requirement for companies on the Main Market. Compared with the US regime of quarterly filings with the SEC, Sarbanes-Oxley and NYSE or Nasdaq listing rules, what's surprising is that even more companies haven't gone to AIM.

The strain was evident in the controversy that surrounded a visit to London in early 2007 by Roel Campos, then one of the commissioners of the SEC, when he likened the AIM market to a casino. John Thain, then CEO of the New York Stock Exchange, followed up with statement criticizing the lax corporate governance standards on AIM. Writing in *The Guardian* newspaper, Marianne Barriaux commented: "There are plenty of examples to back up the criticism" (2007).

Exchanges as symbols of national advantage

New listings on markets like AIM get a high level of exposure, partly due to the publicity machine of the exchanges that support them. A study by scholars at the London School of Economics, commissioned by the London Stock Exchange, defended the market's role showing that although large proportion were early-stage businesses operating in high-risk sectors, the failure rate on AIM was low, less than three per cent in four years (Arcot, Black, & Owen, 2007). But that isn't the only view of these types of markets. A 2006 survey of users showed that 41 per cent of investors claim AIM's performance was "due to the poorer quality of companies coming to market" (Baker Tilly & Faegre & Benson, 2007).

Market for new companies serve a valuable economic purpose, giving growing companies a chance to accelerate their growth through the access to external capital, taking advantage of the transparency that a "listing" gives to reduce the risk to investors and therefore, so the theory goes, the cost of capital to the company. That encourages entrepreneurship and stimulates job creation, innovation and eventually profitability and tax revenues. For a while, we live with a regime of transparency, regulation and corporate governance that's less strict than we demand of larger companies that are better able to bear the costs of compliance. It worth it because the small companies of today, so the theory goes, are the big companies of the future – some of them, at least.

It's less clear that facilitating access to capital for *foreign* issuers has quite the same beneficial effects for the listing venue. Financial services are clearly a strong point of the economies of both New York and London, something that Michael Porter noted as a source of national competitiveness (Porter, 1990). But Britain benefits from a Russian company coming to the AIM market to the extent of investment banking fees, listing fees and transaction fees associated with trading the in stock, which in turn pay

salaries and bonuses to City workers and generate tax receipts on any surplus. Benefits to the real economy are less obvious, though it's conceivable that company executives, visiting the UK for investor relations purposes, might become familiar with UK companies in related businesses and strike up joint ventures or supply contracts whose effects would boost the exchange's home country.

Indeed, as stock exchanges become more like ordinary companies, the link between the exchange company and national competitiveness gets more tenuous. Trading itself is dematerializing as it moves to electronic platforms accessed from anywhere in the world (except perhaps the US; institutional investors can, however, still trade, though perhaps by placing a long-distance telephone call, or by using email). Moreover, regulatory changes like the adoption in the European Union of the Markets in Financial Instruments Directive, known as MiFID, have increased the scope and scale of competition for financial transactions. Electronic trading platforms almost devoid of nationality are now free to compete for transactions services, and investment banks, in Europe at least, may now match orders internally without going to the exchange at all. The London Stock Exchange may still be a UK company despite having acquired Borsa Italiana, and NYSE Euronext may feel much more like a US company than a French one. But it's less than clear the Euronext-Amsterdam is really very Dutch or that any of these will stay that way as trading fragments across a wide variety of platforms. It is materially different now that exchanges have largely lost their policymaking and regulatory roles.

Benefits from Sarbox

If the benefits of markets to national competitiveness may be in question, perhaps there's a benefit of companies from associating themselves with national regulatory regimes that are perceived to offer a higher standard of investor protection. A reason often cited for why companies list on capital markets outside their home countries is to gain easier access to investors. But what makes that access "easier" is that it means achieving a lower cost of capital. The Russian company, for example, that is "good enough" to list in London is presumed to have demonstrated a quality of transparency and accountability sufficiently high to reduce any stigma there is from being based in a country without a long history of property rights or commitment to capital markets or indeed the market economy in general.

The issue surrounding the quality of listings is, therefore, important for the reputation of national capital markets. The perceived excessive regulation in the US that followed the passage of Sarbanes-Oxley raised questions in the opposite direction: was the net economic benefit of such a heavy-handed approach to regulation still positive?

The value to a non-US company of a listing on US capital markets has been demonstrated on several occasions. In the face of pressure from Sarbanes-Oxley, a study commissioned by the Bank of New York, the leading sponsor of American Depositary Receipts through which most foreign listings in the US are achieved, showed benefits for companies' cost of capital. The work, conducted by the consultancy Oxford Metrica, showed that having depositary receipts trading on markets other than the home country added up to 10 per cent to shareholder value in the first year of listing. But taking up a US listing added a further 15 per cent. Moreover, terminating a DR programme destroyed 20 per cent of value (Knight & Pretty, 2003).

The timing of the research – before issuers felt the full impact of Sarbanes-Oxley – more than its sponsorship raised some doubt about how relevant its conclusions might be for *future* decisions, especially in view of the competition for new listings coming from London and the increasing irrelevance of national borders for investment decisions by large asset management firms. Since then, however, new studies have emerged revisiting these themes. Joseph Piotroski and Suraj Srinivasan found that US capital markets mattered for smaller companies with perceived lower governance standards. After controlling for company characteristics and other determinants of their exchange choice, they found that the listing preferences of large foreign firms choosing between US exchanges and the London Stock Exchange's Main Market did not change following Sarbox. But the choice for a smaller company of listing on Nasdaq or on the AIM market in London showed rather different results. "The screening of smaller firms with weaker governance attributes from U.S. exchanges is consistent with the heightened governance costs imposed by the [Sarbanes-Oxley] Act increasing the bonding-related benefits of a U.S. listing" (Piotroski & Srinivasan, 2008).

Another study found a two per cent gain in foreign companies' value from being subject to the rigours of Sarbox. "This suggests that minority investors regard SOX as providing them with benefits in excess of the costs of complying with the regulation," the authors wrote (Duarte, Kong, Young, & Siegel, 2007). US-based companies fared

even better: Sarbox increased the value of medium-sized ones by between six and 11 per cent.

Failures of Sarbox and their impact

These findings suggest we ought to take a nuanced view of the value and drawbacks that arose from enactment of the Sarbanes-Oxley legislation. Costs of compliance were certainly great. They fell perhaps disproportionately on medium-sized companies, which may have lacked the accounting and compliance infrastructure to cope with the additional data collection and analysis but were too large to escape into the category of "small" companies granted exceptions from Sarbox in terms of both its effective date and the extent of the reporting requirements. The legislation brought benefits in terms of restoring investor confidence in US capital markets and asserting a higher level of corporate governance and accountability than had previously been the case.

Without doubt, Sarbanes-Oxley prompted a number of foreign issuers to abandon their US listings. They might have done anyway, as the cost of listings on any foreign market has been thrown increasingly into question over recent years, as institutional investors learned to use markets other than their home country ones and as transactions came to be concentrated on markets with the greater liquidity rather than the greater proximity to the trader.

But let's recall that the legislation, whatever its virtues and vices, had failed to address in any significant way several of the most important failings at Enron, the case that was most centrally responsible for the loss of confidence in US markets as well as for the losses investors and employees suffered in the wake of its collapse. Would this missed opportunity – this *opportunity cost* – come back to haunt us?

The subprime link

On August 9, 2007, trading in many credit markets around the world came suddenly to what seemed a complete halt. The Frankfurt-based European Central Bank injected nearly €100 million into money markets (FT.com, 2007). It was the first public sign of a problem that had been growing for months, perhaps even a year or two, as the US housing market suffered a downturn after several years of heady growth in both prices and new building. The boom in activity was funded by cheap credit

coupled with the development of wholesale markets for collateralized debt obligations all around the world. Two banks in Germany, the state-owned Sachsen LB in Leipzig and Industrie Kredit-Bank in Düsseldorf, suffered severe liquidity crises brought on by their exposure through "conduits" to the credit default risk that arose from the looming possibility of mortgage foreclosures on parts of the portfolio of assets bundled into the CDOs they had purchased.

The infection was global, and over the next six months banks around the world would report losses and impairments of assets. It is still early for academic or regulatory research to trace and evaluate all the causes for this sudden market failure. But the price tag – perhaps a trillion dollars – dwarfed Enron and WorldCom and all the other failings that had given rise to the previous financial crisis just a few years before. US capital-market practice was, once again, under serious question. Indeed, some questioned the integrity of the financial system as a whole, with calls for new approaches to governance of financial firms and higher standards of personal ethics (for an example, see de Rothschild, 2008).

The credit "squeeze" became a "crunch" before the media and many market participants settled on "crisis" as the correct description. There were significant differences, of course, from the previous crisis, set off by Enron. This one started in and affected mainly credit markets, not equities. The proximate cause was the busting of an asset bubble inflated by years of low real interest rates causing housing prices to escalate beyond the means of ordinary workers – the so-called "subprime" borrowers – to pay for them. Enron's fall, too, stemmed from an asset bubble, but it was a bubble largely of the company's own making, aided or abetted by its auditors.

Despite the differences, there are some eerie similarities. Both involved hyperactive financial intermediaries. Both involved use of new instruments of finance to offload risk, and in particular the use of off-balance sheet entities to disguise (in the case of Enron) or just "distribute" (in the case of subprime CDOs) the risk. The accountants at Arthur Andersen, like others in the profession, pursued a business model using one set of fees – audit – to accelerate another – consultancy. The subprime crisis involved banks using one set of fees – mortgage origination – to accelerate another – distribution – and with the added element that their capital would then be free to originate again, and distribute again, and again and again.

Enron's collapse was also brought about by excessive trust in numbers and the experts who created them. Derivatives modelling taught both Enron and the

investment banks that packaged up mortgages into CDOs that it was possible to do something no one had been able to do before – eliminate risk. In both cases, the credit ratings agencies agreed, and in the case of the subprime industry they actively participated in the development of the market but modelling the business idea ahead of time, and then validating the model after the fact. But let's remember: without a fundamental shift in the economic background, risk doesn't go away – it just goes into hiding.

If we compare Enron and the Sarbox response with the root causes of the subprime crisis, interesting lessons emerge (see Table 11). Many of the failings that we saw in Enron – the use of creative accounting through off-balance vehicles and the excessive faith in the modelling of market responses to complex financial instruments – recur in the subprime world.

Table 11 - Enron and subprime compared

Enron issue	*Importance* (least 1, greatest 4)	*Sarbox response*	*Subprime issue*
Stock options-based remuneration	4	Silent	Bonus-led remuneration of investment bankers; option-based for managers
Marking trading assets to market prices, based on management valuation of price trends, often as far as 20 years into the future	4	Silent	Perhaps not an issue
Use of derivatives to create structured products	4	Silent	Creation of CDOs and other structured finance instruments
Creation of special purpose vehicles to take structured products off-balance sheet	4	Indirect	Creation of Structure Investment Vehicles and "conduits" to take risk off-balance sheet
Conventions between Enron and SPEs created a divergence between economic reality and accounting numbers	4	Silent	Lack of consolidation of SIVs within Basel II
Deceptive reporting of ownership of SPEs, allowing it to avoid consolidation of accounts	4	Silent	Deception or self-deception?
Use by SPEs of Enron stock and financial guarantees as collateral for hedges on illiquid investments, thus defeating the purpose of the hedge	4	Silent	Distribution of debt instruments freed capital for repeated lending
CFO role as partner in SPEs, raising questions over his fiduciary duties to Enron shareholders	4	Indirectly through Section 302	Perhaps not an issue
Write-downs of other assets, including telecommunications networks	3	Silent	Write-downs eventually forced the collapse of Bear Stearns, need for recapitalization among other investment banks
Top management's close involvement with auditors	4	Section 201	Perhaps not an issue
Audit committee's infrequent and short meetings	4	Silent	Perhaps not an issue
Audit committee expertise	1	Silent	Probably not an issue
Related party transactions	4	Silent	Were SIVs and conduits "related parties"?

Auditor dependence on consulting fees	4	Section 201	Intermediaries dependence on distribution fees on top of origination fees
Fund managers misled by financial statements	2	Silent	Fund managers misled by expert guidance on risk modelling
Fund managers misled by self-serving sell-side analyst reports	2	Silent	Aggressive sell-side sales activity
Fund managers lacked incentives to seek out high-quality information about the company (including index-trackers)	3	Silent	Fund managers lacked incentive to question modelling
Close ties between sell-side analysts and corporate finance departments of investment banks	2	Silent	Perhaps not an issue
Peer pressure among sell-side analysts	3	Silent	Perhaps not an issue
Financial Accounting Standards Board inaction over SPE accounting rules	3	Indirectly	Banking supervisors, Basel Committee silent on SIVs, conduits
Credit rating agencies' failure	2	Silent	IOSCO code, SEC recognition brought only nominal changes to agency practices
Fear of reprisal for whistleblowing	3	Indirect	Perhaps not an issue
Weakness of internal controls	1, perhaps even 0	Section 404	Internal controls strong, self-control lacking

Importantly, internal controls – over which so much ink was spilled and money was spent in Sarbanes-Oxley's infamous Section 404 – weren't particularly a problem at Enron. Management knew what it was doing. But during the subprime crisis, one bank – Société Générale – showed a spectacular lack of attention to internal control. But the problem had nothing to do with the subprime mortgage market.

Conclusions and questions for further research

The dust hasn't settled on the subprime mess and how it grew to infect banks and asset management firms so widely around the world. Bear Stearns faced a liquidity crisis leading to a fire sale to J.P. Morgan-Chase, orchestrated by the US Federal Reserve Board and funded, at least temporarily, by US taxpayers to the tune of $50 billion. Northern Rock, a UK mortgage lender that didn't engage much in subprime lending but got caught in the crossfire because it relied on interbank loans to finance its lending, ended up nationalized by the Bank of England. Perhaps £100 billion of taxpayer money is at risk, with the potential to distort the UK retail banking market for years. Sachsen LB and IKB both required intensive care from state-run institutions. The CEOs and chairmen of banks ranging from Merrill Lynch, Citigroup and UBS lost their jobs, though none seems particularly short of funds themselves.

This analysis is perforce quite preliminary. But it suggests that the opportunities we missed after Enron – that the Sarbanes-Oxley Act and the attendant regulatory

measures that it directly engendered also missed – may have entailed a massive opportunity cost. We spent too much time and money looking at internal controls – and especially the bottom-up documentation that the lawyers and accountants pushed on corporate management – despite SEC attempts, as early as 2005, to warn against excessive effort in complying with Section 404 (Nordberg, 2005a).

And what of Sarbox Section 405? "Nothing in section 401, 402, or 404, the amendments made by those sections, or the rules of the Commission under those sections shall apply to any investment company registered under section 8 of the Investment Company Act of 1940," it reads (Library of Congress, 2002). Investment companies registered under the 1940 Act are mainly the mutual fund companies. But perhaps it created an air that financial institutions were, in some ways, exempt from learning its lessons.

The answers to many of the questions must await research, though some deserve contemplation even before the data arrive:

- How can we regulate the use the off-balance sheet vehicles to forestall another crash, where "regulate" means getting the right balance of fuel to reach the flame?
- How should credit ratings work? The issuer-pays model is clearly broken. The user-pays model suffers from a deep-seated problem of free-riders.
- How can we structure the oversight by boards of directors of the activities of investment banks that are now so complex that even the originators of the business cannot understand it, and the distributors cannot really get it off the books?
- In global financial markets, how can we keep a connection between stewardship of assets and the liabilities they incur, whether on or off the balance sheet?
- Now that western financial institutions may become deeply dependent upon equity capital from non-traditional sources, what changes do bank supervisors face? How should they play their new foreign-policy role?
- How can we change the remuneration structures so that incentives remain, but without poisoning their purpose?

Postscript

On the first anniversary of passage of the Sarbanes-Oxley Act, Cynthia Glassman, then a Securities and Exchange Commissioner, reflected on life in the world of financial regulation (Glassman, 2003). It was a statute that demonstrated how complex the job of cleaning up Wall Street had become. "Consider, in simpler times," she said, "that the mayor of New York City was able – quite literally – to clean up the street for 7 pounds, 11 shillings, and one penny. That is how much it cost in 1788 to clean and repair the Wall Street sewer system. And, according to *Financial History* magazine, '[a]s late as the 1840s, thousands of pigs roamed the streets of New York. Their job was garbage consumption'."

Waste makes haste. Haste makes waste.

5. Politics in shareholder relations (book chapter)

Status: Published as a chapter of the book H. K. Baker & R. Anderson, Eds. (2010), *Corporate Governance: A Synthesis of Theory, Research, and Practice* (pp. 409-425). Robert W. Kolb Series on Finance. New York: John Wiley & Sons.

An institutional view of shareholders and activism

Corporate governance is a field of many institutions, including the institutionalized practices within the group of actors known (somewhat confusingly in this context) as institutional investors. As discussed in Chapter 3, above, some investors occupy positions close to the centre of the field. Pension funds, the investment arms of insurance companies – in particular those which are themselves listed companies – and main traditional asset management firms operate under broadly similar points of references. Their trade associations often work together on lobbying and on occasion intervene together when corporate governance arrangements at specific companies deviate too far from the standards those organizations support.

In recent years, the rise of hedge funds and sovereign wealth funds, as well as the growing prominence of non-UK institutional investors in UK markets, provide indicators that current arrangements were undergoing changes, at some times radical. What happened in the UK was replicated in other national markets around the world. If anything, the trend was stronger in other markets, which lacked the UK's match of large-scale asset management operations and large listed companies.

Another shift has altered the investment landscape, with implications for institutional arrangements in corporate governance. Cross-border listings of some large corporations mean that large companies domiciled in one jurisdiction now have their primary listing on the stock market of another country, as discussed in the chapter above "Waste makes haste". Viewed through the lens of institutional theory, in particular Greenwood and Hinings (1996), such developments represent shifts the institutional and/or the market context, which may run counter to the values or interest of actors in which organizational field we use as our level of analysis, forming

part of the background needed for radical institutional change. They also look different, depending on whether you view the field from the vantage point of a corporate board, a mainstream investor, or an alternative investor; they depend as well on the stance those investors take, as the chapter seeks to describe.

Although written as an attempt to provide a framework for practical analysis of the field, this essay may be seen as describing ways of view competing and conflicting institutional logics at work (Lounsbury, 2007; Reay & Hinings, 2009), where an institutionalized view of shareholder value held by actors in one part of the field conflicts with the presence of multiple and divergent logics arising from the shifting market conditions. This is a theme to which we return in the concluding chapter.

The politics of shareholder activism (2010)

Abstract: Shareholder activism is an exercise of power that is sometimes benign or threatening to the interests of corporate management, boards, and other shareholders. The complexity of these relationships helps explain the difficulties directors face in pursuing shareholders' interest. What arises, particularly in relation to the growth of hedge-fund activism, is greater dispersion of shareholder interests and growing questions about the legitimacy of how those interests are acted out in the political landscape of corporation governance. This chapter offers a framework to examine the stance that shareholders take when exercising or not exercising their power. Anticipating the expression of shareholder power involves assessing their intentions along three dimensions: (1) their attitude towards an individual stock (buy-hold-sell), (2) their approach to activism (docile, "walkers", or activist), and (3) their investment horizons (long-term, short-term, or "perverse" where shareholders' economic interests do not coincide with their holdings).

Introduction

By the middle of 2008, big institutional investors had grown uneasy about their investments in the German carmaker Volkswagen AG (VW). Owning the shares had become too political. Porsche Automobil Holding SE held more than 30 percent of the shares. VW's supervisory board chairman, Ferdinand Piëch, was a member of the family that controls Porsche, which had become something of a corporate governance pariah by refusing to accept the unofficial norm of quarterly financial reporting in Germany. Porsche had also irritated the country's Social Democrats by dropping the *Aktiengesellschaft* legal form in favor of the new European Union *Societas Europeas* form that allowed Porsche to reduce representation of German workers on the supervisory board. Moreover, Piëch had ousted the VW chief executive in 2006 and then entered a court battle with the company's second largest shareholder; the state of Lower Saxony that held more the 20 percent of VW's equity. Lower Saxony also benefited from a special law giving it veto power over important managerial and board decisions, a statute recently reinforced by the German parliament after the European Court of Justice ruled parts of the old law illegal. The European Commission had said that the

new version of what German news media called the "VW law" was illegal and Porsche agreed. But attempts at VW's annual meeting by other shareholders – including activist institutional investors – to challenge Porsche's creeping control of its rival carmaker fell on deaf ears (Milne, 2005, 2006; Milne, Williamson, & Tait, 2008).

Within a few months Porsche used a derivative instrument known as a contract for difference to acquire an economic interest equivalent to about 75 percent of the stock. Although Porsche had not directly purchased 75 percent of the shares, under German law, the company was able to keep this fact a secret. Speculators, including hedge funds that had expected a fall in the price of VW and sold short, soon faced a mad scramble to cover their positions. VW shares soared by 400 percent, briefly making it the most valuable company in the world. Newspaper reporters began to liken Porsche itself to a giant hedge fund with a small carmaker attached (Schäfer & Mackintosh, 2009).

Shareholder activism is fundamentally a battle for power acted out in a political landscape that stretches from boardrooms through national legislatures and encompasses supranational organizations. The exercise of power by shareholders shapes and is shaped by the political force-fields of corporate governance. When public policy concerning private-sector companies is set, some shareholders make their voices heard as well. Sometimes, the goal is to ensure that shareholder power over management is strengthened. Sometimes, it is to avoid the erosion of power to employees or outside lobbies. Often, however, the goal is to wrest power away from other shareholders.

An obvious and occasionally overlooked question when considering the forces that shape corporate governance is: What is in the shareholders' best interests? One interests of one shareholder often do not coincide with those of others. Most of the time, diverging shareholder interests do not matter because shareholders are not often able to vote on matters of corporate policy. But for directors with their fiduciary responsibility to look after shareholder interests, understanding what is in the shareholders' best interests represents an important question. The competing interests of shareholders arise from different stances that investors take to their investments. Shareholder interests constitute a complex picture of rivalry for the high ground. The rivalry shapes the way shareholders vote at company annual meetings, how they vie for directors' attention, and how they seek to influence the public policy debate on the enterprise's future. The discussion of activism focuses mainly on the approaches that

institutional investors take. They dominate the investment landscape, even in the United States, where private persons – retail investors – give a greater sense of "democracy" to shareholder capitalism than in many other countries around the world. These private individuals, unless extremely wealthy and willing to take risks, are rarely able to gain a voice in the political debate that sets the policy of individual companies and the framework of laws and regulations in which boards operate.

The purpose of this chapter is to describe the role that shareholder activism plays in corporate affairs. The first section gives a history of activism, showing how the practice has changed, especially as hedge funds have become activist investors, and discussing the issues that type of activism raises. The next two sections develop a model called the Shareholder Stance. They explore how different shareholders' interests can collide and how coalitions of shareholders can develop over issues, despite the different approaches to their investments. The next section shows how these differing stances can lead to conflict over policy decisions, leading to conclusions that suggest the difficulty in identifying what "shareholder value" means when activism is viewed as a political process.

Issues in shareholder activism

Many people, including policymakers in major countries, believe that shareholders ought to actively engage with the managements and boards of the companies in which they invest. In Britain, for example, the government has encouraged institutional investors, who collectively own more than 80 percent of the equity in U.K. listed companies, to vote their shares. Pension funds have been under pressure to publish their voting records so that beneficiaries can judge their performance. But in the minds of many corporate executives, a difference exists between shareholders being active and being activists. From its origins in the efforts of small shareholders not to be overlooked, the evolution of shareholder activism has resulted in institutional investors ousting management, changing a firm’s strategic direction, or altering a company's direction. With the addition of activist hedge funds to the mix in the past few years, some writers such as Lipton (2008) now see a condition in which shareholder activism is on steroids.

Naming and shaming

The practice of naming and shaming began in the United States during the 1940s when a change in securities regulation gave shareholders the right to offer resolutions for consideration at corporate annual meetings. However, there were restrictions: proposals had to be "proper subject for action by securities holders" (for elaboration, see Gillan & Starks, 2007, p. 56). In the 1970s, many such resolutions were the product of a handful of "gadfly" investors, private investors including Lewis and John Gilbert and Evelyn Davis. These "gadfly" investors demanded higher dividends or other shareholder-friendly changes in company policy through a combination of direct agitation at annual meetings and skillful use of the media to publicize their efforts. Other activists came from religious groups and from those espousing political causes, often adopting the techniques of the gadflies (Marens, 2002).

In the mid-1980s came the addition of research-led programs, backed by pension funds and other institutional investors to seek out underperforming companies and effect changes in direction. Robert Monks used his LENS asset management company and his research firm Institutional Shareholder Services to identify issues with corporate governance practices in companies. He built coalitions of investors including large, public-sector pension funds such as the California Public Employees Retirement System (CalPERS) to demand changes from corporate managements as well as legislative and regulatory actions that would give shareholders a bigger say in setting corporate policy and selecting directors.

Ward, Brown, and Graffin (2009) found that naming and shaming poor performers had an effect on share prices, as institutional investors reacted to a reputable signal, in their case, the Council of Institutional Investors and its focus list. But, they found the investors' reaction was less pronounced in the case of companies with boards that were seen as independent of management. Those boards responded to the signal by changing management incentives to favor a change in direction.

These efforts are often confrontational as these activists frequently use the media to challenge corporate decisions and muster support for their positions from other investors. By contrast, much of this form of shareholder activism in Europe takes place behind closed doors. Asset managers occasionally join together to discuss issues with companies in their portfolios. Asset managers, however, must bear in mind the rules about not acting so closely together that they might be deemed to be "acting in concert" and thus be forced to make a takeover bid. The Association of British Insurers and the

National Association of Pension Funds in the United Kingdom, whose members have investments in financial markets around the world, will sometimes organize meetings with company executives and directors to seek to resolve issues or change the board's thinking. Seldom do these encounters reach the glare of public attention. "If our engagement ever reaches the front page of the *Financial Times*," one pension fund manager states, "that is because it has failed" (in a private conversation with the author).

A somewhat different approach can be seen in perhaps the most vocal of European investment institutions, Hermes. Similar to CalPERS, the U.K. asset management firm Hermes, owned by the old British Telecommunications pension fund and the largest pension fund manager in the country, set up a special unit to conduct activist campaigns. Because of its size and its actuarial needs, Hermes invests across the entire U.K market. Hermes justifies its activism as the only way to improve the performance of its investments. Again like CalPERS, Hermes has a subsidiary to target underperforming companies, takes very large stakes, and then presses management for changes in policy and personnel – often in private but occasionally in public. A study of Hermes' performance by (Becht, Franks, Mayer, & Rossi, 2008) shows abnormally high returns on its portfolio through engagement activities. The lesson: activism pays. Its success in the United Kingdom led Hermes to move into continental European and U.S. markets.

Hedge fund activism

Actions such as those undertaken by CalPERS and Hermes became in many ways the model for a new form of shareholder activism. Activist hedge funds use detailed analysis of a company's business to identify weaknesses. They then build large equity stakes to force management to listen. The biggest difference between the older-style activists, such as Monks and his allies, and the newer-style activists, such as hedge funds, is that the hedge funds exploit very high leverage. They also build positions in options and other derivative instruments that traditional asset managers would not be willing or allowed to use. As a result, hedge funds potentially seek policy changes designed to affect shorter-term performance than their more traditional counterparts. This short-term orientation frequently allows the popular press to portray hedge funds as rapacious. In Germany, a politician once likened them to "locusts" (see the section on "Shareholder politics and markets" below). Are hedge funds, especially the activist

ones, the devil described in popular accounts? They may be aggressive, but do they justify the fear that corporate managers often show?

In the United States, Klein and Zur (2006) find that hedge funds took quite a different activist approach than traditional activist investors. Instead of targeting underperforming companies and seeking changes in direction, these funds sought to extract cash from generally well performing companies.

Activist strategies among hedge funds have gained support, albeit based on data during the heady days in investment markets in the mid-2000s. Brav, Jiang, Thomas, and Partnoy (2006) find hedge funds working in ways often prescribed to large blockholders: friendly interaction with management in striving for better financial performance. At other times, hedge funds may confront management that they see as entrenched. Importantly, Brav et al. find that the performance improvements they sought persist after the hedge funds had exited their positions. As Brav et al. (p. 37) note, "Unlike traditional institutional investors, hedge fund managers have very strong personal financial incentives to increase the value of their portfolio firms, and do not face the regulatory or political barriers that limit the effectiveness of these other investors."

Clifford (2008) reports that target companies of hedge funds pursuing activist agendas perform better than a control group of investments that hedge funds passively held. But Clifford's evidence suggests that the funds seek a greater liquidity buffer for activist portfolios. That is, the lock-in periods for activist funds are typically longer than the lock-in periods that the hedge funds manage without engagement. By examining the record of voting, litigation, and change of control contests, Partnoy and Thomas (2006) find that hedge-fund activism is more effective in inducing change in corporations than engagement by traditional institutional investors.

Moreover, Haarmeyer (2007) believes that activism by hedge funds has accelerated the distribution of corporate cash in mature businesses, through dividends and share buy-backs. According to Haarmeyer (p. 38), "Hedge fund activists become catalysts for initiating and helping to execute the painful but critical process that moves resources into more productive uses and thus drives shareholder value creation and economic prosperity."

Issue-based activism

A more limited form of activism comes in agitation over particular issues either in corporate policy or in company law and regulation. A topical case is the growing calls for new ways to address the persistent problem – as seen from the perspective of investors – of giving shareholders a "say on pay" of senior management. Since 2002, shareholders in the United Kingdom have had an advisory vote on compensation policy, an example where "voice" has made some difference. Practitioners argue that such efforts – copied in some other European and Australian jurisdictions and a matter of heated debate in the United States – could undermine the board's discretion in setting pay levels. Keith Johnson, a former Wisconsin state pension fund manager, and Daniel Summerfield from USS, the U.K.'s second largest pension fund, argue that giving shareholders a direct voice on pay should empower the board, rather than undermine it. As Johnson and Summerfield (2008, p. 3) remark, "Say on Pay leaves boards with full control over executive compensation while giving them increased support for a display of backbone when needed! … Muddling through is no longer an option." Johnson and Summerfield see the move at many U.S. companies for majority voting, instead of plurality voting, as a step to create greater shareholder voice on pay. A study of the outcome of the U.K. experience by Ferri and Maber (2008) gives a more qualified view of the success that shareholder votes on pay might have on the level of executive pay. Their analysis suggests that say-on-pay increased the sensitivity to pay levels of executives in poorly performing companies, and especially among those that had high compensation before introduction of the law. Still, giving shareholders a voice had little effect on the overall levels of pay.

Giving shareholders greater rights is only one part of the activist equation. For a director seeking to act in shareholder interests there is another question. What is it that interests shareholders?

Dimensions of shareholder politics

Many factors contribute to the interests that a single shareholder might have in the board's decision making. A shareholder may be more interested in receiving dividends than capital gains or want the board, for example, to avoid investments in genetically modified crops. Shareholders from one country may bring with them preconceptions about the best way to organize a business when they invest in a company based in a

different country. These factors all contribute to the content of any recommendations that shareholders make to the board. Taking a step back from the content of their interests, one can assess their political stance across three dimensions: (1) their attitude towards the stock, (2) their approach to engagement and activism, and (3) their investment horizons.

Attitude

At any given time, shareholders have a simple view of each stock in their portfolio or watch-list: they buy, sell or hold. Investment analysts use a wider variety of categories in their research recommendations and these nomenclatures vary somewhat between investment banks. In the wake of the dot-com collapse in 2000-2001, investment banks and the analysts they employed faced criticism for their use of arcane classification systems and for making recommendations where the intended advice meant something different from the words themselves (Dreman, 2000). Legislation, litigation, and new codes of ethics for research around the world ensued (for an example, see CFA Institute, 2005).

For many asset managers, the investment decision rarely involves massive shifts towards or away from a particular stock. Consequently, a more nuanced version of the old "buy-sell-hold" mantra has emerged: investors might accumulate, reduce, or maintain their exposure to a particular security.

Participation

Investors can take three participatory stances towards their investments; either as a general inclination towards their entire portfolio or towards a specific stock. Investors may be *docile*, passive in their approach to the company, its strategy, and its management. That may involve routinely voting with management at shareholder meetings or perhaps not voting at all. This is frequently the stance of index-tracking funds, which are explicitly designed as low-cost operations. These funds seek to avoid the cost of voting and trading the shares they hold.

A second approach is the "*walkers*", invoking a notion sometimes called the "Wall Street Walk" (Admati & Pfleiderer, 2007). If unhappy with a company's direction, investors will sell their shares to avoid future price declines or to seek greater returns in an alternative investment. They can also walk into an investment. That is, investors buy when seeing a strategic decision they like or a change in the business environment

that might be favorable to a particular stock or industry. Traditional active portfolio managers, who seek to outperform the index or benchmarks by intelligent stock selection, often adopt this stance. A wide range of other investors use this approach whether they are the traditional "long-only" asset management firms that buy and sell actively, individual investors looking for a gain, or leveraged investors seeking to turbo-charge their holdings by buying stock on margin.

"Walkers" can affect corporate policy and therefore governance. If the stock price is depressed by their decisions to sell, then the company may have difficulty raising capital in debt and equity markets. The resulting increase in the cost of capital, so the theory goes, makes the company less competitive, putting pressure on profitability and on management to change direction. Some writers such as Coffee (1991) find this an inefficient way of monitoring and controlling corporations. Such writers argue that the role should fall to certain types of investors, particularly pension funds and closed-end collective investment funds.

Edmans (2009), however, has modeled situations in which the use of exit rather than voice can itself be a form of activism. Studies by Edmans (forthcoming; Edmans & Manso, 2009) consider companies in which investors' stakes are too small to influence the company by either gaining a seat on the board or getting its concerns heard by management. These investors' stakes are large enough that staying informed about the company's business and monitor management performance, and then using the threat of an exit to gain attention is worthwhile. Edmans' work suggests that using "exit" as a form of "voice" need not lead to a short-term management focus. The signals sent through activism-with-your-feet could even stimulate boards and managements to take a long-term focus.

There are funds that are neither passive nor walkers but take a different approach with at least some of their investments. Activist shareholders seek to influence the direction of the companies in which they invest. They often use their voting rights to indicate displeasure with strategy or management, while lobbying occasionally with directors and senior management for a change in policy. Activists come in a variety of flavors. Some advocate specific policy changes on ethical grounds. This approach was commonplace as shareholder activism gained ground in the 1960s and 1970s as individual shareholders, churches, and charities used their votes to force changes in policy of companies towards investments in munitions and tobacco or on trade with the apartheid regime in South Africa. Indeed, much of the early effort in the United

States to develop corporate governance research arose from churches who sought to use their votes at shareholder meetings to express their displeasure with U.S. foreign policy and military actions in Vietnam.

Other activists seek changes in management or shifts in strategy in poorly performing companies. Others lobby for actions to give shareholders greater rights, for example, to oversee executive pay policy or to vote on potential acquisitions. Still others may seek to oust the board of directors and impose a new board and new management or push through a merger or acquisition by another company hostile to the incumbent management and board.

Some, by dint of the size of their holdings, can get private access to senior managers or members of the board to make their opinions known. Others, generally the smaller ones, resort to "megaphone diplomacy" as a way to be heard. A few, notably large pension funds in the United States and United Kingdom, combine the two using the latter when attempts with the former have shown few results. What these activists share is their active use of voting rights and often other ways of expressing their voice on policy. But they share something else as well. All seek to assert what they see as their rights *as owners* to influence decision making with the board and management (S. Davis, Lukomnik, & Pitt-Watson, 2006).

Horizon

Shareholders' intentions towards a stock also vary over time. Stocks held today are ones that shareholders might be inclined to buy again or sell at some time in the future. Beyond that lies a general inclination toward the process of buying and selling. Index-tracking funds, for example, hold shares for as long as the company is a constituent of the index they track. Their actions are dictated by index decisions. Only those on the cusp of the index are ever likely to be traded. Thus, for most of the investments of these managers, the time horizon of the investment is quite long. Pension funds, looking to achieve sufficient yields over the lifetime of their beneficiaries, share a long-term orientation toward the market in general although some may choose to manage their portfolios more actively. They tend to be long-term investors despite sometimes having a short-term horizon for an individual stock. The investment literature, similar to the tax code in some jurisdictions, draws a distinction between long- and short-term investing. The latter is more speculative in nature. For tax purposes, capital gains and losses might be treated more like earned income for individuals or income from

operations for corporate entities rather than savings. Both academics and the taxman often set an arbitrary threshold to distinguish between the short- and long-term, for example, one year. In practice, differentiating between an investment of 13 months, of 11 months, or even decades can be quite difficult. From a corporate governance perspective, long-term investors sometimes expect different treatment from the companies, even if their attitude towards the stock might involve an inclination to sell. There has been a growth of speculative, short-term investing among traditional, long-only funds as institutional investors seek to build their businesses by outperforming rivals as a result of beating their quarterly benchmarks. In turn, this has put pressure on corporate managements to strive for better short-term performance often at the expense of strategic decision making (Tonello, 2006).

A third stance exists under the rubric of horizon – the *perverse* orientation towards an investment. The horizon is often short-term though it need not be. One version of this stance might involve buying and selling simultaneously but with differing time horizons for the two actions. For example, otherwise long-term investors seeking to achieve capital gains but avoid dividend income often take this stance. They will sell the stock on a "cash" basis over the dividend record and/or payment date, having arranged ahead of time to buy the stock back "forward" at a predetermined price. These stock "lending" activities have counterparties. Sometimes the counterparties are investors seeking dividends to boost the yield of a portfolio that pledges its beneficiaries a regular stream of income. These investors then capture the dividend in exchange for an interest payment to the lender. Depending on their separate tax positions, these approaches can produce benefits for both sides.

Corporate governance implications arise when these arrangements cover voting periods at the company's shareholder meeting. Who is the "real" owner? When both tend to be long-term in orientation, the governance implications might not be particularly large. Given the broad diversification of assets in many institutional portfolios, the borrower might well be a holder or even a lender of the same stock it has borrowed, so the implications for voting and corporate governance are perhaps of greater theoretical than practical concern.

Other types of borrowers such as short sellers with non-neutral intentions may hold the stock. These "shorts" borrow the stock so they can deliver it to someone to whom they have sold. The intention in a short-sale is to buy the stock back at some point in the future before the pre-arranged return sale to the original lender. If the

stock falls in the meantime, the short-seller makes a gain on the difference less the fee paid for having borrowed the stock in the first place. As a result, short-sellers can benefit from a fall in share price or a collapse of the company. During the period in which they maintain the short position, they are in a technical sense the holder of the shares. For these reasons, various countries ban short selling and other restrict its use. Before the banking crisis hit in the second half of 2008, many countries had begun to give short-sellers a freer hand. In 2004, the U.S. Securities and Exchange Commission (SEC) experimented with a new rule to lift the requirement that a short sale could only take place when the previous transaction in that stock was at a higher price than the one before, called the "uptick" rule (SEC, 2004).

Hong Kong, a market with a history of stock trading almost as old as London and New York, introduced short selling subject to an uptick rule in 1994. It allowed "naked" short sales – when the seller does not first borrow the stock – a year later and then removed the uptick rule. After a cascading sell-off in the Asian markets in 1998, the uptick came back only to be repealed again in 2007. McKenzie and Henry (2007) believe short selling is broadly neutral over time as heavy selling in one period reverses in the next.

In the United Kingdom, the Financial Services Authority broadly backs short selling. Yet, incidents in the early months of 2008 led it to adopt a temporary measure to tighten reporting requirements when companies were in the process of issuing new capital through "rights" issues (FSA, 2008). Australia, which had some curbs on the practice, sought market opinion in 2008 about how to tighten short selling regulations (ASX, 2008). In the weeks after the collapse of Lehman Brothers in September 2008, authorities in many jurisdictions, including the United States, moved to curtail short selling in the stocks of financial companies. The SEC quickly rescinded the U.S. ban; Christopher Cox, the outgoing chairman of the SEC, even called the ban the "biggest mistake" of his tenure (Paley & Hilzenrath, 2008). Constraints in other countries stayed in place for many months.

In the last several years, the perverse stance has added a layer of complexity. Through the use of derivative instruments, including a device called a contract for difference (CFD), an investor may have a large economic interest – whether the share rises or falls – without actually buying or selling the shares themselves. These can pose governance issues for the companies involved because CFDs can be linked with an implicit commitment on the part of the counterparty such as an investment bank to

hold the equivalent number of shares and even vote them on the instruction of the derivative-holder.

An example of a governance problem in this type of perverse relationship is the Mylan Laboratories bid in 2004 to acquire King Pharmaceutical in the United States, which resulted in so-called "empty voting." The hedge fund Perry was a major shareholder of King and stood to benefit from the transaction. However, shareholders in Mylan needed to approve the transaction and opposition to the deal arose from some large shareholders including the activist investor Carl Icahn. To push the deal through, Perry bought a stake in Mylan, simultaneously hedging the investment with an equity swap with two investment banks. Indeed, the swaps more than covered Perry's exposure and gave Perry 9.9 percent voting rights at a time when it had a net negative economic interest in Mylan (Hu & Black, 2006; Kahan & Rock, 2006).

Shareholder politics and markets

Because investors take these different stances, traders can make a market in company shares. Buyers need sellers and even long-term investors sometime sell. Differences of tax positions can lead otherwise like-minded investors to take opposite stances towards the same stock. Even short-sellers, who are the most perverse of the perverse stance, perform a valuable function in providing sellers when others seek to buy. When coupled with an activist stance, actions of short-sellers can raise serious governance concerns. Evidence exists that short selling helps the market achieve the best price for corporate equity (for recent examples, see Bris, Goetzmann, & Zhu, 2007; Chang, Cheng, & Yu, 2007; Charoenrook & Daouk, 2005; Curtis & Fargher, 2008; McKenzie & Henry, 2007). Indeed, Cohen, Diether, and Malloy (2007) show that in markets with poor disclosure regimes, short selling provides a useful mechanism for the transmission of private information. Bris et al. (2007) present a more nuanced picture. By looking at dual-listed shares that trade on markets that either permitted or restricted short selling, they find evidence supporting the notion that price discovery was better with short selling. Although short selling does not cause a crash, their results indicate that it may affect the magnitude of a crash.

Figure 3 summarizes the variety of possible approaches along these three dimensions. A complex picture emerges indicating the difficulty for investors or any individual to know what constitutes "shareholder value" when shareholder interests

fundamentally diverge on structural grounds, irrespective of differences on companies' business policies and future cash flows.

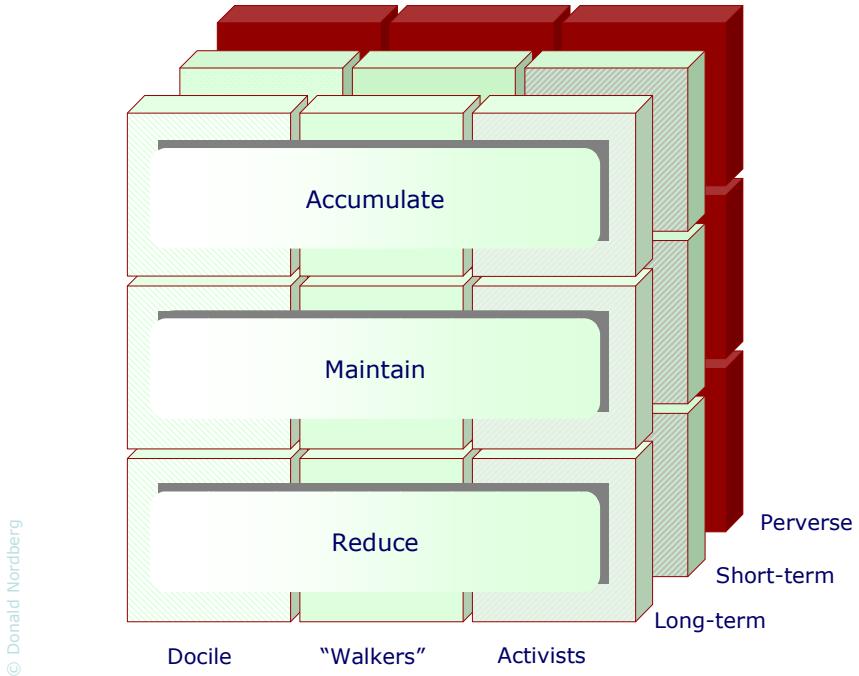

Figure 3: Shareholder stance
The shareholder stance is a tool to evaluate what a particular shareholder's interest involves. It has three dimensions: the attitude towards the stock (accumulate, maintain, and reduce), its participation in company affairs (docile, walkers, and activists), and the investor's general investment horizon (long-term, short-term or perverse).

The balance between investors' different interests will change over time for both individual companies and the market as a whole. For example, the growth of passive investment through index-tracking funds has led to an expansion of funds that seek to maintain their stakes in companies over a long time-horizon. To keep costs down, many of these funds are docile and vote with management if they vote at all. With the rise of index funds has come a relative decline in the strength of traditional long-only, actively managed asset management firms that were the backbone of the "walkers" and activists taking a long-term approach to the horizon.

While the growth of hedge funds in 1990s and the early years of the new century vastly expanded the number of managers taking a short-term view of their investments, hedge funds probably still represent a small proportion of equity ownership. Data concerning the size and shape of hedge fund investing are fragmentary at best. The industry is secretive and lightly or unregulated in many jurisdictions. Early versions of hedge fund strategies often speculated on intra-day

price movements with any associated risk hedged through the use of derivatives. These trades had little to do with the governance of the company. What created a new governance relationship and a new set of politics to go with it was the development of hedge-fund activism: asset managers taking a large, often highly leveraged stake in a company and holding it while agitating for a change in policy.

Perhaps the most celebrated case in the brief history of hedge fund activism is the move by a fund with the cuddly name The Children's Investment Fund (TCI). TCI rocked the tradition-bound world of German equities when Deutsche Börse, the German stock exchange company, tried to take over the London Stock Exchange in 2004. TCI sensed an opportunity to prevent the merger and generate a higher share price for Deutsche Börse. The shares of bidding companies often fall during or after a takeover, reflecting the premium paid for the acquired company. In cases of contested takeovers, the premium is likely to be even higher. TCI sensed that if it could thwart the merger, then Deutsche Börse's share price would increase. TCI acquired a substantial stake and agitated for a change in direction through contesting the re-election of directors at the exchange company's 2005 annual meeting. The move attracted other hedge funds to follow suit and soon U.K.-based and U.S.-based hedge funds held a large portion of the shares in this German institution. The tactic succeeded to a greater extent than almost anyone had imagined possible. Deutsche Börse not only abandoned its bid but also dismissed the chairman of its supervisory board, its chief executive officer, and its chief financial officer (Nordberg, 2005b). Germany's vice chancellor then famously warned about "locusts" invading the capital markets (Bovensiepen & Blechschmidt, 2005) and a new term – hedge-fund activism – entered the corporate governance lexicon (Achleitner & Kaserer, 2005).

TCI's intervention in the case of Deutsche Börse was in the spirit of much of the activism of corporate raiders in the 1980s and 1990s. That is, this intervention used leverage to invest heavily in a company and then used its voting power and appeal to persuade other investors to seek a change in strategic direction. Whether the campaign ultimately created value is unclear because so many other changes in the company and its competitive landscape have ensued. TCI attracted support from other traditional, long-term investors more associated with "walking" rather than activism, suggesting that TCI's interest was not *perverse*. But the approach to get their slate of directors elected rather than following the company's plan of action shows that TCI's

engagement was a play for power with the board and management of Deutsche Börse, the German government, and the trade unions to defend the status quo.

Power and politics between shareholders

The array of potential political stances that shareholders take shows how the lines of conflict potentially develop around company-specific issues, corporate control, and law. A few examples help to illustrate the point.

1. **Entrance versus exit.** A venture capital fund is typically an investor with a long-term horizon. Its interests differ fundamentally from those of another long-term investor, such as a pension fund, in the period shortly after a company issues stock on a public exchange. The venture capital firm wants to sell its stake soon and uses its seat on the board to agitate for policy that would maximize cash flows and enhance short-term performance. The interest of the pension fund, a large but distant investor with little voice and perhaps even a docile approach to participation, would be better served by a policy of investment in research and development aimed at providing sustainable profits.
2. **One share, one vote**. The founder maintained supermajority voting rights when his company went public 25 years ago. The founder's shares carrying five times the voting strength of those held by others. The founder only owns 10 percent of the cash-flow rights but has 50 percent of the voting rights. The founder retires. The institutions that bought the lower-voting shares now argue that because of the founder's retirement, the disproportionate voting rights should be abandoned. Because the matter cannot be resolved in the boardroom or the annual meeting, the institutional investors take their case to the government seeking a new law banning disproportionate rights. Having been rebuffed by government, they then turn to a supranational body urging it to propose a new legislative mandate to be imposed by all member governments.
3. **One share, more votes.** Aware of the rise of hedge fund activism and the perverse horizon incentives of many hedge funds, pension and insurance funds argue empty voting could lead to decision making that would damage the economic interests of the company and perhaps even the sustainability of the business. They argue, first with the board, then at the shareholder meeting, and

later with the government for long-term investors to be given superior voting power over "mere" speculators.

4. **Director nominations.** To avoid the practice of a powerful chairman-CEO creating a board of cronies, institutional investors agitate – first with the board and then at the shareholder meeting – for a change in the articles of association that provides shareholders a voice in nominating candidates to the board. Unsuccessful, they turn to the securities market regulator for a rule opening the proxy statement. A lobbying organization representing CEOs makes representations about how damaging such a measure would be. Opening the nominations process would make companies subject to an assault from single-issue lobbying organizations that would seek to get their own board members elected, who would pursue their own agendas rather than those of the company. The regulator considers the arguments and proposes that only shareholders representing at least five percent of the equity should be allowed the right to nominate directors.

These are not far-fetched examples. Each is drawn from a real-life example of politics-in-action in corporate governance. Each case involves the assertion by one party that its interests are more important or even more legitimate that those of other shareholders. Each actor in this political system seeks to use its power to enforce its view on the board's decision, the shareholders' decision, or the macro-political decision. In these disputes, each side had a legitimate point even when those points are sometimes in conflict. Resolving these conflicts without resorting to physical force requires that the exercise of power depends crucially on its perception of legitimacy.

Summary and conclusions

The changing nature of shareholder activism has led some to argue that activists should be subject to more rigorous public scrutiny and accountability. Anabtawi and Stout (2008) argue that an increase in shareholder power should accompany an increase in fiduciary responsibility on activist fund managers. For its part, the International Corporate Governance Network (ICGN), a loose association of long-term, traditional asset management firms with a bent towards activism, has recognized the problem. Perhaps to head off too much intervention from the government, the ICGN

set itself the task of reforming the governance approaches of the firms themselves (Cadbury & Millstein, 2005).

Such calls indicate potential concerns with the power that institutional investors hold. Weber (1922/1947), a sociologist, identified three bases for legitimacy in the exercise of power. Legitimacy arises in a pure way either through tradition, by an appeal to reason and legality, or in the charisma of the leader. The power of the chairman or CEO in dealing with activist investors comes mainly from charisma entrenched with a dose of legality as boards invoke company law to limit shareholder involvement in the day-to-day affairs and management decisions. Tradition looms large in persistence of the unequal voting rights in many established continental European companies.

But what provides the basis for legitimacy by one type of shareholder – long-term, activist asset management firms – that corporate boards and management should ignore the wishes of another type of shareholder – the perverse activist? Those long-term activists may be outnumbered in voting strength by the perverse activists and the long-term, docile investors who lent them stock, and other long- and short-term investors who have chosen to walk. Whose rights are more legitimate and on what basis?

In these circumstances, legitimacy involves an appeal to reason. Can it be reasonable, as these investors plead with boards of individual companies and with governments, that companies act in the interests of the holders of a majority of the shares when those interests are perverse? Is it not better under all circumstances, they say to heed the wishes of the long-term investor, even if the short-term and perverse ones have control? Company policy cannot be set for all investors equally. Even determining where the majority interest lies is hard enough when investors take differing stances and use their power in differing and even perverse ways to influence company policy. How should managements and boards take account of the interests of the docile, long-term institutional investor who has lent its stock to a short-seller?

There is another approach, another political channel to explore. It involves appealing beyond the circle of shareholders, to government or another authority with political legitimacy, to impose accountability on the asset management industry such as through mandatory share voting or mandatory reporting of how they voted their shares.

Legitimacy helps. Legitimacy allows corporations to enjoy the trust of the investment community with the benefit of lowering investors' perceived risk and the cost of capital. The company becomes more competitive with economic benefits for the whole economy. But as the VW/Porsche case shows, in a crunch, the decisions that boards adopt come back to raw power – legitimate or otherwise – and its skilful deployment in the politics of shareholder activism.

Part 4: Ethics in corporate governance

This part includes three articles: "The Ethics of Corporate Governance," in the *Journal of General Management* (2008); the paper "Rules of the game" accepted in September 2011 for publication in *Business Ethics: A European Review*; and "News and Corporate Governance," in *Journalism: Theory, Practice and Criticism* (2007). Each has an opening note setting them in the context of institutional theory. The *JGM* piece is theoretical; the *BEER* and *Journalism* pieces are examples of differing ethics in conflict.

6. Ethics (*JGM*)

Status: Published Summer 2008 by *Journal of General Management* (Braybrooke)

An institutional view of ethics and corporate governance

The previous two chapters dealt with conflicts of ideas, and by extension of institutional logics, between corporations and a variety of publics they face. In Chapter 4, the struggle takes place over the public interest, first broadly construed and then defined in law and regulation. The argument presented in Chapter 5 conceptualized the tensions between different shareholder types and suggests reasons for the difficulty corporations face in understanding where shareholder interests lie. That is, an important contest over corporate governance lies between the corporation and external constituencies. In this conceptual chapter and the two case examples that follow that contestation moves inside the boardroom, and how the directors as individuals and collectively as boards choose what they believe is the right thing to do.

It might be argued that, however insignificant, every decision of a director of a public company of behalf of the company is an ethical one, because it involves spending someone else's money. That is not to say that directors deliberate in ethical terms about all – or even many – of the decisions they face. This chapter argues that conventional, shareholder-value-based attitudes among directors, as well as many of the prescriptions of agency theory, entail an implicit utilitarian ethical stance. It conflicts with duty-based ethical view implicit in some versions of stakeholder theory.

That these attitudes go unstated, even undiscussed, much of the time suggests that institutional forces are at work as much as ethical ones, and that what appears in an abstracted way to choices are often behaviour conditions by rules taken for granted. In that sense, this chapter, one of the first pieces written and published among this collection, is one whose issues I now think are most in need of further analysis. There are three reasons for this. First, the discussion of competing claims and stakeholder theory presented here does not fully reflect the factors that point towards the concept of boards as mediating hierarchies (Blair & Stout, 1999), which becomes important in

view of the difficulties, discussed in Chapter 5 and also raised in this chapter, of determining where shareholder interests lie. Second, seeing the role of boards as adjudicating conflicting stakeholder claims opens an avenue to consider the implications of virtue ethics, which this chapter does not discuss. Finally, the distinction here between act- and rule-based ethics has links to codification and institution-building, suggesting that links between ethics and institutions need further discussion. The concluding chapter returns to these themes.

The ethics of corporate governance (2008)

Abstract: How should corporate directors determine what is the "right" decision? For at least the past 30 years the debate has raged as to whether shareholder value should take precedence over corporate social responsibility when crucial decisions arise. Directors face pressure, not least from "ethical" investors, to do the "good" thing when they seek to make the "right" choice. Corporate governance theory has tended to look to agency theory and the need of boards to curb excessive executive power to guide directors' decisions. While useful for those purposes, agency theory provides only limited guidance. Supplementing it with the alternatives – stakeholder theory and stewardship theory – tends to put directors in conflict with their legal obligations to work in the interests of shareholders. This paper seeks to reframe the discussion about corporate governance in terms of the ethical debate between consequential, teleological approaches to ethics and idealist, deontological ones, suggesting that directors are – for good reason – more inclined toward utilitarian judgments like those underpinning shareholder value. But the problems with shareholder value have become so great that a different framework is needed: strategic value, with an emphasis on long-term value creation judged from a decidedly utilitarian standpoint.

Keywords: Corporate governance, ethics, utilitarianism, teleology, deontology, consequentialism, agency theory, stakeholder theory, stewardship theory, shareholder value, strategic value, boards of directors, non-executive directors, fiduciary trust, corporate social responsibility

Introduction

Whenever a board of directors needs to take any action, its individual members face a decision: what is the right thing to do? Most of the time, choosing the right course is a matter of business judgment on what ethicists call non-moral issues. In a few instances, the choice is a narrow, legal one, where compliance with specific statute or regulation is at stake. But in some cases – and in particular for major decisions like mergers, acquisitions, down-sizing or large investments – neither the law nor business judgment may be sufficiently clear. These decisions often involve conflicting versions of what's *right* in a moral sense. Important decision-making in the boardroom is, in

short, a matter of ethics. While directors will choose to act on individual decisions from different theoretical perspectives, their tough calls are likely to be based on more fundamental and often unspoken assumptions about the nature of what is right. The lobby for ethical investment brings with it similarly unspoken assumptions about the ethical basis on which its recommendations are made. This paper explores how ethical frameworks underpin theories of corporate governance to give guidance to directors and in particular to those independent, non-executives who increasingly act as the moral compass for the enterprise. It suggests, moreover, that the ethical approach that sits most comfortably with the purpose of most corporations is one that rejects important aspects of both stakeholder theory and shareholder value.

Concern about corporate governance has developed historically in response to major crises of confidence, fraud and market failure, and with it development of advances in our thinking about the role that corporations play in the economy and society. The 1929 stock market crash formed at least part of the recognition of just how different the economic and moral imperatives of large listed companies and institutional investors were, compared with the Victorian concept of the company (Berle & Means, 1932/1991). The 1930s also saw recognition of the way that the corporation could be a vehicle for economizing effort through the reduction of transaction costs and freeing resources for productive use elsewhere (Coase, 1937; Williamson & Winter, 1993). The focus of what we now call the economics institutions of capitalism (Williamson, 1985) lay in showing how capitalism created of social wealth, and not merely the exploitative power of the capitalist.

Another surge of interest came in the early 1990s from what was perhaps a less dramatic string of events but ones which reverberate in the news more than 15 years later: the near simultaneous collapse of Polly Peck, the Bank of Commerce and Credit International and, perhaps most importantly, Robert Maxwell's collection of enterprises (see Wearing, 2005 for a detailed discussion). Those events threw into doubt the principles-based, self-moderating system of accounting, the gentlemanly approach to financial regulation and the cozy, patrician ways in which directors were selected and boards did their work. The result was the Cadbury Report (1992) and eventually what became the Combined Code of corporate governance, which was then emulated in other jurisdictions.

A third wave came from the excesses of the dot-com era of the late 1990s and the subsequent collapse of Enron in 2001, of WorldCom in 2002. There were other cases,

too, which might have seemed just as dramatic had they not been preceded by such egregious lapses that had rocked the confidence in US financial markets and led to the implosion of the global accounting practice of Arthur Andersen. The by-product was a new, stringent law on corporate responsibility commonly known as the Sarbanes-Oxley Act (Library of Congress, 2002), which led to a new spurt of legislative, regulatory and self-regulatory actions around the world to clean up the mess and reduce the risk of a systemic infection.

The collapse of the German Herstatt Bank in the 1970s, of IBH Holding in the 1980s had demonstrated that continental European countries were not immune from the problem. Those cases had been dealt with largely by tapping the hidden reserves of the German banking system. In Switzerland, Credit Suisse had similarly made its governance fiasco known as Chiasso disappear by tapping into shareholder funds it had hidden from view. But in the early years of the 21st Century that was harder to do. In the 2003 lapses and frauds at the Italian food producer Parmalat and the Dutch supermarket group Ahold came reminders that corporate governance was an issue for all.

What lay behind all of these episodes was a sense of moral hazard associated with the accumulation of financial resources and power in the hands of corporations and the sense that the directors of these corporations, entrusted with society's wealth, were unaccountable and open to corruption. While there were issues about the personal morality of individuals, these episodes raised questions about the ethics of the corporate systems as a whole. These ethical concerns took on four main questions:

- Were managers in distant corporations draining the resources of shareholders for their private use, as Berle and Means had described?
- Was the private use of corporate wealth actually contributing to broader social wealth, as Coase had maintained, or damaging it owing to market failure?
- What assumptions were the directors of corporations using – consciously or unconsciously – when those excesses occurred under their noses?
- What might they have done differently if they had focused on the examining those assumptions?

These questions lie at the heart of what have become the four main theoretical perspectives on the problem of how directors can best control corporate wealth and power: agency theory, shareholder value, stakeholder theory and stewardship theory and at the heart of the claims that ethical investors are making on directors. This paper

argues, however, that there is sixth stance available to the individual board member – sometimes confused with the concept of shareholder value – that lies at the heart of the work of independent, non-executive directors: decisions based upon perceived strategic value.

Theories of corporate governance

The workings of the boardroom are, as a matter of necessity, largely hidden from view and therefore from detailed examination. From conversations and public statements of individual directors we've seen emerge several theories that *describe* how boards operate and seek to *prescribe* the basis on which directors should make decisions.

Stiles and Taylor (2001) outline six theories of corporate governance, though perhaps only three have a useful normative character. First, the *legal* view is a narrow one, which reflects what some directors might see as their role – fulfilling the obligations of company law – but which provides little worthwhile guidance for their actions. While directors may have *de jure* responsibility for the company, *de facto* control rests with management. Two other theories – *class hegemony* and *managerial hegemony* – are almost entirely descriptive, though what they describe provides implicit but salutary advice to boards: all too often boards either act to perpetuate a ruling elite or exist as a legal fiction disguising the reality of managerial power. More interesting from an ethical perspective is the *organizational economics* approach, which uses agency theory to suggest the board's role is to control abuses in managerial power, and transaction-cost theory to lead decision-making. A *stewardship* approach assumes a psychological stance: managers, and by extension directors, will be motivated by things other than narrow self-interest, to be good stewards, to do a good job. The *resource-dependence* approach sees outside or non-executive directors as having the role of facilitating access to funds, people and other resources. This can, of course, be seen as a subset of a transaction-cost approach. Having directors with the right contacts means cheaper loans, better terms on supply contracts, the first pick of new business school graduates.

The approach of Stiles and Taylor draws on the analysis of Zahra and Pearce (1989), who describe four perspectives. They share with Stiles and Taylor *legal, resource dependence* and *class hegemony*, but Zahra and Pearce focus on *agency theory* while

leaving out direct reference to transaction-cost economics. They do not mention *stewardship theory* at all.

These surveys of theories of governance, however, leave out perhaps the two most important and conflicting ones: the competing cults of stakeholder theory and shareholder value. Owing to their prescriptive nature and their influence on decisions made by directors, we'll look in greater detail into agency theory, stakeholder theory and stewardship theory to see what ethical assumptions lie behind each, and then elaborate the virtues and drawbacks of shareholder value.

Agency theory

The origins of agency theory in corporate governance are usually traced to the groundbreaking work of Adolf Berle and Gardiner Means (1932/1991). Agency theory, a term they never used, came to be seen as a way to examine the issue of individual greed. As Jensen and Meckling (1976) argued, putting managers in charge of wealth that is not theirs creates, in economic terms, a cost, one they call agency cost. This cost doesn't exist in a business owned by its manager, which is why the problems of governance in a private company are different from those in public companies. In what Berle and Means call the *modern corporation*, however, the problem cannot be eliminated, but it can be controlled. Since this realization, public companies around the world have developed incentives that seek to align the interests of managers with those of shareholders. Controlling agency costs lay behind the growth of the use of stock options and other equity-based pay systems, rather than relying solely on salary and bonuses to motivate managers. Rational managers will see that it is not in their interests to divert the company's resources to their private use when they have so much more to gain from taking actions that benefit shareholders as well as themselves. In large public companies, a second layer of potential problems arise. Shareholders employ directors to watch over the work of managers, creating a second moral hazard, or put another way a second layer of agency costs.

From an ethical perspective, however, the focus on economics in both instances changes the moral choice from one of "right" or "wrong" into one of "better" or "worse".

Stakeholder theory

The stakeholder view of corporate governance is often associated with Japanese and continental European practice, and perhaps most closely with Germany, where

law has required that half the seats on supervisory boards go to representatives of the workforce, and where custom has long mandated that a company's bankers and large-block shareholders have seats as well.

The term "stakeholder" is recorded as early as 1708, when it meant a neutral party holding the stakes of the contestants in a wager. But that's not at all the meaning it has developed over the past quarter of a century. "Stakeholder" has deliberate echoes of "shareholder" and even more of "stockholder", the more common American term. That rhetorical device boosts employees, suppliers, customers and outside interests to a linguistic status with something approaching the same claim to rights over a company's activities.

Its origins in the theory of corporate governance are somewhat difficult to trace. R. Edward Freeman links it most directly to the Stanford Research Institute in the early 1960s, though he accepts he couldn't quite pinpoint it (see Freeman, 1984, p. 49, n1). Freeman defines stakeholders as "any group or individual who can affect, or is affected by, the achievement of a corporation's purpose" (1984, p. vi). SRI and other strategic thinkers used stakeholder concept mainly as a tool for strategic analysis. It was in part a result of the growing recognition of the complexity of strategy – that the company wasn't simply a production system, where strategy was based primarily on products and the means to produce them, as it had been seen for first half of the 20th Century. Gradually strategists had come to appreciate that corporations created value through the complex interaction of various networks of relationships. Examples of that approach range from Igor Ansoff's thinking in the 1960s through to Michael Porter's conceptions of industry analysis in the 1980s, the balanced scorecards of the 1990s and current work on customer relationships and their lifetime value (see Ansoff, 1987; Bell, Deighton, Reinartz, Rust, & Schwartz, 2002; Kaplan & Norton, 1992; Porter, 1980; Rust, Lemon, & Zeithaml, 2004). But considering the interests of stakeholders in strategy doesn't imply stakeholders should be regarded as *the* or even *a* purpose of corporate activity. Indeed, Ansoff argued forcefully against the stakeholder approach, drawing a distinction between a corporation's "responsibilities" to a wide range of interested parties and its "objectives", which guide management to fulfilling the company's purpose (Ansoff, 1987, p. 53).

Strong versions of stakeholder theory challenge the assumption that directors and by extension managers have their sole duty to the company's owners. Indeed, Freeman even defends exploiting the word "stakeholder" precisely because it sounds like

"stockholder". Words, he writes, "make a difference in how we see the world. By using 'stakeholder' managers and theorists alike will come to see these groups as having a 'stake'" (1984, p. 45). Stakeholders have legitimacy because they can affect the direction of the company; it is legitimate for management to spend time and resources on stakeholders, he argues. That is, however, still some way from arguing that these people and groups are "ends" of corporate purpose, to which corporate boards owe a duty, rather than just "means" to the end of shareholder value.

The usual argument against the strong versions of stakeholder theory is that shareholders have their entire investment at risk, while suppliers, customers and employees in general receive benefits from the corporation contemporaneously, and enjoy the added protection of prior standing in contract if things go wrong. But Freeman, writing with William Evan and using examples based on US law, pointed out that shareholders, managers, customers, suppliers and employees all have their contractual rights protected by one or another aspect of law. "Another way to look at these safeguards is that they force management to balance the interests of stockholders and themselves on the one hand with the interests of customers, suppliers and, other stakeholders on the other" (Freeman & Evan, 1990, p. 347).

Can we find guidance in company law? In many jurisdictions the matter is quite clear: directors are responsible and accountable to shareholders. But that legal accountability is only a narrow sense of the ethical issues directors face, and with mounting public pressure – from corporate governance scandals and environmental concerns – even the legal context is subject to change. An example was the eight-year long debate in the UK over revising company law that finally ended with the law reform of 2006. The business lobby beat off attempts from the more leftwing elements of the Labour Party to amend the duty-of-care provisions. Business interests even successfully lobbied to get government to repeal a requirement for large listed companies to provide a detailed narrative account of the business in an Operating and Financial Review taking specific heed of employees, suppliers, customers and the environment. But the final version of the law nonetheless retained a degree of accountability to stakeholders in the Business Review (UK Parliament, 2006) mandated under European Union law. Moreover, at about the same time another branch of government, the Department for Environment, Food and Rural Affairs, issued guidelines concerning annual disclosure for all substantial businesses – public and private – of key performance indicators for environmental affairs (DEFRA, 2006).

While not carrying the force of law, these guidelines carry the threat of affecting a business's ability to contract with government. A narrow legal definition is, therefore, subject to change.

Most arguments for a stakeholder approach to governance aren't based on a narrow legal claim, however, but appeal instead to a larger moral purpose. Freeman declared that the ordinary view of corporations – with shareholder value at the center – "is or at least should be intellectually dead" (Freeman, 1994, p. 14). That view doesn't go undisputed, either in its method of argument (see Child & Marcoux, 1999 for an example) or its conclusions about the appropriateness of stakeholder theory. Indeed, John Hendry declared that the normative stakeholder theory and Freeman in particular had overshot. "To the extent that they have their sights too high they have also undermined their own position by sacrificing credibility and introducing major problems," he wrote (Hendry, 2001, p. 159). Not only was the emphasis on stakeholder rights wrong in theory, they were falling out of practice, he said. Stakeholder concerns had "become increasingly marginal to the corporate governance debate" not just in the US but also in such "stakeholder oriented societies" as Germany, Japan and South Korea (p. 173). Hendry was, of course, writing before the next big crisis in governance was to occur – the collapse of Enron, which robbed employees of pension rights and led to the biggest changes in public accountability of executive directors since the creation of the US Securities and Exchange Commission in the 1930s.

Stakeholder theorists seem to be representing two different ethical perspectives. The Freeman and Evan approach was, in some ways, making the argument on the devil's own terms. They said that seeing the corporation as a contracting mechanism, as Coase (1937) and Williamson (1985) had done, provided a way of showing the stakeholder theory was about tangible costs and benefits, a means of reducing the economic burden of the social contract, the weak version of the theory, where the ethical determination is based on the consequences of the action. This is far from a typical stakeholder argument, which holds that businesses are accountable to larger aims than profit maximization (Crowther & Caliyurt, 2004; Donaldson & Preston, 1995; Evan & Freeman, 1993). John Hasnas says: "When viewed as a normative theory, the stakeholder theory asserts that, regardless of whether stakeholder management leads to improved financial performance, managers should manage the business for the benefit of all stakeholders" (Hasnas, 1998, p. 26). This is just the type of conclusion that is sure to raise the hackles of many business people, and led Milton Friedman to pen

his famous retort that the social responsibility of business is to make money (Friedman, 1970).

It's not surprising to see how stakeholder theory became conflated with corporate social responsibility, though we can argue that there is a difference. Indeed, the devil's argument (e.g. Freeman & Evan, 1990) might well be making an argument that treating suppliers, customers and employees well reduces transaction costs, thereby contributing to profits. But the more common view of stakeholder theory is that advanced by these authors and a host of followers that respect for individuals is a greater good that businesses cannot ignore (Evan & Freeman, 1993). The discussion of an even broader theory of social contract for business (Donaldson & Dunfee, 1994) lies behind more contemporary notions, including that of the UK think-tank Tomorrow's Company: businesses require a "license to operate" from society (Hampson, 2007). This approach forms the basis of what we call legitimacy theory (e.g. Deephouse & Carter, 2005; Guthrie & Parker, 1989; Lindblom, 1994).

Stewardship theory

As a description of board practice, stewardship theory suggests that directive will be motivated by some larger than personal wealth. Drawing on organizational psychology, it suggests that self-esteem and fulfillment loom large in their decision-making, as Abraham Maslow (1943) had suggested in his hierarchy of needs. As a prescription, however, it contends that individual directors should look after the interests of someone or something larger than their personal self-interest. Some may be guided by a code of conduct or statement of corporate purpose, like the charitable aims of the foundation that owns 90 percent of the German manufacturing giant Robert Bosch GmbH, the Credo of Johnson & Johnson or the trust principles that have protected the editorial integrity of the news operations of Reuters Group plc. In other cases, a legalistic approach would look at their fiduciary obligations as described by company law. But on many decisions, the law is silent and the director needs to look elsewhere to find the guiding principle. Some directors see their roles as being stewards of a particular interest. When a major shareholder secures a seat on the board, its director will understandably be tied to that shareholder's aims, whatever company law might say. That's why we saw new emphasis on the role of *independent*, *non-executive, outside* directors in the governance reforms introduced with, say, the Sarbanes-Oxley Act in 2002, the Higgs Review and subsequent revision of the UK

Combined Code in 2003 or the New York Stock Exchange's listing rule changes that same year. Independent directors, these reforms hoped, would be stewards of some greater good. But what?

An ethical framework for governance

These theories of corporate governance encompass what in ethics are known as consequential (sometimes called teleological) and idealistic (also called deontological) approaches. Deciding the "right" course of action can be based on an assessment of the benefits arising from it (morality based on the *consequences* of the action) or by obeying some more general rule or ideal state (some ethical principle) irrespective of the outcomes of the action. The former is probably best known in its 18th and 19th Century incarnation – utilitarianism, embracing John Stuart Mill's notion of the greatest good for the greatest number (Mill, 1863/1991) – which underpinned much of the development of the field of economics. But there is another strand of consequential thinking that also plays a role in corporate governance, ethical egoism, in which the individual decides on the basis of what is best *for himself*[32], irrespective of the consequences for others. Among its proponents were Epicurus, Hobbes and Nietzsche, philosophers who perhaps no longer have the great fans clubs they once enjoyed, except perhaps among CEOs (for a crystalline exposition of ethical theory, including the distinctions between act- and rule-utilitarianism, see Frankena, 1963).

But this thinking – when other actors invoke governance mechanisms like contract and the force to law to constraint the actions of the egoists – lies at the heart of the assumptions we see at work in agency theory. The CEO, indeed any self-interested actor, will seek to maximize personal gains. The role of corporate governance is, therefore, to constrain his actions without dampening his drive to succeed. In agency theory, the board uses negotiation with the CEO and pay policies for the rest of senior management to channel energy toward common outcomes, albeit with different specific goals: we assume the CEO will attempt to maximize his wealth. If the way to do that also maximizes shareholder wealth, then *job well done*. This ethical stance underpins nearly all the traditional corporate governance literature, as Hendry's

[32] For convenience, the masculine form will embrace both genders. The current custom in polite English speech of pluralizing to escape gender bias (e.g. "the person themselves") jars especially badly here. We are speaking of 1) *individual* actions and, 2) in the context of corporate governance lapses, overwhelming *male* perpetrators.

conclusions infer (Hendry, 2001). Business culture breeds people who seek to maximize profits, personal or corporate. If the means to that end differ depending on whether we are looking at the personal or corporate, greed is widely thought to take precedence over the sense of corporate purpose. Nor is this approach confined to the boardroom. Much management literature and the "how-to" approach to organizational change are about aligning personal goals and incentives with corporate aims.

Stakeholder theory, in its strong form, approaches corporate decision-making from a deontological perspective. This is especially true among proponents of what we have come to call corporate social responsibility, around which we see developing an industry of "socially responsible" or "ethical" investors (though one suspects that many of the managers of SRI funds take a rather more ethically egoistical approach). There have been many attempts to demonstrate that what's good for society (in a deontological sense) is also good for financial performance (in a utilitarian sense). The evidence to date, however, is less than entirely convincing. This lack of empirical support for the (financial) value of corporate social responsibility hasn't silenced its proponents, giving greater evidence that their stance is fundamentally deontological and idealistic in the philosophical sense.

Indeed, much of the academic literature in support of stakeholder theory comes overtly from this perspective. Donaldson and Preston (1995), for example, see stakeholder theorists drawing support mainly from the normative aspects of its ethical foundation – a nod, at least, toward deontology. The philosophical tradition for stakeholder theory draws most directly from Immanuel Kant (for examples, see Donaldson & Dunfee, 1994; Evan & Freeman, 1993; Hasnas, 1998), whose notion of the "categorical imperative" – an *a priori* obligation – formed the heart of what John Stuart Mill, his utilitarian predecessors and his followers set out to dislodge. There is some greater good, in Kant's view, that "is not derived from the goodness of the results which it produces" (Kant, 1785/1964, p. 17). When extended to embrace an obligation upon business owners to respect some larger and largely unwritten contract with society for their license to operate, we hear echoes of other philosophical traditions: Rousseau's social contract and Marx, which contribute to the skepticism of business people, reared in capitalism and steeped in the thinking of Adam Smith, whose thinking in part informed Mill's version of utilitarianism.

Stewardship theory arises as well from deontological roots. Though not nearly so well explored in the academic literature, it has an intuitive appeal to many people in

business. In the corporate governance literature it's more associated with the governance of charities, where by definition actors – in management or among the trustees – are presumed not to be seeking to maximize profits but rather working for some greater good. But stewardship is not confined to the charities, either. Peter Weinberg, a partner at the boutique investment bank Perella Weinberg Partners and former Goldman Sachs executive, wrote of what a privilege was to join the board of a public company. "Serving on a board is like taking on a position in public service," he wrote in the *Financial Times*. "It is not (and should not be) a wealth creation opportunity but a chance to play a role in the proper workings of our marketplace" (Weinberg, 2006). Boardroom pay has improved markedly since the scandals of 2001 and 2002 and the resulting demands for more non-executive directors who must spend more time on their mandates. Indeed, it is difficult to see how personal profit maximization would lead many of the current crew of serving independent, non-executive directors at public companies to take up those roles when there was much better money to be in private equity.

This is not necessarily true for all outside directors of public companies, however. Despite the move in recent years away from deep entanglement of German banks with the equity of German industry, many bankers still sit on supervisory boards of German companies, taking those roles not for personal gain, nor out of a sense of what Weinberg (2006) called *public service*. They are, however, serving at least in part to serve a *different* higher purpose – that of looking after the interests of their bank's loan portfolio. Like the lawyers, bankers and accountants who so often populated American company boards over decades, this, too, is stewardship, but of a different kind than that envisaged in the calls for "independence" of mind and purpose invoked in the Higgs review of the role of non-executive directors in the UK (Higgs, 2003), the NYSE listing rule changes (New York Stock Exchange, 2003) and the German government-backed code (Cromme Commission, 2002/2007), among other governance regulation and principles. But it is still deontological in nature, as there is a greater good that guides those directors' decisions – just not one that Rousseau or Marx might have cherished. Nor is stewardship theory limited in use to the boardroom. Muth and Donaldson (1998) point out that stewardship, unlike agency theory, recognizes non-financial motives of managers, for example, the need for advancement and recognition, intrinsic job satisfaction, respect for authority and the work ethic. But these three broad theories of corporate governance – one rooted in utilitarian ethics, the others in

deontological – miss out the key area most on the minds of corporate directors: shareholder theory.

Shareholder value

The mantra of corporate management at least since the 1980s in what is often called Anglo-Saxon capitalism has been "shareholder value". It's a measure of the financial rewards delivered to shareholders through the combination of cash (dividends and share buy-backs) and the capital gains achieved on public or private equity markets.

Table 12 - theories of governance

	Personal	*Corporate*
Consequentialism (teleology)	Agency theory	Shareholder value
Ethical idealism (deontology)	Stewardship theory (in the main)	Stakeholder theory (in the main)

Overtly utilitarian, shareholder value guides directors to decide what's in the greater interest of the holders of the greatest number of shares outstanding. Mapping the ethical approach to the interest served gives us a map of governance theories like those in Table 12. With the inclusion of shareholder theory, our faith in the economic purpose of the corporation is restored and the sound economist sitting on a board of directors has an ethical framework to guide decisions. End of story.

But not quite.

The problems with shareholder value

Discerning what is in the interests of shareholders has never been an easy task. Founders and their families have different interests from venture capitalists looking for an early exit; both have different interests from the institutional investor who has just purchased shares during an initial public offering from either of them. Do you set strategy for the investor who holds the shares today, or the one who is likely to hold them tomorrow? Or in three years' time?

In the comparatively relaxed days of the 1980s, when all directors had to worry about was corporate raiders and vulture capitalists, delivering shareholder value was a pretty safe ethical bet. In Germany, where the tax system, accounting conventions and

company law requiring *Mitbestimmung* (worker-co-determination of corporate policy) constrained the efforts of supervisory boards to deliver profits, yes, even in Germany shareholder value became the vogue.

Shareholder-value rules-of-thumb grew from the broad patterns of share ownership. In the US, shareholders of large public companies were mainly domestic. About half were private individuals, the rest institutional investors of a conventional sort. In the UK, ownership was also domestic but perhaps less so than in the US. Institutions made up a large majority of the holdings, though they were, again, largely of a conventional nature: domestic insurance and pension funds. In continental Europe, however, even in the early 1980s, a large proportion of shares – a quarter to half, depending on the country – were held by foreign institutions, many of them in the UK. The globalization of capital markets, the introduction of new instruments and the development of fast, electronic trading platform was about to change all that.

By the start of the new century, derivative markets, short-selling, hedge funds and cross-border trading made the task of understanding the interests of shareholders not just difficult, but impossible and even perverse. Consider the simplest of these developments: collective investment tools like mutual funds or what in the European Union are fetchingly called as UCITS. Their growth has accelerated the concentration of corporate share ownership in the hands of institutional investors. Some are index-tracking or passively managed funds, where the interests of the fund lay in overall performance of the market. The owners' economic interests are, therefore, different from those of the company in its competitive marketplace. A case in point is the takeover battle between Barclays and a consortium led by Royal Bank of Scotland for control of the Dutch bank ABN-Amro. The antagonists shared many of the same shareholders, whose greater interests might lie more in preventing bidding war than in winning or even losing. Deciding what to do *in the interests of shareholders* might be deciding to do nothing at all, because doing anything might damage a competitor that your owners also own.

Even the managers of active funds, however, can see their economic interests diverge from those of their beneficiaries, introducing another level of agency relationship, and with it another agency problem. The competition between them for short-term financial performance led to rapid portfolio turnover. Even in 2002, a dull year for equity markets, the average duration of an equity investment by a US mutual fund was a mere 11 months (see Bogle, 2003), which raises the question of what interest

it would have in the long-term performance of the company. Nor was this short-term focus merely a US phenomenon. Actively managed UK funds turned over their portfolios about every two to three years.

The pressure to deliver short-term fund performance – and with it the focus on delivering share-price appreciation earnings announcements – lies at the heart of what a lot of people, including many corporate managers, feel is wrong with the Anglo-Saxon model of financial markets (Aspen Institute, 2007; CED, 2007; Tonello, 2006).

But their interests were still easier for a corporate director to discern than those of the other players in the equity market. Hedge funds using high-octane, heavily leveraged strategies have become a large force, not just in the volume of their trading activities but in the absolute numbers of shares they hold. Moreover, many used instruments known as "contracts for difference" to create an economic interest in the company's performance which don't involve the quaint, old-fashioned notion of owning the shares. The UK Panel on Takeovers and Mergers modified its disclosure requirements to inclusive derivatives (Takeover Panel, 2007) and the London-based Investor Relations Society called on the Financial Services Authority to demand daily disclosures of such positions as well (Nordberg, 2007a).

If that weren't enough, hedge-fund activity supercharged the practice of stock-lending, in which a traditional institutional investor – even a passively managed index-tracker – might lend shares from their portfolios for a fixed period of time in exchange for a payment of interest from the hedge fund. Stock-lending gives the hedge fund temporary ownership, creating two types of trading strategies. One involved short-selling – selling shares today in the expectation of buying them back later at a lower price. This means the economic interest of the (temporary) owner of the shares is in seeing the company perform badly. In the cases of some small companies, we've even seen the short interest – the number of share sold in this fashion – represent a majority of the voting stock. For a brief period, therefore, it was, in a utilitarian sense of greater value to shareholders for the company to go bust.

The second trading strategy of hedge funds has been to join the ranks of shareholder-activist fund managers. This approach involves taking control of the shares for the sake to effecting a change of direction on the company, to pursue a particular acquisition or to change the chief executive. The high profile case in 2006 of the actions of The Children's Investment Fund and its investment in the German stock exchange operator Deutsche Börse AG provoked a political storm that included the

German Social Democratic Party chairman Franz Müntefering, then a member of the German government, referring to hedge funds as "locusts". Just how profitable of this approach can be was demonstrated in a large quantitative study of the shareholder activism of the Focus Funds of the UK asset management firm Hermes (Becht, Franks, Mayer, & Rossi, 2006).

Whatever the success of these trading strategies, they complicate massively the problems directors have in pursuing an ethical stance based on achieving shareholder value. Even more harshly than before, shareholder camps divide along the lines of what is in their *personal* self-interest. The voices from the traditional, long-only asset managers, especially those managing pension-fund assets with a long investment horizon, argue that directors should act in the interest of long-term investors, not short-term speculators, a phrase often spat out with the same disgust as Müntefering used with "locusts". Some push for governance solutions giving greater voting power to long-term holders. Seemingly unaware of the irony, some of these same investors – wearing a different hat – argue against the disproportionate voting power afforded to a) founding-family shareholders, say, in Belgium, b) the beneficiaries of pyramids share structures in Italy, or c) super-voting rights of A-shares in Sweden. It's easy to see how these shareholders themselves face conflicts of interest with their narrowly personal and utilitarian stance. [It's worth noting, however, that an Oxford Union-style debate at the European Corporate Governance Institute in 2007 soundly defeated the motion that long-term investors should have double the voting rights. The vote was 13 in favor to 55 against with three abstentions (ECGI, 2007)].

Toward a new ethical stance in governance

This discussion suggests, *from the vantage point of the independent, non-executive director,* that an ethical system based on shareholder value is unworkable on a practical basis as well as having deep theoretical flaws. Stakeholder theory is flawed as well, but for different reasons. It fails in theoretical terms because it struggles with determining the difference between means and ends. It fails on a practical level because when everything is a goal then nothing is. Agency theory helps the director in finding solutions to the narrow problems of corporate governance: how to keep managers from diverting corporate funds for private purposes. Qualified by reference to transaction-cost economics, as in the organizational economics theory as outlined by Stiles and

Taylor (2001), it can even help directors decide when it is no longer worth trying to prevent managers from stealing shareholder funds, indeed why it might help shareholders to encourage what the British media like to call fat-cat pay. It was, after all, all those very fat-American-cat CEOs who delivered the disproportionately large gains in profits, share price appreciation and productivity while taking home large sums of cash pay and huge, unrealized gains on stock options.

Stewardship theory helps explain why people might still want to serve on boards of directors of US public companies, despite the risk of federal prosecution under Sarbanes-Oxley or shareholder lawsuits so common in litigious America. Stewardship will help guide a director's decision when the board faces authorizing a questionable transaction or deciding when and how to report bad news. For a summary, see **Table 13**.

What is missing, though, is the big picture, a theory to guide the large, *strategic* decisions, the ones that involve a substantial commitment of shareholder funds or the opportunity costs of abandoning one line of business for the sake of entering another.

Table 13 - Perspectives of boards of directors

Dimension	*Board's role*	*Directors' accountability*	*Theoretical origins*	*Ethical assumptions*	*Limitations*
Class hegemony	Boards perpetuate power of ruling elite	Capitalist culture Themselves as a class	Marxist sociology	n/a	Descriptive, not normative
Managerial hegemony	Board is a legal fiction	CEO	Sociology	n/a	Descriptive, not normative
Legalistic	Fulfilling legal requirements	To the state As mere fiduciary of shareholders	Corporate law	Law = right	Not useful for decision-making beyond narrow compliance
Agency	Monitor agents (executives) to ensure efficient use of principal's (i.e. shareholders') funds	Shareholders	Economics and finance	Assumes ethical egoism on part of executives Act-utilitarian for outside directors	Narrow definition of board's role In public companies, directors are themselves agents, monitoring another agent's actions

Resource dependence	Cooperative mechanism to secure vital resources Boundary-spanning Create legitimacy	Each other and shareholders	Transaction-cost economics Organizational theory Sociology	Rule-utilitarian	Sees board in passive role, facilitating rather than setting direction
Stewardship	Trustee Representative of external principle(s)	Beneficiary of the "trust" Self, one's conscience	Sociology	Idealism Rule-deontological	Without clear basis for trust, lacks a shared basis of decision-making
Stakeholder	Special case of stewardship with stated beneficiaries	Customers, suppliers, employees, competitors, society at large and shareholders	Sociology Trade unionism Religious belief, esp. Christian altruism	Idealism Rule-deontological	Useful only for easy decisions Confuses means and ends Temptation for director to act as trustee of one interest group
Shareholder value	Special case of stewardship	Shareholders	Economics and finance	Act- and rule-utilitarian	Susceptible to short-termism Derivatives markets compound difficulty of knowing who shareholders or what their interests are
Strategic value	Ensuring value maximization over long-term	The enterprise	Strategic management Transaction-cost economics	Act- and rule-utilitarian	Unpredictability of future

Strategic value

This framework for the ethics of corporate governance wasn't, perhaps, quite complete. Instead of looking "corporate" aims, we might better have formulated the notion as serving shareholder interests. The teleological, utilitarian stance remains shareholder value, with all the problems that entails, but the deontological focus becomes not that of stakeholder theory but of a narrower view: the one of socially responsible investors. A third and broader category of aims – collective ones – can be added to the framework to accommodate the deontological approaches of stakeholder

theory and corporate social responsibility, involving the interests of those who aren't shareholders. That leaves a gap, in ethical terms utilitarian and in scope collective, which we shall call strategic value (See Table 14).

Table 14 - Ethics of governance, expanded

	Personal	*Shareholder*	*Enterprise*
Consequentialism (teleology)	Agency theory	Shareholder value	Strategic value
Ethical idealism (deontology)	Stewardship theory	Ethical investing	Stakeholder theory; social responsibility

The shareholder perspectives are both problematic. Shareholder value still suffers from every director's inability to assess it in a meaningful way. Ethical investing operates on the hope that social responsibility will be profitable but on the conviction that even if it isn't, it is still the right thing to do. Stakeholder theory – especially in its guise as corporate social responsibility – carries over the confusion of means and ends.

Strategic value, while not easy to determine, asks the director to take actions on the basis of what's best in a utilitarian sense for the viability and persistence of the enterprise.

An example: Faced with the decision between a takeover bid at a price than gives certainty of a 30 percent gain over a six-month period compared with an uncertain gain of 100 percent over a three-year period, how does the director choose? The incumbent CEO, conflicted as we know under agency theory, will vote for or against, depending on the size his severance package and what his next job outside the company might be versus what position and power he'll enjoy in the merged entity. The chairman, when it's not the same person, might act in his personal interest (a comfortable retirement, perhaps) or out of a sense of stewardship for the narrow interests of his close friends in senior management. A non-executive but bound director may feel obliged to vote in stewardship of the owners he represents, the founding family, the venture capital fund, the activist shareholder.

Under the governance model that the reforms this decade have promoted, the decision rests in the hands of the *independent, non-executive, outside* directors. They are now, supposedly, in a majority. They control all the key board committees. They are

able to monitor performance through their control of the audit process, and to command the necessary data through their independent staffs. They already possess the requisite strategic knowledge through their formal induction to the board and the company and their deepening knowledge of the business through the greater frequency and length of board meetings. On what basis do they decide?

They assess what constitutes strategic value. That means judging sources of value – particularly the intangible ones – that might be lost in a takeover. If the company itself, using its own resources – its people, its customer relationships, its supply chain, its research and development – has a pretty good chance of matching the money on offer from a bidder, then it's better to stay independent – better, that is, in the sense that doing it oneself generates the psychological benefits we valued in aspects of stewardship theory as well as creating the options for further value creation through having succeeded ourselves. It recognizes that it's better for wealth creation, for society, to *earn* a capital gain rather than just *make* one. If, on the other hand, the offer is clearly much better than what we can manage ourselves, it's better to let someone else manage the business.

Basing decisions on strategic value involved considering the interests of stakeholders, yes, but in their strategic sense, for the options they generate in the creation of future wealth. The orientation of the independent, non-executive director should, therefore, be on the long term, regardless of what shareholders say. Its utility is limited by the unpredictability of the future, a shortcoming it shares with all other theories. And shareholders may, after all, be merely here today, gone tomorrow. The enterprise remains.

Conclusions

Boards of directors face a wide variety of decisions that will involve invoking – consciously or otherwise – decision framework and ethical perspectives. The dangers of executive excess call out for non-executives to look to agenda theory to guard against excesses and transaction-cost economics to know when it becomes counterproductive to stop here. In most cases they will see shareholder value as the governing framework for decisions, and in some instances, especially when the companies themselves have adopted sweeping statements of purpose, stewardship theory comes into play. Given the economic purpose of most corporations, however, it

is not terribly surprising that directors might draw more on utilitarian ethics, using the expected consequences of their decisions as the basis for determined their "rightness", than on deontological calls for a higher authority of an imperative beyond what is prescribed in law. As such, when crucial decisions arise, directors can be guided by their determination of what is likely to create strategic value, where the goods of stakeholder like employees, customers and suppliers may well be taken into consideration, but as means to purpose of wealth creation over the long term.

7. Rules of the Game (accepted by *BEER*)

Status: Accepted September 2011 by *Business Ethics: A European Review* (Wiley), following a revision and resubmission process earlier in the year.

An institutional view of 'Rules of the game'

This paper discusses a case in which the rules of the game change, following a financial crisis at an unusually public version of a private company: Liverpool Football Club. Its argument is presented in mainstream ethical terms, though the background of the case might as easily have been described through institutional theory. It is in part a matter of director duties in law, and in part a matter of the personal conviction of the directors who voted by a majority to disenfranchise the owners and sell the club against their express wishes – the agents had defied the principals in an extreme form. That is concerns a prominent and famous football club meant that the deliberations were conducted in an unusually public way. That it is a private company with just two individuals as owners eliminates the ambiguity over the nature of shareholder value (as discussed above in the chapter "The politics of shareholder activism").

The case can also be seen in institutional terms, where the failure of club, financially and on the pitch, unsettled accepted logic of the rights of owners when it came into sharp conflict with a fan-oriented logic. Unsettling the institutional arrangements opens the way to radical change. In terms used by Greenwood and Hinings (1996), the institutional context, with its conflicting logics, came to be out of line with the values of the non-shareholder directors, who also saw power dependencies shift as the deadline for loan repayment approached.

Where this remains an ethical case is that the taken-for-granted "rules of the game" are broken and the basis for decision, absent clear advice from case law, forces directors to reconsider their values. Its resolution, which can be interpreted as decision based on a pragmatic view of ethics, leaves the door open for a new logic to take hold, or for the old one to reassert itself.

Rules of the game: Whose value is served when the board fires the owners?
(2011)

Abstract: How does a board of directors decide what is right? The contest over this question is frequently framed as a debate between shareholder value and stakeholder rights, between a utilitarian view of the ethics of corporate governance and a deontological one. This paper uses a case study with special circumstances that allow us to examine in an unusually clear way the conflict between shareholder value and other bases on which a board can act. In the autumn of 2010 the board of Liverpool Football Club sold the company to another investing group against the explicit wishes of the owners. The peculiar circumstances of this case provide insight into the conflict between ethical approaches to board decisions, allowing us to see certain issues more clearly than we can in listed corporations with many shareholders. What the analysis suggests is that the board saw more than one type of utility on which to base its ethical decision, and that one version resonated with perceived duties to stakeholders. This alignment of outcomes of strategic value with duties contrasted with the utility of shareholder value. While there are reasons to be cautious in generalizing, the case further suggests reasons why boards may reject shareholder value, in opposition to mainstream notions of corporate governance, without rejecting utility as a base of their decisions. Further the partial alignment of duty and utility facilitates a pragmatic decision, rather than one based on *a priori* claims.

Keywords: Corporate governance, boards, ethics, pragmatism, shareholder value, Liverpool FC

Introduction

In 2010 a strange event occurred in a corner of the world of corporate governance: The board of directors of a sizeable enterprise in the UK fired the owners. The event attracted wide coverage in the news media, providing a rare public glimpse into corporate governance operating in the raw. What the incident revealed made intriguing reading for sports fans around the world, throwing up a cast of characters with heroes and villains, a real-life boardroom soap opera, the modern-day equivalent of a morality play. But the lessons we can draw from it, about the ethics of corporate

governance and the role of company directors are larger and more nuanced. Liverpool Football Club got new owners and hope for salvation from a forced descent from the English Premier League. In the press and on television the club's directors were hailed as courageous and virtuous as they evicted the greedy merchants from the temple of Anfield.

Away from the hype of the headlines, a more mundane set of concerns arise: The incident suggests that directors do not, in practice, or at least in this case, put their allegiance to shareholders above all. The case raises questions about the nature of shareholder value, which lies at the heart of much of the academic literature and public-policy debate over corporate governance around the world during the past several decades. It offers a rare chance to examine a key issue, how in practice directors see their governance role in quite a pure form, without much of the messy complexity of public corporations and various categories of institutional investors and focuses attention instead on the relationship between boards and owners. At work in this case is a different logic, a different ethic, than the one prescribed in much of the literature on corporate governance, one with implications for how business people use ethics to inform their judgements.

In this essay, we consider first the background of the case and the corporate governance issues it raises and then review what the literature tells us about the role of boards and owners, both under the law and independently of it. We then consider how longstanding debates in ethics give shape to the work of boards of directors – independently of law and regulation – and how in particular utilitarian approaches to board ethics have clashed with duty-based perspectives. The evaluation of the case suggests that in practice the board of this company chose what it felt was the "right thing to do" once the duty and utility became aligned in purpose, a purpose that remained at variance with notions of shareholder value that lie at the heart of many normative views of corporate governance. We conclude with observations about the limitations of generalizing from this case to the wider world of corporations, but also with reasons why this pure case resembles closely the model of corporate governance that the mainstream literature describes. It suggests that pragmatic decisions arise when some forms of utility align with perceived *a priori* duty.

'You'll Never Walk Alone'

Liverpool FC is a proud club. As it entered the 2010-11 season, it could claim 18 championships in the top English football league – tied with its arch rival Manchester United for the lead. It had not won the league, though, in the last 20 years, despite regularly finishing in the top four and competing in the top European club competition. From the stands at its stadium at Anfield, supporters sing out their anthem at the end of every match (from Rodgers and Hammerstein, via Gerry and the Pacemakers), with an appeal to an unnamed "other" person, spirit or force:

> Walk on, walk on, with hope in your heart
> and you'll never walk alone.
> You'll never walk alone.

The background to the case was widely chronicled in the UK press and in statements from the club itself (e.g. Eaton, 2010a, 2010b; Gibson, 2010; Liverpool FC, 2010; R. Smith, 2010; S. Smith, 2010). In February 2007, the club came under the ownership of two American investors, Tom Hicks and George Gillett in a deal that valued the club at £219 million. Hicks, a venture capitalist, had experience of sports franchises, having bought the Texas Rangers baseball team he had acquired in 1998 from George W. Bush, who used the proceeds to finance his successful campaign to become President of the United States. Hicks teamed up with Gillett, who owned the Montreal Canadiens hockey team, promising to revive Liverpool FC with investment in a new stadium and in players to secure its place at the very top of English football. The financing method they adopted was similar to their experience in managing other sports franchises: borrow money on the promise of future revenue streams and maximize the yield to shareholders by keeping equity investment to a minimum. Royal Bank of Scotland made the loans to finance the deal.

The two owners soon fell out with each other, leaving the club without direction or the planned further investment, just as the global financial crisis swept RBS into its maelstrom. Performance on the pitch was good but not great, and the club found it difficult to compete for new talent against rivals like Chelsea, Real Madrid and latterly Manchester City, with seemingly unlimited funds available from wealthy owners who cared little if not at all about the cost. By the autumn of 2010, with the loans coming due for repayment and RBS unwilling, perhaps even unable to extend the term, the club teetered on the brink of slipping into administration, a form of insolvency. The board tried to negotiate the sale of the club to a series of other investors, without

success. The turmoil unsettled the team. Seven games into the new season, Liverpool sank to near the bottom of the Premier League, having won only one match and gained only six points. Under league rules, Liverpool FC would have nine points deducted if it went into administration. That would give it a total for the season to-date of minus three, making the threat of relegation next season to the second tier of teams palpable. If that happened, the club would lose tens of millions of pounds in television revenues; key players seemed certain to leave even before that. This path would clearly be bad for the club, bad for the supporters, and probably bad for football. Fans assailed the owners for their actions and inactions, for betraying the proud traditions of the club – their club, the *fans*' club.

The board felt urgent action was needed. After various suitors pulled out of proposed deals, the board was left with a decision: the most viable alternative to administration was to sell the club to another American sports investor, John Henry, through his company, New England Sports Ventures. But there was a catch: Henry's offer, worth about £300 million, was sufficient only to pay off the debt and accrued interest on the loans to RBS. Hicks and Gillett would receive next to nothing. By a vote of 3-2 the board approved the sale of the club to Henry. The dissenting votes were from Hicks and Gillett.

Hicks and Gillett then sought to have two board members removed and replaced with their own associates. [An overview of the board and governance arrangements is provided in Appendix 1.[33]] The chairman Martin Broughton, who was also chairman of a major listed company, argued that he had joined the Liverpool FC board on explicit written agreement that he should try to find a buyer. Christian Purslow, who had worked in senior managerial roles at a major listed company, became managing director and joined the board to put the club's finances in order. Moreover, Broughton insisted that he and only he could remove members of the board. Hicks and Gillett took their case to court. They lost in a ruling by the High Court in London, which ruled that the board did have the right to sell the club. They then sought and gained an injunction to block the sale from a court in Dallas, Texas, with tenuous jurisdictional grounds, before losing again in London before the Dallas court backed down. The deal was forced through over the continuing objection of the owners. Henry took control of the club, though Hicks and Gillett immediately threatened to sue the other three

[33] NB: The appendix is not part of the paper accepted for publication.

directors personally for breach of trust. Still, the fans won, and arguably football won. Hicks and Gillett had lost.

The courts no doubt considered the finer points in property rights and contract law in reaching their conclusions, and what company law says about the obligations of directors, under the newly revised Companies Act (UK Parliament, 2006), to which we return shortly. The board no doubt took legal advice before voting to disenfranchise the owners, for the sake of minimizing the danger that another court might find the directors in wilful disregard of the law. But law is only an approximation of ethics, the attempt by society to settle what is right with a degree of fairness to all. The decision to go against the express wishes of the owners they were meant to serve raises issues of ethics that underpin, often in an unspoken way, the field of corporate governance. What does it mean for corporate governance when the board fires the owners?

Corporate governance, in theory and practice

Much of the literature on corporate governance has taken the view that the purpose of boards is to ensure the company strives to achieve shareholder value. Under agency theory, managers, the "agents", are assumed to act in their own interest, which may diverge substantially from those of shareholders, the "principals" (Eisenhardt, 1989; Fama, 1980; Fama & Jensen, 1983a). This theoretical approach views the board of directors as the shareholders' intermediary. Shareholders elect boards to monitor the performance of managers at closer hand than shareholders could do on their own. In this view, boards may represent another level of agency relationship to their principals, but one, if properly structured, that is less likely to show conflicts of interest with the principals, and thus help to overcome the agency problem that arises from the separation of ownership and control in corporations (Jensen & Meckling, 1976). The ethical assumption is this: Agents should act in accordance with the interests of owners, so the corporate governance imperative is to align the utility of boards and owners. In practice boards' primary roles are 1) to structure pay for managers that align their interests with those of shareholders and then 2) to monitor performance against targets. Discussions of the agency problem are often couched in terms of behavioural economics: They assume that "economic man", as non-ethical actors, will respond to incentives in a self-interested way. This line of theory led to the growth of pay-for-performance and stock options in public companies. While they represent an

"agency cost" to shareholders, that cost is worth incurring if performance enhances shareholder value even more. With growing theoretical justification (e.g. Rappaport, 1986), striving for shareholder value became the main goal of enterprises and the defining purpose of boards.

Agency theory may dominate the literature on corporate governance, but it has its critics as well, who give voice to alternative interpretations of the role of boards. Challenges come from the idea that directors have greater duties that monitoring managers and controlling their behaviour. Empirical studies suggest that boards have input to the strategy of enterprises (McNulty & Pettigrew, 1999; Pugliese et al., 2009; Pye & Pettigrew, 2006), even if their contribution is modest (Stiles, 2001). Directors also facilitate access to scarce external resources (A. J. Hillman et al., 2000). These contributions sit uncomfortably in corporate governance models where the board's role is performance monitoring and control (Roberts et al., 2005). Blair and Stout (1999) argue that boards serve as a mediating hierarchy to resolve the contesting claims on a company's resources. Still others see in the behaviour of directors and senior corporate officers a commitment to doing a good job, an area known as stewardship theory (J. H. Davis et al., 1997; Muth & Donaldson, 1998). Its conclusions share with agency theory a focus on value creation, often for shareholders, but like resource-dependency approaches they reach conclusions about the "right thing to do" that are at odds with an agency-based approach.

Other doubts about the adequacy of agency theory have emerged as well. Most of the corporate governance literature focuses on relationships on larger listed companies, with a large number of dispersed shareholders, where the agency problem is seen as most acute. Berle and Means (1932/1991), arguing in the context of a collapse in confidence in corporations in the wake of the Wall Street Crash of 1929, described the issues raised by the separation of ownership from control, setting the stage for much of the debate over corporate governance since then. But the agency problem is not just a matter of remote and powerless principals unable to control agents. A second stream of the literature concerns large owners who abuse their comparative power and expropriate corporate resources for their own purposes at an agency cost to minority shareholders, a stream of argument often focused on continental European companies, so many of which have controlling "blockholders" (Enriques & Volpin, 2007; Laeven & Levine, 2008; Roe, 2003). Another stream looks at governance in private companies (e.g. Bartholomeusz & Tanewski, 2006; Ng & Roberts, 2007), but that often focuses on

issues of succession planning in family businesses, rather than shareholder value (Hillier & McColgan, 2009; Scholes, Wright, Westhead, & Bruining, 2010). That literature, however, raises issues that go to the heart of this case, and by reflection those of large listed companies as well: What happens when shareholders interests are out of line with the interests of the business itself?

Perhaps the loudest challenge to agency theory comes from proponents of stakeholder theory (e.g. Donaldson & Preston, 1995; Freeman & Philips, 2002), who see boards as having duties that go beyond satisfying shareholders. This position holds that directors should look after all those who have a legitimate interest in the enterprise, including suppliers, customers, employees and others. In this view, the duty of directors is to assess the salience of stakeholder interests (Suchman, 1995). Stakeholder theory can be seen as taking two forms. In a weak form, boards should promote those stakeholder claims that also contribute to the value of the enterprise, what Jensen (2001) calls enlightened value maximization. A strong form of stakeholder theory, however, ascribes rights to stakeholders, placing their interests on a par or even ahead of shareholder interests (Crowther & Caliyurt, 2004). Freeman, whose early invocation of the term stakeholder (1984) launched this stream of discussion, has since sought to reconcile what he called the instrumental and normative forms of stakeholder theory (Freeman & Philips, 2002).

In the UK, the nature of stakeholder rights was hotly debated during an eight-year process that began shortly after a Labour government came to power in 1997. Some political actors on the left urged the adoption of worker representation on boards, using Germany's longstanding principle of "co-determination" as a base. Others pressed for explicit duties of directors towards employees, customers and suppliers, citing Dutch law among others as a model. More conservative voices, including much of the asset management industry, argued for shareholder primacy. When the reform of company law eventually passed, it specified, for the first time, the "general duties" of directors as being "to the company" (UK Parliament, 2006, Section 170). Section 172 then specifies how directors are to interpret that obligation. Directors must have "due regard to" the interests of a variety of stakeholders, but that phrase as a sub-point of the main statement: "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole" (Section 172.1); case law shows that by "members" the law means shareholders. While advocates of normative forms of stakeholder theory claimed

progress, supporters of shareholder interests asserted that the "benefit of members" had maintained precedence (Mullerat, 2010). Ministers in the Labour government at the time spoke of the Act as embodying "enlightened shareholder interest" (UK Government, 2007), partially echoing the attempt by Jensen (2001) to reconcile shareholder and stakeholder perspectives. Those words do not, however, figure in the legislation, and other actors made different interpretations. The GC100, an association of general counsel for the largest 100 companies on the London Stock Exchange, says directors should act in "the interests of the Company and its shareholders, both current and future, as a whole" (GC100, 2007, p. 1). This may well prevail for large, listed companies with a dispersed and fluid shareholder base; whether it applies where shareholders are clearly identified is less clear. The Institute of Chartered Accountants in England and Wales gives a yet another view: The law gives directors a "single duty to work for the benefit of shareholders"; moreover, those same ministers "consistently tried to provide comfort to directors on the impact of the provisions" (ICAEW, 2011). But the accountants' institute notes that until case law develops we cannot be sure. The case of Liverpool FC might become one, but in the meantime, how does a director decide?

When the legal ground is new, ambiguous and untested, and when current theory of corporate governance that informs the training of company directors pulls boards in at least three different directions, the choice becomes an ethical stance. We turn now to a discussion of the ethical principles that underlie these contesting approaches to corporate governance.

Ethics in corporate governance

Virtually every decision a board could make has ethical dimensions: Their choices almost always involve spending someone else's money. A substantial literature sees corporate governance as a practical example of ethics in action (Brickley, Smith, & Zimmerman, 2003; Martynov, 2009; McCall, 2002; Roberts, 2005, 2009; Rodriguez-Dominguez, Gallego-Alvarez, & Garcia-Sanchez, 2009; Wieland, 2001; Zetzsche, 2007). The starting point is often that the agreement to create a corporation is a decision based on perceived utility for the participants, so utilitarian ethics hold sway. Echoing Bentham (1789/1904) and Mill (1863/1991), this approach sees the greater good for the greatest number of shareholders as its central principle. Agency theory, sometimes

seen as taking an amoral stance, can be viewed as being based on ethical egoism (Frankena, 1963), moderated through the moral force of the invisible hand of markets (Zak, 2008). This view has resonances in company law and theories of the firm as a nexus of contracts with the aim of minimizing transaction costs (Coase, 1937; Williamson, 1988).

This view sits unhappily with many scholars of ethics, as a shortcoming of utilitarianism and other consequentialist approaches yield problematic responses to many of the moral questions that businesses face. Much of stakeholder theory, particularly of the strong variety, is built on deontological assumptions of *a priori* duties of boards to consider the broader impact of corporate decisions (Bowie, 1999; Evan & Freeman, 1993; Freeman & Evan, 1990), rather than just the fabled "bottom line".

Various scholars have attempted to bridge the divide between duty-based and consequentialist approaches. Hasnas (1998) argues for a consent-based view of corporate governance, as it represent the common ground between shareholder- and stakeholder-based approach as well as with a social contract theory of the firm. This, too, is unsatisfactory as the basis for the difficult decisions, however, when the interests of shareholders and stakeholders polarize sharply, which is when boards need to turn to ethics for guidance, cases where both law and codes of conduct tend to be silent. Hendry (2001, p. 173) argues that business ethics scholars have failed to make the case for a realistic version of stakeholder theory that would provide a practical alternative to the shareholder perspective, concluding that "despite all the talk of stakeholders, they have become increasingly marginal to the corporate governance debate".

The divide is apparent when setting out the ethical approach that underpins the main theories of corporate governance. Nordberg (2008a) makes the case that another consequentialist approach is possible, changing the frame of reference away from stakeholder versus shareholder notions of the firm. He proposes a concept called "strategic value", in which directors may adopt a utility-based approach, calculating the value of the outcomes of their decisions, though not with shareholder value or even an instrumental notion of stakeholder theory as its focal point. In this ethical frame, directors focus on the consequences of decisions to the value of the business, irrespective of the outcome for any stance any group of shareholders might take. This is not quite what the UK law identifies as the responsibility of directors, as it puts greater emphasis on the descriptive first part – to "promote the success of the

company" – than on the normative second part – "for the benefit of its members as a whole" (UK Parliament, 2006, Section 172).

Still, shareholder value is a problematic notion, despite the mathematical formulation advanced by Rappaport (1986) with its calculation of a return on capital largely divorced from the interests of the people who provide it, locating the decisions of boards as rational, economic ones, while ignoring the bounded nature of the rationality that leads to them (Simon, 1955). This approach to value calculation stands accused by think-tanks (e.g. Aspen Institute, 2009; Tonello, 2006), policy-makers (e.g. Walker, 2009b) and academics (e.g. Bebchuk, 2005) of fostering a short-term approach to business decisions. The metric of "total shareholder return", the sum of dividends and capital gains, seems simple enough to calculate until one recognizes shareholders lack a common time horizon for their interests, even if those interests were common (Admati & Pfleiderer, 2009; Edmans & Manso, 2009; Nordberg, 2010).

Another approach draws upon the philosophical tradition of pragmatism to reconcile competing claims of duty and utility. Hendry (2004) argues the case for a bimoral approach to move beyond the shareholder-stakeholder views with their utilitarian and deontological underpinnings. Hendry draws the view from Rorty (1989) that behind American pragmatism sits an optimistic view that people "will use their freedom not only to advance their self-interest but also to protect the common interest" (Hendry, 2004, pp. 149-150). Here the moral choice involves living with and reconciling tensions between obligations and self-interest. Singer (2010) shares the view that shareholder and stakeholder orientations split along deontological and consequentialist grounds with a utility-based view for more instrumental approaches to stakeholders in the middle. He sees in the American pragmatist tradition of James, Dewey and Peirce a way to reconcile the dilemma and work through the dialectic of contesting ethical norms. He notes that Margolis (1998) called for pragmatic solutions when empirical ambiguities arise. Margolis and Walsh (2003) see ambiguity as the starting point of many strategic decisions, pointing towards a pragmatic basis for decision-making weighing the balance of contending ethical frames.

With this frame of reference in mind we return to the case of Liverpool FC as its directors voted to ignore the expressed wishes of the owners and sold the club out from under them. What was the ethical basis for their decision, and what implications might it have more generally for the work of corporate boards?

Ethics at Liverpool FC

The exact nature of the deliberations of the Liverpool FC board cannot be known in detail. Even if the individuals would agree to discuss them, the contentious nature of the events and the litigation that ensued suggest they might at best offer redacted views of the events or engage in reinterpretation of meanings after the event. The event itself was reported in news media, which took an uncommon interest in issues of corporate governance because of the uncommon celebrity of the company and the uncommon passion of one set of stakeholders, the fans. Liverpool FC makes good headlines even without a boardroom bust-up.

To those interested in corporate governance, this case is uncommon for another reason. It presents a remarkably simple example of the issues that arise between owners and boards. First, it is a private company, required under law to report only summary annual financial statements to the authorities and only many months in arrears. It faces no obligation for continuous disclosure of material information. However, in keeping with the practice of several large football clubs in the UK, many of which were once listed on public equity markets, Liverpool FC has been more forthcoming with disclosures than the law requires. Second, when the case began, and stripping away the formalities of the corporate entities that acted as intermediaries, there were only two shareholding individuals, so discussions of its corporate governance need not deal with the complexity of how board could discern where the interests of shareholders lie. Third, both shareholders were members of the board of directors, with direct access to all the information relevant to the board's decision. Neither the separation of ownership and control nor the information asymmetries that complicate analysis of corporate governance concerns in public companies apply.

The board voted by 3 to 2 to sell the club to New England Sport Ventures. Despite their disagreements over seemingly everything else to do with the club, Hicks and Gillett were united in their view that selling the club was a bad idea. The agency problem described by many scholars of corporate governance (Fama, 1980; Fama & Jensen, 1983a; Kumar & Sivaramakrishnan, 2008) took on a rather different light. Viewing the board and senior management of the club as agents of the owners, the agency problem swells to extreme proportions: not only has the board appropriated resources of the owners, they have taken control of the company away its owners and given it to another party.

The proposed price, from New England Sports Ventures or the other would-be suitors, was insufficient to give the owners much if any return on their investment. The alternative – Hicks and Gillett remaining as owners while the club enter a court-ordered administration – included the risk that key players would see to leave the club at the next available time in January 2011. The consequences included possible relegation next season, with lower revenues from television rights, but with the possibility that the owners could still recover some value at some time in the future. Whether that would be the case is a business judgement, and opinion on the board might well have been divided. Even so, the interests of the shareholders were clear: They had expressed them in no uncertain terms.

The case raises legal questions concerning the boundaries of property rights and the nature of the contracts under which the chairman and the managing director joined the board. As noted above, it seems likely that the board took legal advice before acting against the instruction of the owners, but earlier they faced what was essentially a question of ethics in corporate governance. Narrow self-interest, what Frankena (1963) calls ethical egoism, seemed not to play a role in the board's decision. A threat of litigation hung over the case, and the board members who voted against the owners had little personally to gain other than the peace and freedom of leaving the board with the job of selling it done. They may have calculated, more or perhaps rather less formally, the utility of the transaction, but clearly the owners' perception of utility was very different. And if the board's fiduciary duty is to the owners, as one reading of Section 172.1 of the Act has it, then a legal interpretation of utility would have led the board to a different conclusion. This was not, then, a simple, utilitarian view based on shareholder value.

An analysis under stakeholder theory suggests a different interpretation of the rationale for the board's decision. The chairman and managing director were both avowed supporters of the club. Much of the interest among news organizations and reporting on the club's website focused on fan reaction. New management would end the boardroom feuding and let the players concentrate on on-the-pitch performance. Fewer players would demand to have their contract sold to other clubs in the next transfer period in January. New owners would proceed with rebuilding the stadium to increase its capacity and create improved amenities for fans. Most importantly, new owners would give the club a fighting chance to revive its performance enough to escape relegation, a humiliation that fans could scarcely contemplate. Moreover, as a

sports enterprise, Liverpool FC has commitments to its competitors. Unlike a normal business, the presence of competitors is fundamental to the product. Horizontal growth by acquisition has no meaning. And the nature of competition-as-product gives a requirement from greater regulatory intervention and an ethical obligation towards other clubs. Football league rules are set to facilitate the failure of clubs, though the demise or even just the demotion of one of the biggest clubs would cause both financial and reputational damage to others. This alters the stakeholder map, making competitor claims more salient (Agle, Mitchell, & Sonnenfeld, 1999) and justifying a level of regulation that further constrains the action of managers and owners and the discretion that boards have in choosing a course of action.

But was this an invocation of stakeholder rights over shareholder rights? Was this a decision based on a sense of duty to a larger purpose? As the case reached its conclusion, Broughton spoke of his allegiance to the fans and the club's "wonderful history, a wonderful tradition", adding:

> I said "keep the faith". I had the faith. I was quite clear in my mind that we were doing the right thing, and I was quite clear that justice was on our side and that we would work our way through it…. I want to thank the fans as well. This has been as stressful for them as it has been for us. I fully sympathise with their anxieties and the nerve-wracking nature of that. I thank them for keeping the faith (Eaton, 2010b).

This statement, cast in moral and even religious language, suggests that the board held, at least to an extent, to a notion of duty from the perspective of stakeholder theory, and that a deontological rather than strictly utilitarian view led to the board's decision to cast shareholder value to the side. Yet both anecdotal evidence from executives in other enterprises and the academic literature on corporate governance and social responsibility (e.g. Barnea & Rubin, 2010; Hawkins, 2006; Lea, 2004) have many examples of considerable scepticism of directors towards any notion *a priori* rights of stakeholders.

"Keeping the faith" involved another set of stakeholders, without whom the enterprise would fail: the players, supported by owners who would take an approach seeking the common good, the good of the fans. Broughton's interview continued:

> "We have had an incredible team and they've all done a great job…. We have owners now who understand about winning, are dedicated to winning, have put the club on a sound financial footing, are willing to back the club to get back to being one of the, preferably THE, top teams…. NESV bring the passion, the experience, the

> understanding of sport and the passion of fans and the need to think about how the fans as stakeholders fit into the whole thing. It is a business but it's not just a business and they understand that the emotional side of the fans and that's what sets them apart" (Eaton, 2010b).

"It's a business but not just a business": In this case, we see a determination by the board in which stakeholder interests, in particular those of the fans but also those of players, took priority over shareholder interests. In this way, the role of the board emerges not as the monitor for shareholders but as a mediating hierarchy (Blair & Stout, 1999) to settle competing claims. That is, however, only one part of the board's calculus.

The consequences of a decision in favour of the owners' interest would have damaged, perhaps very badly, the business of the football club. The fact that a perceived duty to fans coincided with one utilitarian judgement (strategic value) at odds with another (shareholder value) gives the decision of the board greater impetus to decide against the interest of the owners and against shareholder value. What remained for the courts to decide were the narrow legal matters of property rights and contract, not the moral principles that underpin the board's decision. In the face of ambiguity, the board adopted a pragmatic approach, suggesting that pragmatic decisions arise more easily when consequential and deontological interpretations of what is right coincide, even if they coincide imperfectly. In this case, one version of utility trumped another. In different circumstances, a different interpretation might arise from the same set of considerations.

Conclusions and observations

This case differs from the mainstream corporate governance literature in several ways that may limit applicability of its conclusions. It involves a private company, not a modern public corporation of the type described in the seminal works on corporate governance and agency theory (Berle & Means, 1932/1991; Jensen & Meckling, 1976). Unlike other private companies, it is one unusually in the public eye. These observations must, therefore, remain very tentative. To generalize would require research that goes beyond an inquiry into one decision by one board of one company operating under one country's law and regulation.

That said, the peculiarities of the case also allow a particularly clear view of the issue issues and ambiguities surrounding the concept of shareholder value and how they affect the ethical choices a board faces. By eliminating the ambiguity over where shareholder interests lie, the ambiguities over ethical choices are laid bare. By examining a private company that adopts an unusually public stance because of a perceived obligation to stakeholders for transparency, the case affords unusual access to board deliberations.

The picture that emerges is one of a contest between differing goods and rights that illustrate the value and shortcomings of taking a strong view of stakeholder theory, with its roots in duty ethics, and those of shareholder theory, with its basis in a narrow view of utility. This special case shows that appeals to shareholder value involve appeal to a different special case, that of the public company with dispersed shareholders, where that narrow view of utility often approximates the wider view of the strategic value of the business.

In this case, deontological and utilitarian views differ on what is right; but when aspects of those views approximate each other the door opens for a pragmatic choice. In public companies these views are blurred by the uncertainties over whether the concept of shareholder value pertains to current shareholders, future shareholders or market participants as a whole. Those uncertainties give boards latitude to justify decisions to themselves without having to choose between utility and duty when rejecting at least a narrow definition of shareholder value. The analysis suggests further that the term shareholder value can be used as a substitute for strategic value when needed to resolve an ethical dilemma and used with a different meaning when discussing specific decisions with special shareholders.

You'll never walk alone: The fans make this point at every game, and in this case the board paid considerable heed to their arguments, a stakeholder view. The rules of this game can be derived from the actions of the board as moral agents, if not exactly as agents of shareholders. The fact that the board agreed with fans and not owners does not mean that the board had abandoned utility, merely that it had abandoned a narrow view of it, the view of shareholder value. Different circumstances might well lead to a different conclusion, as pragmatism suggests.

Appendix 1: Liverpool FC governance arrangements 2010

According to records at Companies House, in the summer and autumn of 2010 Liverpool FC, legally known as Liverpool Football Club & Athletic Grounds Ltd., was the principal operating unit of Kop Football (Holdings) Ltd., itself a subsidiary of Kop Football (Cayman) Ltd., whose ultimate owners were Thomas O. Hicks and George N. Gillett Jr. The tables below give an overview of the corporate governance arrangements. Kop Football (Holdings) sold Liverpool FC to New England Sports Ventures in October 2010.

Table 15 - Board

Board roles	*Kop Football (Holdings) Ltd., October 2010*
Chairman	Martin Broughton (appointed 8 June 2010; resigned 15 October 2010)
Managing Director	Christian Purslow (appointed 25 June 2010; resigned 15 October 2010)
Director	Ian Ayre (commercial director of Liverpool FC; appointed to Kop board 18 December 2009; resigned 15 October 2010; then named managing director of Liverpool FC on 22 March 2011, following asset sale); he was, thus, an executive director but having been appointed before the then chairman and managing director his position was in a sense independent of them
Director/shareholder	Thomas Hicks (Ultimate owner)
Director/shareholder	George Gillett Jr. (Ultimate owner)
Company Secretary	Philip Nash (appointed 28 April 2010; resigned 23 November 2010)

Table 16 - Governance arrangements

Provision	*Combined Code recommendation*	*Kop Football (Holdings) Ltd.*
Chairman-CEO	Separate roles	Separate: Broughton, Purslow
Board independence	At least half the board, excluding chairman, independent of management and major shareholders	Two of five independent of management; three of five independent of shareholders; none independent of both
Chairman independence	Chairman should be independent at time of appointment	Broughton was independent, having been recruited for his major company experience to organize sale of the club
Audit	Committee made up of independent non-executive directors	No evidence of committee
Remuneration	Committee made up of independent non-executive directors	No evidence of committee
Nomination	Committee made up of majority	No evidence of committee

	independent directors	

NB: The provision of independence from shareholders in the code is designed to offset the so-called principal-principal conflict, that is, when a major shareholder might abuse rights of minority shareholders. The descriptive and normative literature on small company governance suggests that different norms apply family- or individual-owned businesses to those at the listed companies (Brenes, Madrigal, & Requena, 2011; Chua, Chrisman, & Sharma, 1999; S. Lane, Astrachan, Keyt, & McMillan, 2006; D. Miller & Le Breton-Miller, 2006; Ng & Roberts, 2007). Absence of committees is not uncommon in private company governance, where boards are generally small.

8. News and corporate governance (*Journalism*)

Status: Published in December 2007 in *Journalism: Theory, Practice and Criticism* (Sage Publications).

This essay was written after I had been accepted to study at the University of Liverpool in 2007 but before I had formally enrolled in September. The occasion arose when two cases raising corporate governance issues presented themselves almost simultaneously in an industry I knew well – news. The paper was drafted that summer and was accepted quickly by the editors of the target journal, *Journalism: Theory, Practice and Criticism*, owing to its topical content and published in the December 2007 issue.

An institutional view of corporate governance in news organizations

This essay is rather different in character from the others in the collection. One reason is chronological: This was the first of the papers I researched and drafted after taking up doctoral studies. It was also written for a different audience, for academic journalists, and aimed at a media studies journal. More importantly, however, the difference in approach comes from my personal engagement with this topic and these cases. This chapter concerns an issue I have lived with for almost all my professional life. It deals with *specific* issues that stimulated my general interest in the field of corporate governance and the desire to pursue it as a research agenda. In a sense, therefore, it also provides a bridge between more mainstream corporate governance theory and practice in Chapters 1-7 and the reflections about the forces driving my research in Chapter 9.

News gathering and governance

My career in journalism – including 18 years at one of the companies in this analysis and strategy consulting work I later did for the other – provided almost daily reminders of the tensions that exist between a) the commercial goals of the corporations, their managers and shareholders, and b) the imperatives of news

coverage. The former involves the well known desire for profits, dividends and capital gains. The latter often involves expenditures on news gathering with little promise of a return. Those expenditures are not merely financial. Two vignettes, very different in character, illustrate the point.

The first is an incident involving a senior commercial manager at Reuters, who had come from the accounting side before being put in charge of a large profit-and-loss centre and then development of information products for investment banks. One day he read a first-hand account of journalists who had been captured by rebels in west Africa and threatened, at gunpoint, with execution if Reuters did not publish news favourable to the rebels' cause. The journalists refused, and after some time and much distress the rebels relented. This manager sent a copy of the story to all his staff with a note saying how proud it made him feel to work for this organization. He was not a sentimentalist about news, but he saw in this episode that value involves more than market capitalization and that costs involve more than money. Since those days, and especially during the conflicts in Iraq and Afghanistan in the past decade, news gathering has become a very costly business.

The second is the observation of the famous American jurist Louis Brandeis that sunlight is the best of disinfectants (Brandeis, 1913-14). That saying has become part of the canon of corporate governance and disclosure. A colleague at Reuters used to say that the purpose of a news organization was to shed light on dark places. The similarity of those sentences highlights the role of news organizations in the system of corporate as well as political governance, a topic with a small but growing literature (Marron, Sarabia-Panol, Sison, Rao, & Niekamp, 2010; G. S. Miller, 2006; Schudson, 2002; Tambini, 2010; Thompson, 2009; Westphal & Deephouse, 2011). The published version of this chapter contributed a bit to it. I felt honoured when the Global Corporate Governance Forum of the World Bank Group asked to republish it for Forum members and followers. The paper had found a route from media studies academics to the wider corporate governance community.

News and institutional theory

Often called the Fourth Estate (Fengler & Russ-Mohl, 2008; Sherman, 2002), the press is a social institution. The Leveson Inquiry into the media and society, underway in the UK at this writing, is investigating the behaviour of news organizations and in particular News Corporation, a company that figures centrally in the discussion in this

chapter. While his findings will not be known for some time, Lord Justice Leveson has heard a variety of arguments why journalists might usefully stand *outside* conventional institutional arrangements to which other corporations and individuals are subject. Walter Williams, who founded the first academic school of journalism more than a century ago,[34] explained those reasons by describing the news a "public trust" (Williams, 1908/2005). Its mission was to hold the other institutions of society to account. His "Journalist's Creed" includes a rather quaintly worded exhortation that journalists should be wary of those with money, including the proprietors of their own newspapers. In what might be seen as a precautionary warning for the events now unfolding, he wrote that "bribery by one's own pocketbook is as much to be avoided as bribery by the pocketbook of another; that individual responsibility may not be escaped by pleading another's instructions or another's dividends".

The two cases described in this essay may not involve "bribery" in any literal sense, but they take an ethical look at the corporate governance arrangements put in place at two news organizations to prevent the pursuit of money from influencing news judgement. As such this dual-case study also presents an ethical dilemma for directors: Should they pursue shareholder interests, as law (to some extent) and custom and practice dictate, or protect editorial integrity?

For the larger purposes of this thesis, these cases can be viewed as conflicting institutional logics at work. The cases have close analogies to the one of higher education textbooks discussed in Thornton and Ocasio (1999), where an emerging commercial logic, provoked by shifting market conditions, came into conflict with the established editorial logic that had previously been taken for granted in the organizational field they studied. In the twin cases here, both Dow Jones and Reuters had adopted corporate governance mechanisms frowned upon by investors but which protected the editorial operations of the companies from ill-effects of takeover bids. The editorial logic here was even stronger than that described by Thornton and Ocasio, as these two organizations sought explicitly to protect the integrity of the news gathering and thus prevent any commercial interest from using control of the company as a means of achieving favourable news coverage, or – especially importantly for Reuters – preventing any sovereign investor seeking to prevent news coverage of events in their countries. In both cases, therefore, the logic was based on deeply held beliefs.

[34] At the University of Missouri, in Columbia

In keeping with agency theory in corporate governance, however, these mechanisms also protected management from the full force of market dissatisfaction when their commercial performance faltered. The cases described here involve a conflict of ethical stances that may as easily be viewed as a conflict of institutional logics. What they show is how in this industry, with these imperatives, the tensions between the editorial and commercial logics – between the stewardship towards the news and the pursuit of economic utility – cannot easily be resolved. As in the case of Liverpool FC and in much of the behavioural literature on corporate governance, this paper suggests that when ethical frames of reference and institutional imperatives collide, the role of the directors is to make difficult choices. Ideas for further research emerging from this thesis include revisiting the two cases to explore how the ethics – and the institutional logics – have developed in the years since 2008, when both transactions closed and control changed hands.

News and corporate governance: What Dow Jones and Reuters teach us about stewardship (2007)

Abstract: The outcomes of near simultaneous bids for the news organizations Reuters Group plc and Dow Jones & Co. Inc. in 2007 hinged on mechanisms of corporate governance put in place at each company to protect the integrity and independence of the editorial operations. Neither company is particularly a model of good governance, since the restrictions – super-voting shares at DJ, veto-power by the trustees of the Founders Share Company at Reuters – almost completely rule out an open market for corporate control. This paper looks at Reuters – and in even greater detail at Dow Jones, where the private actions of the board and shareholders came into rare public view. It suggests that stewardship theory plays a large role in protecting a perceived social value of the integrity of the news, figuring more heavily in crucial board decision-making than shareholder value. But the outcome of both cases means that the tension between the two is not easily resolved.

Keywords: Corporate governance, stewardship theory, stakeholder theory, mergers, takeovers, Reuters, Dow Jones, newspapers, news industry, financial information, journalism, case study

The resignation

Dieter von Holtzbrinck had done what he could. The deal wasn't concluded – the deal he had opposed – not by some distance, only the shareholders themselves could decide that. But the board of directors of Dow Jones & Co. Inc., publishers of *The Wall Street Journal* and purveyors of the most famous stock market index in the world, had decided to recommend a bid from the Rupert Murdoch's News Corp. to buy the company for $5 billion. It was – every expert on Wall Street had said so – an excellent price. But not to Holtzbrinck, scion of a famous German family and publishing company that publishes *Handelsblatt*, Germany's venerable business newspaper, who had been invited to join the Dow Jones board when the two companies bought shares in each other in 2005.

"Although I'm convinced that News Corp. offer is very generous in financial terms, I'm very worried that Dow Jones unique journalistic values will long-term strongly

suffer after the proposed sale," he wrote to his fellow directors the next day, July 19, 2007. "Listening to our lawyers, one has to vote for a deal which is in the best (financial) interest for the shareholders, except if one can prove that such deal bears risks for the company that overcompensate the financial profits. I cannot prove that my worries are right. I can only refer to News Corp. business practices in the past, can only refer to Jim Ottaway's article in the Journal, etc. I do not believe that the 'Special Committee' can finally prevent Murdoch from doing what he wants to do, from acting his way" (von Holtzbrinck, 2007).

Ottaway, another DJ director, had written: "I defend Rupert Murdoch's rights of free speech and press freedom. But I also defend the Dow Jones and American journalistic tradition of a strict separation wall between political opinions expressed vigorously on editorial pages, and news reported with as much factual objectivity as humanly possible" (Ottaway, 2007b). As well as intervening with his editors, some years ago, Murdoch's News Corp. had been widely reported as caving into pressure from Beijing government to drop news channels, including the British Broadcasting Corp., from transmissions into China. Murdoch has repeatedly denied that political pressure led to the decision.

Holtzbrinck resigned from his position on the board.

The story so far...

News is a strange business. For decades it hasn't worked in any rational sense like a business at all. Newspapers tended to be owned by people who were already rich. A bit like sports teams, they weren't there to make money. Their *corporate purpose*, if one dares put a label like that on it, was to let the proprietor have fun. Some rich people enjoy watching sports and inviting their friends and business associates down on the field to meet the players. Business is – or *was* – incidental. News was a little different. Proprietors owned newspapers for the glory, yes, for the "esteem" and "self-actualization" we learned about from Abraham Maslow (1943) in business school. But they often – perhaps mainly – wanted the opportunity to shape the thinking – or frighten the pants off – of the politicians and policy-makers around them. Think of the big names in the old world of the newspaper: Ochs of *The New York Times*, Bagehot of *The Economist*, Beaverbrook at *The Express*, Katherine Graham's *Washington Post,* the

Chandlers' *Los Angeles Times*, McCormick's *Tribune,* Pulitzer's *World* and *Post-Dispatch* (see Edwards, 1988 for a broad look at the British press).

Nor was it just the British and American newspapers. *Le Monde*, for example, has run as a collective more reminiscent of the Paris Commune of 1871. The *Neue Zürcher Zeitung* has always been more of a license to burn than to print money. The founders and even the current owners of *Die Zeit*, the *Frankfurter Allgemeine* and the *Süddeutsche Zeitung* all approached their mission in post-Hitler Germany with a selflessness that no doubt contributed greatly to their lack of drive for what business-folk call profit maximization. Even Axel Springer, the most zealously profit-minded of the German proprietors since the Second World War, saw *Die Welt* more as a way of making Germany safe for democracy and capitalism than as a means of making money. Money is what *Bild* was for.

Nor was it just newspapers. Bill Paley's CBS News, with Murrow, Cronkite and company, was the justification for getting his license to print money with the non-news airtime in the 1950s and 1960s. CNN never made any serious money for Ted Turner, either, though he was painted as a money-grubbing right-winger when he deigned to try to buy the post-Paley CBS. The BBC's often excellent news is detached from a profit motive thanks to a statutory right to print money in the form of an annual tax on television sets (see Halberstam, 1979 for an overview of newspaper and television in the US).

Nor was it just these daily doses of news. The news weeklies include Luce's *Time* made money, but that wasn't its purpose and it didn't maximize the Luce family fortune. *The Economist*, post-Bagehot, still claims to be a newspaper though it isn't, really. Its profits now are the envy of the business. But they weren't for many years and profit is not its purpose.

The same larger purpose applied to the news-folk who supplied them. The Associated Press, Agence France Press, Deutsche Presse Agentur and their like operate either as cooperatives of newspapers they serve or with the help of government money that keep the people informed about the world. United Press International wasn't like that. Formed in a rescue of the old United Press and International News Service, United Press International had ties to the Scripps newspaper chain, but it was at best their supplier of news and never made money. It doesn't survive (see Boyd-Barrett, 1980 for a history).

Reuters and Dow Jones

News operations that make money do so because they capture a valuable market. Charles Dow and Edward Jones saw money to be made from Wall Street, and so transformed a small gossipy afternoon newsletter into the *Wall Street Journal* in 1889 to print the stock exchange quotes his little wire service transmitted as well as news. It was seen from the beginning as a way to make money by making news – the news that could make Wall Street traders money (Wendt, 1982). But Dow Jones & Co. did so well with the old technology of newsprint and ink that it almost missed out on how the old ticker tapes from the 1920s became the electronic world of news that took hold in the 1970s and 1980s. It did get into the game, first through a joint venture with the Associated Press called AP-Dow Jones, then on its own by buying a company called Telerate that sold financial data to banks and brokers on dedicated computer terminals. But it never made it big, eventually selling off Telerate and buying the AP out of the Dow Jones Newswires business, which without Telerate's terminals had no real home. The world of fast financial information had almost entirely passed Dow Jones by.

For twenty years, that world was dominated by Reuters. The London-based global news agency had been a bit like Dow Jones in New York, carrying stock and commodity prices over telegraph cables. Knowing the news moved stock and bond prices, Julius Reuter started transmitting news, too. But rather than print it on paper and walk it around to brokers, he transmitted words as well as numbers on his telegraph. It worked well, for a while. But then the Depression hit in the 1930s. As a private company without either government aid (except, perhaps, surreptitiously during the Second World War) or a sustaining cooperative to keep it alive, it struggled to survive. For the global traders in London, foreign political news drove prices and collecting foreign political news was a lot more expensive than the task facing Dow Jones, which only really needed to get domestic company news when most big companies kept their headquarters in New York. Reuters found a way to turn the copper wires of its telecommunications network (subsidized by governments around the world) into gold again in the 1970s by transmitting gold prices, stock prices, bond prices and foreign exchange prices alongside its news (see Read, 1992 for an authorized but largely uncensored history). It was a business model that would propel the struggling news organization into stock market superstardom, the hottest of hot stocks of the mid-1980s.

Dow Jones & Co. remained largely a family-run business even after it floated on the stock market itself. As ownership passed through daughters, the name of the controlling family became the Bancrofts. They needed capital to expand the newspaper and raised it, as many had before, with an issue of shares to the market. But unlike most companies – most in the US and UK, that is – they did so while retaining a special class of shares for the family. Even in 2007, after the expansion of the company into a global media business, the Bancroft family and their close friends the Ottaways, whose family newspaper chain DJ acquired in the 1970s, they still controlled nearly 64.2 percent of the votes upon which the company's future depended, even though they held just 24.7 percent of the stock.

Reuters needed capital, too, to expand the development of its electronic data services for financial markets. It saw a dramatic reversal of its fortunes with the launch starting in 1973 of the Reuters Monitor. Monitor, a crude online service by today's standards, was revolutionary at the time, putting traders around the world in instant contact with each other. It laid the groundwork for acceleration of trading in all financial markets that followed. But keeping up with demand – and the need for further technology development – required more funds than the company was generating in profits. After a long and difficult internal debate about the effect outside capital would have on the independence and integrity of the news services, the company floated on the London Stock Exchange in 1984 (Lawrenson & Barber, 1985 wrote a glowing account of those who won and lost out on the money). The float came after a decade of stagflation in the western world and the accumulation of wealth in oil-producing countries in the Middle East. Many Reuters managers feared that oil wealth would acquire the company, with the risk that the tradition of independence and objectivity of its news coverage would suffer. So rather than permit that it, like Dow Jones, adopted a capital structure that prevented outsiders seizing control. At the time, since it was rescued from near bankruptcy in the middle of the century, Reuters was owned by mainly its customers, the Fleet Street newspapers – the main national dailies – and the Press Association, a collective of regional UK papers. Struggling with antiquated technology and restrictive trade union practices, the newspapers saw selling shares as a way to generate the cash to fund their own modernization. But the still wanted their news supplied in the same reliable, truthful way. So they devised a structure to cash out without losing what they valued. The Reuters Trust Principles (Reuters, 2007 update) restricted the rights of shareholders: no one party could control

more than 15 percent of the stock. And the trustees of the Reuters Founders Share Company, a panel of eminent individuals drawn mainly from the newspaper industry, would be able to veto any action that the board or shareholders might take that they thought might endanger the news service.

Editorial integrity is key

In doing so, both Dow Jones and Reuters embedded editorial integrity in the heart of their corporate structures, with different governance mechanisms but with the same effect. Both companies – like the New York Times Co., the Washington Post Co., like Rupert Murdoch's News Corporation, too, which had both *The Times* and *The Sunday Times* in London, the *New York Post* and various television stations and satellite networks around the world – created shareholding structures that would prevent them ever being taken over, unless the families or foundations that controlled these mechanisms agreed.

News organizations aren't the only companies that chose to take this approach. It is, in fact, the preferred form that companies around continental Europe took when they needed to raise outside capital. But it's quite uncommon in the United States and almost unheard of in Britain, the world's two largest and most sophisticated capital markets. The large investment institutions that provide capital in these markets – insurance companies, mutual funds and pension systems – don't like the idea of buying stock that has fewer rights. Protecting a company from a takeover is preventing an investor from realizing a capital gain. And that means the shares should always trade at a lower level than the economics of the business would justify.

The journalists and their supporters among the customers of Dow Jones and Reuters might well think that editorial integrity was worth the cost – the cost, that is, of having investors forego a bit of profit. Looked at another way, it was also the cost of having, as the accountants would say, a higher cost of capital than competing businesses that didn't restrict voting rights. And having a higher cost of capital will, over time, mean you lose out in the competition for tomorrow's customers.

The model breaks down at Dow Jones and Reuters

In May 2007, within two weeks of each other, the boards of Dow Jones & Co. Inc. and Reuters Group plc faced decisions that would transform their businesses and

challenge the assumptions that lie behind the protections for editorial integrity that both companies had in place.

Dow Jones had largely missed the transition to electronic financial information, and its attempts to get into the market were certainly too little if not entirely too late. Profitability of the *Journal* suffered in the wake of the dot-com bust in 2000. The value of Dow Jones stock languished through good times and bad (see Figure 4).

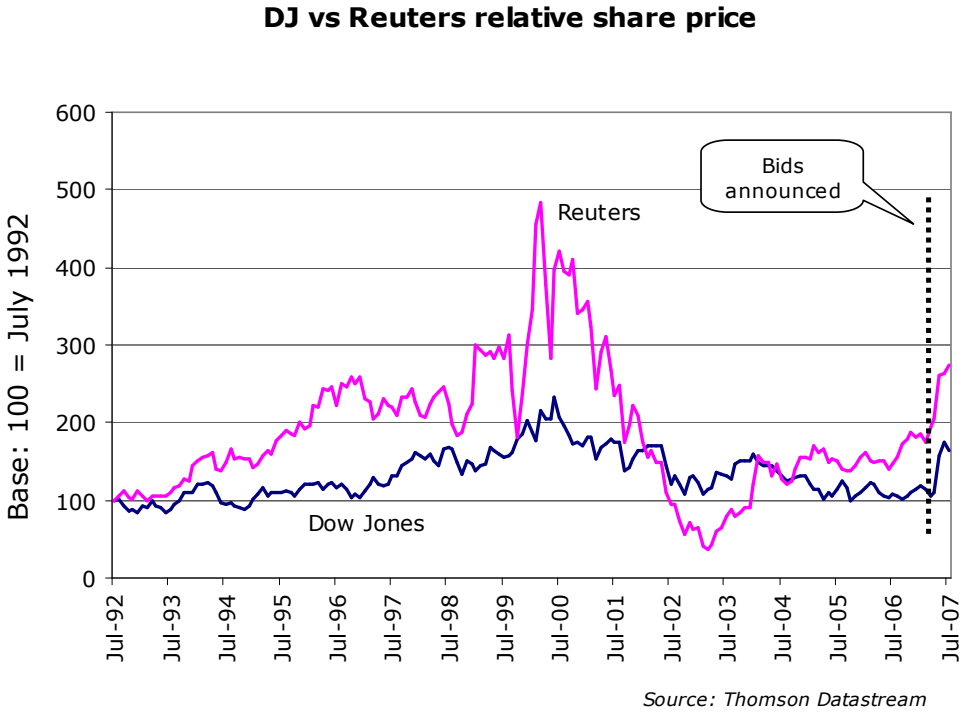

Figure 4 - Share prices of Dow Jones and Reuters in US dollars

The dominant position of Reuters, though, would come under assault from a complete newcomer in the business. A former Salomon Brothers trader, Michael Bloomberg, saw the need for news from the user's point of view. With funding from Merrill Lynch, he built a new type of financial information platform in the late 1980s that would integrate data, making it much more useful to financiers trying to gather disparate data to decide on an investment. "The Bloomberg" became the hottest terminal on Wall Street, and then around the world. Bloomberg stored financial data and news for years, making them instantly accessible on his terminals. The systems developed by Reuters and Dow Jones-Telerate, by contrast, were dominantly "real-time" information systems, which through away information almost as soon as it was created. A few years later Bloomberg would add a news services, hiring the *Wall Street Journal* reporter Matthew Winkler to build a new type of real-time news service.

Bloomberg News became Bloomberg Magazine and Bloomberg Radio and Bloomberg Television, too. Dow Jones Newswires got pushed off more and more desks of the financial traders. Reuters and DJ eventually learned lessons and Reuters built systems that worked more like Bloomberg's, while DJ withdrew from the race. The Reuters market share had suffered, though, and in the years between 2000 and 2003 saw its share price collapse from more than £16 to less than £1 (former Reuters journalists-turned-business-executives Mooney & Simpson, 2003 give an account of the malaise at the company). Both DJ and Reuters learned, though, to store their news for retrieval from the archives, and for several years shared a joint venture to do so in Factiva. Reuters share price would recover, but by early 2007 it had only managed to get back to around £4 a share. That came with thousands of job losses – though a disproportionately small number came from among the journalists. There were job transfers, too. Some of the work that Reuters journalists had done in New York and London moved to Bangalore in India (Reuters, 2004), a decision that led directly to the departure of one of the top editors after a heated debate (Nordberg, 2005c). It is, of course, to be expected that the decision to treat editorial jobs less harshly in the cutbacks came from understandable strategic reasons in the content business like Reuters, even more than concern about offending sensitivities of company culture or the Reuters Trust Principles.

Thomson bids for Reuters

For more than a year senior management at Reuters had held discussions with Thomson Corp. of Canada about a merger valuing Reuters at about £6.50 a share. The Thomson family still owned about three-quarters of Thomson Corp. stock. The group published databases of business information, textbooks and, like Reuters only much smaller, financial information. They were also newspaper proprietors. Rupert Murdoch bought *The Times* and *The Sunday Times* from Thomson in 1981s. But the family wasn't bailing out of anything except the morass that was Fleet Street at the end of the 1970s. Thomson was instead, concentrating its efforts, having bought Canada's leading serious newspaper, *The Globe and Mail* in Toronto a year before. It has since disposed of it.

The fit with Reuters was pretty good. Both had financial businesses where overlaps could be eliminated to save money and differences could be exploited for new sales. Because of Reuters' size in that market, and the highly regulated nature of the financial

markets both companies served, the deal would have to overcome competition and regulatory hurdles. Other aspects seemed straightforward. Thomson's legal and health information businesses provided steady cash, and the textbook business could be sold to help pay for the acquisition of Reuters. Textbook publishers had been sold at record prices over the past two years, so it seemed a very good time to sell. The chief executive of Thomson was willing to stand down in favor of the Reuters CEO. After a cash-and-shares deal, the Thomson family would control 53 percent of the stock. And that would violate the provisions of the Reuters Trust Principles.

The first port of call, then, wasn't the regulators or the competition authorities; it was the trustees of the Reuters Founders Share Company. When first created, the Founders Share Company was chaired by Katherine Graham, majority owner of *The Washington Post*. But that was 1984, and by 2007 many of the trustees, including its chairman, Pehr Gyllenhammar, were business people. Gyllenhammar had a long association with Reuters, having joined the main board when it floated on the stock market in 1984. Then he was CEO of the car- and truck-maker Volvo. He had gone on to become chairman of a major UK insurance company. To no one's surprise, Gyllenhammar and the other trustees decided that the Thomson deal was fine. And the Thomson family, through their family trust, promised to respect the Reuters Trust Principles.

Murdoch bids for Dow Jones

News of the Reuters-Thomson tie-up slipped out into the market on Friday, May 4, 2007, but it wasn't until the following Tuesday that either of these news companies could manage to bring themselves to make an official disclosure. The leak was probably prompted by news on May 1 that News Corp., the Australian-turned-American publisher and broadcasting company controlled by the Australian-turned-American Rupert Murdoch, wanted to acquire Dow Jones & Co. for a staggering 55 percent premium over its recent share price. The bid valued Dow Jones at $5 billion. It had been trading a level worth $3.5 billion before the news. Wall Street analysts had been saying for years that management of Dow Jones, headed by former journalists, simply lacked the business acumen to run a company with two of the best known brands in the world. The share price, which had moved in a tight range over many years, seemed to reflect that. The financial community, not least the hedge funds that had come to dominate stock-market trading in recent years, saw an opportunity in

Murdoch's bid to make some quick money, and soon much of the non-family stock had passed into their hands.

It's useful to recall how Murdoch achieved his position. He inherited a small chain of newspapers in Australia, and managed in increase circulation, revenues and profits. He bought television stations and used the cash flow to buy newspapers in Britain, including *The Times* and *The Sunday Times* from Kenneth Thomson, but also some downmarket tabloid papers, including the country's largest selling daily, *The Sun*, and largest selling Sunday paper, *The News of the World*. All four were shareholders of Reuters before it went public.

Though it's never been officially confirmed, many executives at Reuters have said over the years that Murdoch is the shareholder who pushed through the decision to have Reuters float. The managing director at the time was Gerald Long. With a crew haircut and a military bearing, Long wanted nothing to do with selling shares to the financial markets. What happened next was this: Long was offered the job of chief executive of News International, the holding company for Murdoch's newspapers in Britain, including *The Times* and *The Sunday Times*. Long jumped at the chance. His role at Reuters, now upgraded to chief executive, went to Glen Renfrew, a long-serving Reuters executive who had started his career as a newspaper reporter in Australia. Renfrew was a strong supporter of the idea to float. When Reuters became a public company, Murdoch's News Corp. had an asset that was to become worth hundreds of millions of pounds sterling. Murdoch used those shares as collateral to raise loans before eventually selling them to outside investors. The proceeds were the money he used to buy newspapers, television stations and the Fox movie studios in America as well as start a satellite television company in Britain we now know as BSkyB.

But buying Dow Jones and its prize asset and brand *The Wall Street Journal* meant winning over the Bancroft family and their concern about editorial integrity. Murdoch's UK papers were right-wing in their politics, so not dissimilar to the opinion pages of the WSJ. But Murdoch had a public reputation of intervening in news coverage, too, calling editors and even reporters and telling them what angle to take. The Fox interests in the US had spawned a Fox News Network, decided conservative in its viewpoint aimed at giving a counterpoint to what he perceived now as the *left-wing* orientation of CNN, the news service, you'll recall, that was so right-wing before. This raised alarm bells among the crusaders for editorial integrity at the *Journal,* including the recently retired CEO Peter Kann, and his wife Karen Elliot House. She

had been reporter and then publisher of the WSJ, and he had been a reporter and editor before his move into management.

Which way would the Dow Jones board vote? Which way would the Bancroft family vote? On what basis would they make their decisions? And what of the outside shareholders – who held a clear majority of the stock but a clear minority of the votes? What rights did they have? For the answers to those questions we need to consider the purpose and practice of corporate governance.

Corporate governance in the news

The restrictive voting rights at both Reuters and Dow Jones run afoul of what many institutional investors consider appropriate practice for listed companies. Why at Dow Jones should the Bancroft family and friends retain a 64 percent share of the vote when they had less half that share of the capital at risk? Why at Reuters should the trustees of the Founders Share Company have veto power when it had no capital at all in the business and it represented, in the final analysis, the interest of customers – and only a small portion of the customers at that?

Company law in both the UK and the United States says that boards of directors should work in the sole interest of their shareholders.[35] Holtzbrinck's resignation letter from the Dow Jones board, however, suggested that there were other issues at stake, ones he regarded as bigger than securing the best deal for shareholders. The Founders Share Company at Reuters made explicit that there was more to the purpose of this company than maximizing the return to shareholders.

Corporate governance – how the activities of a company are monitored and controlled – has become a major topic of concern for corporate executive and government policy-makers alike. Concern about the field had tended to emerge from the shadows in the wake of crises. The first surge of interest in the field started after the Great Crash of 1929 on Wall Street and the global economic depression that followed in its wake. It became a hot topic in the UK in the early 1990s following a rash of corporate failures. The worst of these was that of the newspaper proprietor Robert Maxwell, who had, among other offences, appropriated the pension funds of staff at Mirror Group Newspapers in the UK and *The New York Daily News* to prop up his

[35] In the US, company law is a matter for individual states. In practice most states follow the lead of Delaware, where about half of US public companies have their legal seat, Dow Jones among them.

failing finances. Complacent boards of directors at the companies throughout his empire, made up of cronies and "yes-men", had acquiesced to it. Maxwell disappeared while at sea on his yacht, never to be seen (Wearing, 2005 gives a good account of the case).

Corporate governance came to the fore in the US in 2001 and 2002 following the collapse of the energy trading company Enron Corp. and of the telecommunications giant WorldCom Inc. just a few months later. Part of the response was legislative. The Sarbanes-Oxley Act of 2002 (Library of Congress, 2002) put severe new constraints and obligations on directors of US companies. A reform of company law in Britain, underway before Enron, took new directions before its final adoption in 2006 (UK Parliament, 2006). The European Union took an interest and countries around the world either passed laws (e.g. Germany, Australia) or adopted new private-sector codes of conduct (e.g. Britain, France and many others).

Theories of corporate governance

Central to the governance debate has been the issue of how to prevent executives like Maxwell or Jeffrey Skilling at Enron and Bernie Ebbers at WorldCom from using company money as if it were their own. These directors are, after all, fiduciary *agents* of shareholders, the *principals* behind the business. Boards of directors are there in part as watchdogs over management. It wasn't always this way. Many businesses start out with the sole owner as manager of the business. But listing on stock exchanges means invited outsiders to participate in ownership, and it becomes their money that's at stake. In the 1930s when surveying the wreckage of the Great Crash, Adolf Berle and Gardiner Means (1932/1991) identified this change as having an impact in how companies were managed, and to what purpose. The term "agency theory" came to be used to describe the problem. Having a strong the board of directors and strong shareholder rights were seen as the solution (Jensen & Meckling, 1976).

But agency theory hasn't been sufficient to describe what actually takes place in boards of directors, nor to prescribe how directors should act. Most directors, in line with company law, see their duty as being to promote shareholder value, either in how they allocate strategic resources (McNulty & Pettigrew, 1999; Stiles, 2001) or through their contribution to reducing the cost of doing business from the contacts or the credibility they lend to the company (Williamson, 1988). But others argue that directors have other duties that go beyond maximizing wealth for shareholders. "Stakeholder"

theory, a deliberate play on the American word "stockholder", asserts that directors have obligations to people other than shareholders – suppliers, customers, and especially employees and the broader society (Crowther & Caliyurt, 2004; Evan & Freeman, 1993; Freeman & Evan, 1990). It's a view not widely accepted in corporate boardrooms, even among directors who view good relationships with these interest groups as essential to the long-term profitability of the enterprise.

The journalists at Reuters and Dow Jones – whose interests the restricted voting rights protect – have clearly been grateful for the support. There was scarcely a murmur from those at Reuters at the thought of a merger with Thomson. Indeed, the concern about editorial integrity was probably greater during the second half of the 1980s, when both Rupert Murdoch and Robert Maxwell – fierce *personal* as well as business rivals – both sat on the Reuters boards of directors.

Not so at Dow Jones. The shape of decision-making in corporate boardroom is normally very sensitive and confidentiality precludes outsiders from ever analysing how the decisions were made. Even at Dow Jones, however, which is in the business of making corporate reporting transparent, the transparency that accompanied this deal was extraordinary.

Journalists decried the News Corp. bid, fearing Murdoch's reputation for intervening in editorial decisions at the newspapers News Corp. owned. Murdoch agreed various measures to safeguard editorial integrity (Dow Jones & Co., 2007), but for many, that didn't seem enough. "The staff, from top to bottom, opposes a Rupert Murdoch takeover of Dow Jones & Co. Since the early part of the 20th century, the Bancroft family has stood up for the independence and quality of The Wall Street Journal and has built it into one of the world's great newspapers," a statement from Independent Association of Publishers' Employees, the journalists' main trade union, said shortly after the bid announcement. "Mr. Murdoch has shown a willingness to crush quality and independence, and there is no reason to think he would handle Dow Jones or The Journal any differently" (IAPE 2007).

Moreover, it didn't seem enough to James Ottaway, a Dow Jones director and head of the Ottaway family trust, which had seven percent of the votes. "It's a bad thing for Dow Jones and American journalism that the Bancroft Family could not resist Rupert Murdoch's generous offer," he said in a statement issued on July 31, once it became clear that News Corp.'s offer had found sufficient support to prevail. "It is ironic indeed for the Bancroft family to have to pay 30 shekels of silver to their investment

bankers, and 30 shekels of gold to their corporate lawyers, for scaring some of them into betraying their 105-year family loyalty to Dow Jones independence" (Ottaway, 2007a).

The phrase "scaring some of them" is telling, and reminiscent of Holtzbrinck's *démarche* of two weeks earlier. Holtzbrinck said: "Listening to our lawyers, one has to vote for a deal which is in the best (financial) interest for the shareholders, except …" (von Holtzbrinck, 2007). These two directors felt there ought to have been an "exception" to the rule of shareholder value. It wasn't, however, because the journalists *as employees* deserved special consideration. The basis of their concern lies more in what we know as "stewardship" theory.

Stewardship at Dow Jones

Stewardship theory draws on organizational psychology and suggests that self-esteem and fulfillment loom large in their decision-making, as Maslow (1943) had suggested in his hierarchy of needs. As a prescription, however, the stewardship approach contends that individual directors should look after the interests of someone or something larger than personal or corporate self-interest. Some may be guided by a code of conduct or statement of corporate purpose, bearing a responsibility that supersedes mere shareholder value considerations (see Muth & Donaldson, 1998 for a discussion). There are suggestions of this in Holtzbrinck's quote with its "except …" The matter at stake in his and Ottaway's minds wasn't the rights of the journalists as employees, but the more abstract and even *moral* good of journalistic integrity. *The Wall Street Journal* was something akin to a sacred trust held through generations by the Bancroft family. These non-Bancrofts weren't alone in having doubts about the deal. The Bancroft family, whose members weren't of a single mind about the offer, issued a statement saying: "Accordingly, the Family has advised the Company's Board that it intends to meet with News Corporation to determine whether, in the context of the current or any modified News Corporation proposal, it will be possible to ensure the level of commitment to editorial independence, integrity and journalistic freedom that is the hallmark of Dow Jones" (Bancroft Family, 2007). The family also indicated it was open to other options that might achieve value Murdoch offered with stronger promises on editorial independence. The talks with others, including Pearson plc, publishers of the *Financial Times,* and the US television network NBC, came to nothing, and the vote to go with News Corp. left the family narrowly divided.

Along the way, though, one family member issued a public rebuke to himself and his kinfolk for the poor quality of stewardship of they had made – but stewardship of business, the brands and, by implication, the financial assets that other investors had entrusted to the Bancrofts by buying shares that left the family in control. Crawford Hill, a cousin of the Bancrofts and a holder of super-voting DJ shares, bemoaned the missed opportunities of recent years, when the family didn't act as owners should, but instead were passive and quiescent as the franchise stumbled through the Telerate debacle. He cited the legendary investor Warren Buffett saying DJ might have become a business worth $50 billion, not $5 billion, and he wrote: "So, we never really figured out how to be owners when we needed to most" (Hill, 2007). But Leslie Hill, a family member who opposed the deal, resigned as a Dow Jones director when the deal was announced. She acknowledged in a letter to the board that the deal was good in financial terms, but it failed to outweigh "the loss of an independent global news organization with unmatched credibility and integrity" (Ellison & Karnitschnig, 2007).

For Leslie Hill, as for Ottaway and Holtzbrinck – and we can guess the rest of the Bancroft family – stewardship of the family's legacy of strong journalistic integrity involved a moral choice that involved an appeal to a higher, *a priori* good, not a *utilitarian* decision based on shareholder value alone (Nordberg, 2007b). Crawford Hill's ethical choice, though, was for *active* participation by the family during the past 25 years of strategic drift to create strategic value, a utilitarian concept, alongside the *a priori* end of journalistic integrity. The failure to do so meant, perhaps, that it was time for someone else – even Rupert Murdoch – to assume stewardship, if perhaps for ethical aims somewhat different from what the Bancrofts had embraced.

The absence of financial performance and the missed opportunities that Crawford Hill bemoaned may have been mismanagement. But one can't help but wonder whether the root of the problem lay in a corporate purpose and a flawed governance structure that protected it from a hostile takeover, that is, from the full rigors of a market for corporate control. Boards of directors are, after all, at best the second line of defense in corporate governance. The first is the force of a competitive market.

Stewardship at Reuters

The Reuters merger with Thomson, while still facing regulatory scrutiny, was a much quieter affair. The Thomson family had long taken a stewardship approach to their businesses, at least until the point when they faced the decision to exit a business.

Editorial independence was apparent at *The Times* and *The Sunday Times* during Kenneth (later, Lord) Thomson's ownership. But the sale of the titles to Murdoch in 1981 came amid frustration over what were called at the time the "Spanish practices" of Fleet Street trade unions that prevented the introduction of labor-saving technologies at the newspapers. Murdoch acquired them and promptly launched the opening salvo in what came to be called in competing newspapers the "Battle of Wapping". Murdoch moved the papers away from Fleet Street into a rundown neighborhood to the east of London's financial district, using the wealth from his stake in Reuters he acquired with the newspapers to engineer a modernization that transformed the industry as a whole.

The revival of Reuters after 2003 came in part despite a governance structure that protected it, too, from hostile bidders and the rigors of a market for corporate control. But its board and management were less passive than those at Dow Jones, less steeped in the traditions and rituals of the stewardship elements of their roles. But they were also subject to a pretty harsh competitive environment, where the onslaught from Bloomberg made manifest the consequences of further inaction. The market worked where a stewardship-led culture of corporate governance had failed.

The new Thomson-Reuters will use the Reuters name and reputation – its *brand* in the language of marketing – for the news and financial information businesses. The word "Reuters" may be the name of the German-turned-Englishman who founded the company, but as Lawrenson and Barber (1985) recall, it sounds a lot like the Chinese word for "truth".

Conclusions

For many of the people at Dow Jones, though not for a majority of votes on the day, journalistic integrity was an end in itself, not a means to the end of greater profit and increased market share. Fairly steady cash flow and a bullet-proof shareholder structure seemed to prevent it from the most punishing effects of a free market for corporate control, but not from falling behind its industry and missing opportunities for the growth that might have enhanced it broader social role that the stewardship model of corporate governance was meant to promote.

For many people at Reuters, journalistic integrity is the basis on which it conducts the entire business. If the news is true (as it can be) and free from bias (as it can be), then clients can trust the financial data and transactions services to have integrity, too.

But there's no doubt that a complacency fostered by a dominant market position and a bullet-proof governance structure based on the stewardship model prevented it – for a while – from experiencing the full rigors of the market, including the market for corporate control.

It is too early to say how these cases will develop. But let's reflect for a moment how two such closely linked companies – often competitors, sometimes collaborators – from two different countries both relied upon a heresy in corporate governance: that shareholder value and shareholder rights were *not* supreme. This model of corporate purpose and the structures of corporate governance that sustain it seem to underpin a lot of news organizations. We know that financial markets strive on having news that is independent, and as free as possible from bias. Corporate governance itself works in the main through the transparency of corporate reporting. Indeed, Sir David Walker, in promoting guidelines for disclosure by the UK private equity industry, thought that the news media would, in part, be guarantors of governance. "I'm a great fan of the media," he told the *Financial Times*. "I think the media will do a very good job of identifying X who is not conforming to the standards" (Arnold, 2007).

Perhaps news – on political matters, too, including the news the Rupert Murdoch's News Corp. may have suppressed from reaching his Chinese television viewers – is something that is more important than shareholder value, even in a public company made up private sector shareholders. We see protections for editorial integrity in place at many of the most distinguished news organizations in the world – The New York Times Co., for example. Outside shareholders buy into these companies knowing that their voice – their votes at the annual meeting – won't count for very much. *Caveat emptor* – let the buyer of such shares beware. Some buy them precisely because they see a *social* value in the purpose of free and independent news. But similar structures are used to prop up the corporate control of business people whose purpose may be rather less worthy of a sense of stewardship from their directors. William Randolph Hearst is widely credited – or discredited – for having used the newspapers he owned to start a war. But at least he owned them outright. Silvio Berlusconi, who controlled a media empire through a pyramid structure that gives him effective control well beyond his share of the equity, used his newspapers and television stations to propel him into the prime minister's job in Italy and keep him there when others would have failed.

And what of Rupert Murdoch? He has run News Corp. in many ways as though it was his personal property, yet he owned less than a third of its shares. Dow Jones – its

journalists and the readers of its newspapers and newswires will be wondering about his commitment to the stewardship model of governance. Evidence to-date is that outside shareholders might be more concerned that the he will use these companies he only partly controls for his own purpose – the "agency problem" in corporate governance – than that he will let sentimental stewardship prevent a focus on strategic value.

Part 5: Corporate governance as an institutionalized system

This part, a single reflective chapter, summarizes the individual papers and links them in a tentative framework, as well as exploring avenues for future research.

9. A system of corporate governance?

Introduction

Corporate governance is a field without clear boundaries (Ahrens, Filatotchev, & Thomsen, 2011), intellectually or in practice. Scholars and practitioners across a wide range of disciplines lay claim to it, among them law, finance, economics, financial economics, accountancy, organizations studies, political science, strategic management and applied ethics. The papers collected in this thesis reflect some of that diversity of theoretical perspective and address concerns of several of the practical implications of work in the field. In this concluding chapter, I review the contributions of the individual chapters, consider the contribution of the thesis as a whole, and then examine how these ideas point to an agenda for future research. Building on these, and extending in an even more personal way the themes of Chapter 8, this chapter then concludes with broader discussion of research philosophy through the vehicle of a reflection on journalism and social science.

Contributions

The core of the thesis (Parts 2, 3 and 4) sketches a system of corporate governance and a view as to how institutionalization arises. Part 2 examines codification, tracing the development, institutionalization and evolution of a code of conduct, that is, the creation and maintenance of a body of decision norms. Part 3 considers corporate governance in political terms, as a contest between different interests and ideologies, while Part 4 brings the discussion to the level of individuals and boards. These elements together suggest a system of corporate governance and institutionalization.

Chapter contributions to corporate governance

The individual chapters make their own several contributions, which I summarize in slightly different terms here. Chapter 2 provides an example of how the text of codes can give shape to the discourse in a field. The codes frame the landscape, directing our attention to parts of the field and obscuring the view of other parts. The literature on

discourse analysis and framing reviewed in the course of this programme of study does not speak of framing in quite these terms. But the metaphor of frames is apposite. The picture it surrounds is a limited view and a constructed one (Berger & Luckmann, 1967), rather than a direct reflection of a more realist conception (Bhaskar, 1978).

Moreover, the codes are a social creation, the product of the interaction of actors with a surprising commitment to the field, even though that field is ill-defined. Chapter 3 has shown some of the ways that actors interact to frame the landscape, ruling in and out some possible views, views in the sense of interpretations of the texts. Translation (Czarniawska, 2007) and bricolage (Rao, Monin, & Durand, 2005) are useful metaphors for the metaphor of framing as the codes take shape.

The chapters in Part 3 of the thesis start from a different premise but head off in the same direction. The creation of the Sarbanes-Oxley Act (Chapter 4) represented an attempt to change the behaviour of US boards of directors by ordering them to perform certain activities. Specified actors (CEOs and CFOs) faced imprisonment if they actions were found wanting. This is certainly as close to coercive isomorphism as we have seen in the corporate governance debate, and the intensity of objections to Sarbox reflects the strength of opposition. To little avail. It also reflected the perception, particularly widespread in American corporate governance, that the problem is one of agency and the solution lies not in behavioural governance, as the Association of British Insurers conceived it in its submission to the 2010 UK code debate. The Sarbox solution might be called behaviourist governance, in the mode of B.F. Skinner's famous experiments with animals and humans in the 1950s, relying on incentives, rather than one relying on trust and collegiality, or even one arising from the study of what directors do at work. Much of the discussion of corporate governance, in particular studies seeking to establish relationships between mechanisms and outcomes, is based on the presumption of shareholder primacy, with an implicit view of what interests shareholders have.

Part 4 brings us back to ethics. One stream of the corporate governance literature views the field as if it were simply a branch of applied ethics. Chapter 6 has attempted to construct a view that aligns the mainstream versions of corporate governance theory with mainstream accounts of ethics, with the consequence (for consequentialists) that many people may well be acting from an ethical frame of mind when they decide issues taking routes that more normative critics would reject. There is more to explore in this grid, not least how ethical views outside those covered in the paper line up with

decision-making in corporate governance. Long ago and with mildly socialist leanings, I approached one of my earliest encounters with a senior corporate executive expecting to meet a villain. I came away with the conviction I had been in the company of a virtuous man. Virtue ethics is rather underrepresented in this collection.

Chapters 7 and 8 take us in many ways back to the beginning by posing standard corporate governance questions to companies in non-standard circumstances. What then is the right thing to do? Neither paper decides, but each shows that the decision isn't easy. All the more reason to continue the quest for the virtuous man: Institutional guidance is not enough; we are not excused from needing to choose.

Thesis contribution to institutional theory

The contributions of the individual papers in the collection point towards a system in which structures in the form of laws, codes and practices *inform* – that is, enable and constrain – strategic choice. When pushed to its limits, the system breaks down, and different ways of deciding arise. Individuals face ethical choices when the guideposts of code or law are *uninformative*, when they do not enable yet perhaps still constrain. The ethical choice is often disrupted by those with different values or interests, setting off a conflict that leads (or does not) to a course of action (or inaction), and that may lead to a new set of rules, of code or law, to guide future decisions.

Early in the process of studying for this degree, I envisaged a picture that captured many of these elements. It was a simple model, too simple to reflect the complexity, but it has stuck in my mind, with refinements as I learned more, and still seems worth giving an airing here, albeit tentatively. I alluded to it in the opening problem statement, and it is reflected, in reverse order, in the structure of the thesis.

Let us imagine for the moment that a veil of ignorance, as the philosopher John Rawls (1999) conceived it, could fall on the field of corporate governance, enveloping all its actors. Directors of corporations would have no preconceived ideas of what they should do, how they should behave, in making the decisions that managers of the corporation brought to them. In such a circumstance, they would call upon some notion of ethics, of justice, to guide their choices. They might well start, in words Rawls used in a discussion with the economist Ken Binmore (2005, p. vii), by "operationalizing Kant". Many of the directors I have met would probably have sought to operationalize Bentham instead, but the starting point is the same: directors – at least

of listed enterprises – face ethical choices virtually all the time, because the decisions they make affect somebody else's money (see Chapters 6-8).

Individual ethical decisions in a boardroom require more than a simple choice. Collective decision-making involves negotiating an understanding and outcome, a social construction involving the use of power. Project those decisions to a large stage – for example, the relations between boards and shareholders; boards and regulators; regulators and shareholders; boards, regulators and equity capital markets; or boards, shareholders and creditors – and the process becomes political, even without invoking the dominant concerns of critical management scholars. Corporate governance concerns the exercise of power (Chapter 5).

Negotiating decisions is a difficult process. When the negotiators – directors – are professional elites, wilful and opinionated, brought together only episodically (Forbes & Milliken, 1999) and therefore subject to process losses, the transaction costs rise, which scholars of the new institutional economics persuasion (e.g. Williamson, 1988) see as requiring non-market procedures, that is, ones that avoid the need to negotiate every time. Although this thesis has drawn most heavily on the sociological version of institutional theory, the two perspectives intersect here. The standard operating procedures of new institutional economics share with the rituals and routines of the new institutionalism the characteristics of getting busy people to a decision more quickly, and in a way that is more (that is, "boundedly") or less ("taken-for-granted") rational.

Such pressures no doubt lead the social groups we know as boards to look for recipes about how to do their messy jobs. One set of recipes comes in law and regulation (Chapter 4), blunt instruments of policy, or as more flexible codes of conduct (Chapters 2-3). These mechanisms of governance reduce the range of matters to be negotiated (transactions costs lower), while giving actors who adopt them easy access to public acceptance (legitimacy). According to the picture I have held in mind, these recipes, routine and rituals, these standard operating procedures, carve out a body of decisions that no longer require cognitive effort in the boardroom, where time constraints and task complexity make cognition a scarce resource. It is a resource to be protected for the sake of competitive advantage (Barney, 1991) and to ease issues of dependency (A. J. Hillman et al., 2000; Pfeffer & Salancik, 1978). These institutions create, in effect, what I call an *ersatz* ethic, a rule, the legitimacy of which provides quasi-*a priori* standing that takes the place of an ethical decision.

Through its iterations, this cycle of choice, conflict and rules suggests that principles become rules and codes grow increasingly articulated until they become too costly, leading to interest dissatisfaction, or offend against other value commitments, as the model proposed by Greenwood and Hinings (1996) theorizes. That is, over time their non- or irrationality becomes apparent, or their legitimacy comes into doubt. A practical example might help: Empirical studies may give ambiguous results on whether splitting the role of chairman and CEO improves firm performance (Carapeto et al., 2005; Dahya & Travlos, 2000), but if splitting the roles will keep shareholders quiet, what's the harm? The initial (utilitarian) ethical issue becomes a (deontological) non-ethical non-issue. Simple.

Too simple. I have slowly come to see that the Rawlsian veil of ignorance is not really part of the system of corporate governance I have observed in practice or see described in the literature. Binmore (2005), wearing an economist's hat at a philosopher's party, argues the case that ethics can be viewed as the outcome of an indefinitely repeated game with learning internalized across generations. That's not quite the same as – but not all that different from – a view that sees institutional arrangements embedded at birth (or before) and adjusted every so often when evidence accumulates of the less-than-optimal results that Meyer and Rowan (1977) said would arise from institutionalization. It also suggests another mechanism to resolve the paradox of embedded agency (Seo & Creed, 2002; Thornton & Ocasio, 2008) through organizational learning, though it's a concept, I confess, that has long given me problems. Actors learn in fits and starts, often needing that precipitating jolt (Greenwood et al., 2002) to set the change in motion.

These reflections point to a contribution to the theory of the complex fields of corporate governance and institutional theory, which I will somewhat tentatively advance.

My model is not quite what I initially conceived. Ethics does not give way to politics and politics to institutions, which supersede certain ethical stances. Rather, within institutionalized settings – those in which families and societies not to mention corporations operate – parts of one set of institutional arrangements are thrown into question when a problem offends against its logic and for which a means to resolution is not immediately obvious. Those issues open the debate, which then goes into negotiation, a costly, messy affair, as Chapters 7 and 8 document in somewhat different terms. If it happens often enough the ethic/institution comes into question.

Deinstitutionalization occurs (Oliver, 1992) and with it the search for a (time- and cost-saving) replacement. What emerges is a proto-institution (Lawrence et al., 2002; Zietsma & McKnight, 2009) – in the terms of this thesis a code, something that may require considerable negotiation, drawing on the time and cognitive capacity of elites, that is, on scarce resources, but to a valuable end. It creates a new decision-rule – an institution – that saves time and cognition in the future, one that provides the basis for normative isomorphism and through its legitimacy reduces noise in the (corporate) communications channels. But this does not happen smoothly or completely, as legacy logics persist through sedimentation (Cooper, Hinings, Greenwood, & Brown, 1996) or blending (Glynn & Lounsbury, 2005), as individuals adopt incompletely the identities appropriate to the logic (Creed et al., 2010).

If the processes of code-writing are open, participative, if they are led by a trusted figure, if they are iterative, and if they offer an escape clause to give those elites the possibility of agency, then, as the analyses in Chapters 2 and 3 suggest, there's a chance they will gain acceptance and persist over time, irrespective of whether their arrangements lead to more nearly optimal outcomes. In corporate governance, at least, we have the reminder of a code that didn't institutionalize, didn't inform the decisions of an elite. It's the joke known on the internet as Enron Ethics (2000).

Moreover, corporate governance is not one institution but many, some formal, made up of laws and rules of one country that collide with those of others, and with the informal institutions that develop within and among the increasingly global businesses listed on stock exchanges and those that make up the investment supply chain. That is, formal institutions based on one logic, in one jurisdiction, face continual challenge to their legitimacy from the logics of pre-legitimated institutions from other jurisdictions and from logics that govern the informal institutions that arise within industry or market peer groups. While a choice between sets of formal institutions may not be easy, it is not impossible. In corporate governance it may be as simple as the decision on where to site the corporate headquarters.

What emerges, therefore, is a regulative system in which formal institutions are moderated by other formal institutions and by informal ones, both inside and outside the organizational field. As a result, for institutional practices to gain acceptance and diffuse – and in this case, where actors are especially wilful and powerful – arrangements may come to include an internalized mechanism for bricolage. This practice institutionalizes experimentation with the institution itself, putting in place a

pre-condition for institutional entrepreneurship. The presence of such a mechanism may ironically reduce the demand from entrepreneurs to use it. In the UK and jurisdictions that have copied its practice, that mechanism is known as "comply-or-explain". Perhaps it is a testimony to the power of institutional forces that many companies choose to comply rather than explain. Perhaps it is also a testimony to the limitations of those institutions to affect the behaviour – to constrain the agency – of wilful and powerful actors that companies comply formally while finding ways to work around the institutional constraints.

Implications and future research

These reflections on contributions suggest several avenues for further exploration. One of the two mentioned at the end of Chapter 2 is the subject, at least in part of Chapter 3. But that chapter raised rather more questions than it answered. As promised in its final pages, what follows are some preliminary thoughts about the direction those inquiries could take.

Authorship: One of the hallmarks of the UK codes of corporate governance is how entrenched their concepts have become. That is due in part to the person of Sir Adrian Cadbury, and to a number of the individuals who served or served on his committee. His position in a family of industrialists with a long history of what we now call corporate social responsibility may have dissipated potential opposition among actors who wanted radical reform as well as those who objected to any outside interference with the affairs of private companies. The records in the Cadbury Archive suggest the committee staff and Sir Adrian himself gave such radical ideas a serious hearing before settling on a more modest set of changes. Even as they criticized Derek Higgs's specific code recommendations, contributors to the "fatal flaws only" review of his draft code praised his insights into the work of non-executive directors. That raises the question about whether a fuller consultation process, perhaps with Higgs himself in the lead, might have resolved the tensions more successfully.

During the process leading to the 2010 code, the only named person in the public discourse was Sir David Walker, who did not directly participate in its drafting. The code was largely written by Sir Christopher Hogg, chairman of the FRC.[36] Sir Christopher was deeply steeped in the folklore of corporate governance, having

[36] Based of a personal communication.

advised the Cadbury Committee after a protracted effort by Sir Adrian and the committee staff to get him to take part (see CAD-01181 for details). As we have seen, Baroness Hogg (no relation), who succeeded Sir Christopher as FRC chairman, was a contributor to the 2003 debate in her role as chairman of 3i Holdings, a company that straddles the investor-corporate divide. Stephen Haddrill, who was director-general of the ABI when the consultation processes started for the 2010 code, had become chief executive of the FRC by the time they ended. Peter Montagnon, who edited the Lex column of the *Financial Times* newspaper around the time of the Cadbury Report, went on to become director of investment affairs at the ABI and joined Hadrill at the FRC as the 2010 was undergoing final adjustments. It may be worth noting that Lok (2010) uses data from the FT Lex column to develop his version of the competing logics in identity construction in corporate governance without recognizing the identity of the column's editor during part of the time. The movements of individual voices suggest that in the small world of corporate governance codes may have a biography as well as a history. But the codes also grew more anonymous over time, suggesting that growing institutionalization dilutes the need for personality in achieving legitimacy.

Absent voices: A remarkable feature of the data used in this study in Chapter 3 is the lack of contribution from classes of actors with a vested interest in the outcome. Politicians were mainly on the sidelines. Marjorie Mowlam, a front-bench member of the Labour Party, then in opposition, met Sir Adrian at an early stage in his committee's work, promising (or perhaps threatening depending on the listener's orientation), to legislate more radical change to company law if Labour won the election due in 1992 (it lost). A backbench Labour MP submitted position papers and published articles with academics urging more radical action as well. The smaller Liberal Democrat Party contributed to the Cadbury Committee and also urged more radical changes. These interventions may have influenced the committee's approach to the breadth of opinion considered. The Higgs Review was instigated by government after Labour had come to power in 1997. But otherwise we see little in the archives of all three consultations to suggest formal political pressure. Further research might unearth other evidence to explain what other roles politicians played in the process and how more generally political forces affect codification and institutionalization.

Of interest to market-oriented observers is the nearly complete absence in the records of two large classes of investors. First are foreign investors, whose influence was growing throughout the period. According to the Office of National Statistics,

foreign share ownership in the UK was about 13 per cent at the time of the Cadbury Report. By the end of 2008 it had risen to 42 per cent, at the expense of traditional institutions to which the codes' authors paid such heed.[37] What effect the absence of foreign investors from the process of code development has on its perceived legitimacy in the future will interest corporate governance scholars and practitioners alike. Second are the hedge funds, whose holdings of equities are not as large but whose impact on share trading and therefore price discovery is very considerable indeed. With the growth of activism in some quarters of the hedge fund community (Becht, Franks, & Grant, 2010; Brav et al., 2006; Brav & Mathews, 2011), the implications for corporate governance are in flux (see Nordberg, 2010, which is also Chapter 5 of this thesis).

Logics: One of the suggestions from this study concerns the role of competing and conflicting logics on institutional change (Purdy & Gray, 2009; Thornton & Ocasio, 2008). When actors advocate importing institutional arrangements from other countries – in this case, Germany and the United States – they invoke measures already legitimated by similar actors in an adjacent organizational field. The degree of communication between those fields, in this case the growing presence of the *same actors* in different countries, suggests that legitimacy of alien ideas may be easier to achieve and institutional change more likely. We have not seen that in this case; on the contrary, the continuity of the code is more obvious in these regards than the change. But the dividing lines between fields are becoming blurred, evidenced by the energetic debate in the literature over the relative persistence or convergence of corporate governance standards (Aguilera & Cuervo-Cazurra, 2009; Chizema & Kim, 2010; Goergen et al., 2008; Gordon & Roe, 2004).

This case further suggests that these various logics – Lok (2010) identifies two; Westphal and Zajac (1998) discuss only one – interact with each other. The study provides indications that they draw their legitimacy in part from the spoken and unspoken adherence of their advocates to differing theoretical perspectives (agency theory, stewardship, resource dependency, etc.) common in the corporate governance literature, related at one level or another to what this thesis describes as the overarching logic of accountability.

Fields: Those ideas lead to a more general point about the nature of fields, where the remarks here are expressed even more tentatively than the others in this section.

[37] ONS data retrieved October 15, 2011, from http://www.statistics.gov.uk/pdfdir/share0110.pdf.

The theoretical and empirical literature makes reference to both organizational and institutional fields. Davis and Marquis (2005) consider the two terms to be interchangeable. Hardy and Maguire (2010) agree, but go on to cite Wooten and Hoffman (2008) as arguing that "organizational field" has replaced the term "institutional field". Hardy and Maguire then list a variety of authors, including Glynn (2008); Greenwood, et al. (2002); Oakes, Townley and Cooper (1998), as using the term institutional rather than organizational field. These may be examples of a merely semantic discussion, of little interest to theory itself. But this case shows evidence of adjacent organizational fields (e.g. Germany, US, UK; large listed companies, small listed companies; mainstream institutional investors, foreign shareholders, hedge funds and others) with shared interests, some common values and a common vocabulary,[38] which can mask differences in meaning.

Moreover, corporate governance is a field of many different institutions. Codes may be institutions, but so too are boards. Corporations operate within frameworks of law and regulation, often operating in more than one country's version of them. Institutional investors engage in ritualized, routine behaviour, often (but not always) predicated on a logic of shareholder value that can differ from that used by corporate boards. The contributions to post-Higgs consultation contain several examples of scepticism among company chairmen towards the idea of shareholder primacy, which we see echoed in differing ways in the academic literature (Armour et al., 2003; O'Kelley, 2011; Stout, 2011). The chairmen's views occasionally resonate with what Bainbridge (2010) terms director primacy or how Blair and Stout (1999) see the board as a mediating hierarchy.

These considerations lead me to speculate that there may be a useful theoretical distinction to draw between, on the one hand, a field of organizations operating under one or a few institutional logics, and, on the other, a field of institutions, with overlapping meanings for similar words and habituated actions, crossing the blurred boundaries of adjacent fields of organizations. In the case explored in Chapter 3, overlapping logics and blurred field boundaries seem not to have stimulated on their own significant institutional change. The work of actors who sought to import such logics may have not engaged sufficiently well in "translation" or "bricolage", two forms of institutional work that Battilana and D'Aunno (2009) describe as examples of

[38] NB: The word in the German language for corporate governance is "corporate governance".

"creating" through practical-evaluative agency. Was insufficient "translation" seen as disrupting and an attack on legitimacy?

Power: Finally, we come to what some see as the elephant in the room of institutional theory. As noted early in Chapter 3, some scholars have doubts about the concept of institutional work (Clegg, 2010; Kraatz, 2011); critical management scholars criticize institutional theory as well as management (Cooper et al., 2008; Khan, Munir, & Willmott, 2007; Lok & Willmott, 2006; Willmott, 2011). This study has used a model of critical discourse analysis (Fairclough, 1992) and yet not exploited it for its potential to examine the hidden relationships of power critical theorists see as underpinning human and organizational interaction. In describing how the codes came about and even in the present section in the list of voice absent from the debate, little has emerged about the impact of corporate governance on the impoverished pensioners of the Maxwell enterprises, the victims of Enron, the taxpayers who paid for the bank collapses and even the governments that fell in Greece, Ireland, Italy and elsewhere, in part because to the losses incurred in rescuing the financial system. Surely, there is a lot to be critical about.

Those near the centre of the field of UK corporate governance shaped the debate in ways that other actors did not, perpetuating their influence over the way corporations operate as the code was first written and then revised over time. The language of corporate governance, shaped in agency theory with its emphasis on shareholder value maximization, has institutionalized ways of (not) thinking about the organization of economic affairs. The data used in this study preclude detailed analysis of the type needed to determine, for example, the degree to which company chairmen are self-disciplining, in the sense Foucault (1979) meant, trapped in a certain mentality of governance (2002) despite their lofty positions. But irritation over being ignored, evident in the contribution of Fair Pensions during the third consultation for the 2010 code, suggests that even people directly involved in the investment supply chain can feel disenfranchised by the institutional juggernaut of the UK corporate governance community.

These are matters that some of the other papers in this collection touch upon, though in different terms. The creation of the Sarbanes-Oxley Act was an enactment of power relationships (Nordberg, 2008b; also Chapter 4). The coalitions of interests arising from the model of the shareholder stance (Nordberg, 2010; also Chapter 5) suggest ways of addressing how power plays out in the contest over corporate

governance. A detailed analysis of its role in the formation and development of the UK Corporate Governance Code will need to wait, however, for another paper.

Methods of research

This programme of study and the papers that comprise it arose out of a long reflection on the field that stemmed from my work as a business and financial journalist. My journalistic career was spent in the employment of news organizations that took great pains to avoid snap decisions about the meaning of complex events. One of the senior editors at Reuters, where I worked for 18 years, used to say: "Make your story as simple as possible, and no simpler." A version of that quote is widely attributed to Einstein, but after several years of looking for the source I found something rather close that Einstein did say (see Einstein, 1934), but it wasn't quite so simple. Still, it struck me then, as now, as a good maxim for the work I do and have done, as a journalist and as a social scientist.

If journalism is the first draft of history, then perhaps social science is the second. This reflection came about shortly after I had started to study research methodologies in the first year of PhD studies. I was teaching postgraduate students about one version of it (marketing research) at the same time I sought to start my own research studies. It was a good excuse to go back to the books on philosophy that had lain closed on my shelves for a couple of decades, and to plug the gaps with more contemporary writing. Early on I read Glaser and Strauss (1967) on grounded theory. I felt affinities between Strauss's (1987) view and the practices I was asked to conduct as a serious journalist working for serious publications written for serious readers.

Sometimes journalism was a venture into the unknown, much as the way even the purist view of grounded theory describes. I would be asked by my editors – and later as an editor I would ask my correspondents – to write a story about something that I/they had never heard of. Frequently, I/they had to conduct interviews without any background knowledge, piece together the essential information, get a sense of what was changing, and follow those leads wherever they headed. When I/they stopped hearing anything new from the sources I/they would contact, then the search would shut down and I/they would write what we had learned. Deadlines provided focus but made the observations all the more tentative.

Of course, those circumstances were few and far between. Once I/they had covered that subject matter before, even written an incomplete or frustratingly simple story, I/they would know something about it, have reference points, background. I/they would be faster at flushing out of sources what had changed. I/they would be less likely to make certain mistakes (of commission) but more likely to make others (of omission) and more susceptible to "capture". You will recall that word from the rebuke the Association of British Insurers used the Chapter 3 to describe the work of risk "experts", like the specialists among its members. Knowing something may taint work based on grounded theory, but it is also inevitable among intelligent people. The skill, discipline, trick (if you will) is to develop the ability to stand back from the inquiry, stand back from the emergent conclusions, and think again about what I/they had seen. In journalism, in the places I practiced it, we tried to turn the stone over and look at the underside, adopt the stance (as best we could) of someone involved in the story but with a very different background from our own. What would they see and write? What evidence is there, in the interview notes, the statistics, the body language of the speakers and the reactions of the audience, that might lead someone to take a different view from the emergent one? Then we would write what we saw. The story would be as simple as possible, but no simpler.

Social science research, I have found, has many parallels with this type of journalism, but with differences of some significance. The mode of operation expressed by scholars writing about research methods involves an ideal of distance and calm reflection in place of the excitement of the chase in journalism. That idealism seems to exist among researchers who eschew idealism as a philosophical stance, as evidenced in a recent exchange over critical theory and business schools in the literature (Ford, Harding, & Learmonth, 2010, 2011; Tatli, 2011) that spilled over into the Academy of Management listservs. That idealism captures a spirit of science, of discipline and patience in pursuit of truth, a spirit that the journalist, with deadlines pressing, can rarely afford. Moreover, the journalist probably wouldn't want either discipline or patience, such are the institutionalized values of the trade. The journalist knows, after all, that tomorrow is another day, the chance for another story with a different set of presumptions, a chance to achieve balance and completeness through a body of work, not a single piece.

But scholars have deadlines, too, just rather longer ones. The pressures for getting into print inherent in the publish-or-perish mentality in US universities and its

analogues elsewhere in academia push the social scientist towards impatience, threatening discipline. Those pressures arise in part, too, from the pursuit of relevance (RAE 2008) and impact (REF 2014), which are more easily accommodated when the social scientist adopts – at least in part – the mantle of the journalist, seeing the significance of a phenomenon – at least in part – through the eyes of someone outside the peer group, among users of the research findings. Three of the pieces in this collection reflect that approach (Chapters 5, 7-8); two others share its urge but have resisted, I hope, its temptations (Chapters 2-3). Each was inspired by events in the "real" world that demanded explanation for a broader public than academic peers, and not just for the sake of their contribution to a league table of research-active staff.

There is room and a need in academic social science for faster scholarship. Traditional research might then be the third rather than second draft of history, making space for a second draft with greater immediacy than academic publishing permits, with greater discipline than journalism but sharing some of its impatience. Such work is evident in corporate governance, where the urgency of the public policy debate has prompted scholars to exploit with relish the vehicle of working papers to disseminate ideas in advance of journal publication. It is no surprise that Social Science Research Network was founded by one of the most famous names in corporate governance scholarship. Something similar is afoot in the journals themselves. The move by publishers (e.g. Sage, Wiley) to online-first publication – sometimes in manuscript form (e.g. *Academy of Management Journal*, *Strategic Management Journal*) – responds to that sense of urgency. Two of the pieces in this collection (Chapters 5, 7) stimulated the editors to push these papers to the front of the queue to ensure they promptly came into print.

Such scholarship might not stand the test of time, of course. The movement in journalism from daily newspapers to websites and from the evening news bulletin to 24-hour news channels has increased the immediacy and impact of news, not always to beneficial effect. Some scholarship requires longer gestation, sober reflection, theoretical contribution, not just relevance and impact. Research needs theory-building, not just its application, even if the rush to publish pushes scholars towards

the empirical and would-be scholars towards PhDs by published work (A. Hillman, 2011).[39]

But content as well as timeliness might benefit from greater experimentation. Journals like *ephemera* and the *Journal of Management Inquiry* push at those boundaries. These reflections suggest greater variegation in social science, more publication models, and greater willingness to discard institutionalized approaches to academic writing in favour of the joint aims of relevance, impact, and – most of all – insight.

Conclusions and directions

This collection of essays contributes in several ways to our understanding of corporate governance and perhaps even on a theoretical level to how larger phenomena of codification and institutionalization take place. But I am aware of some large holes in the work, as a rather long programme for further research makes plain. And there is more.

Returning after a long gap to university studies has been a delightful if frustrating opportunity to catch up on thinking in fields ranging from philosophy and sociology, to literature and science, and sensing again the links between them. Reengaging with some of it (Foucault) and coming new to others (Giddens) has been a pleasure. Even if only little of their work is reflected directly in this collection, their views are reflected through some of the many people who cite their work.[40] I have, however, made reference in passing to some writing from that direction that seemed germane, even inescapable: Rorty, Toulmin. Others from different directions have slipped into the reflective comments in this final chapter: Bhaskar, Rawls, Binmore. I have avoided others (Kahneman, Checkland) even when they impress me as offering rich seams of explanation for the phenomena and concepts this collection explores. They beg more questions than I can answer here, or yet.

Corporate governance and the processes of studying it have complexities that this study has not captured. The story presented here is as simple as it could be, but it is still too simple. There is more work to do.

---

[39] The drive behind *this* collection, I would like to think, involves more than the "growing popularity of 'three-paper' dissertations in lieu of one large project" that Hillman (2011, p. 607) regrets.

[40] Cooper et al. (2008) cite a book I have yet to locate (Posner's *Public Intellectuals* of 2001, Harvard) saying that Foucault has been the most cited author in sociology, with double the citations of his nearest rival in 1995-2000. Giddens cannot be far down the list.

References

Achleitner, A.-K., & Kaserer, C. (2005). Private Equity Funds and Hedge Funds: A Primer. *Center for Entrepreneurial and Financial Studies, Technische Universität München* Retrieved June 21, 2008, from http://ssrn.com/paper=1109100

Adams, R. B., Hermalin, B. E., & Weisbach, M. S. (2010). The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey. *Journal of Economic Literature, 48*(1), 58-107.

Admati, A. R., & Pfleiderer, P. (2009). The 'Wall Street Walk' and Shareholder Activism: Exit as a Form of Voice. *Review of Financial Studies, 22*(7), 2645-2685.

Admati, A. R., & Pfleiderer, P. C. (2007). The 'Wall Street Walk' and Shareholder Activism: Exit as a Form of Voice. *Stanford University Graduate School of Business* Retrieved June 22, 2008, from https://gsbapps.stanford.edu/researchpapers/library/RP1918R2.pdf

Agle, B. R., Mitchell, R. K., & Sonnenfeld, J. A. (1999). Who matters to CEOs? An investigation of stakeholder attributes and salience, corporate performance, and CEO values. *Academy of Management Journal, 42*(5), 507-525.

Aguilera, R. V., & Cuervo-Cazurra, A. (2004). Codes of Good Governance Worldwide: What is the Trigger? *Organization Studies, 25*(3), 415-443.

Aguilera, R. V., & Cuervo-Cazurra, A. (2009). Codes of Good Governance. *Corporate Governance: An international review, 17*(3), 376-387.

Ahrens, T., Filatotchev, I., & Thomsen, S. (2011). The research frontier in corporate governance. *Journal of Management and Governance, 15*(3), 311-325.

Akkermans, D., Van Ees, H., Hermes, N., Hooghiemstra, R., Van der Laan, G., Postma, T., et al. (2007). Corporate Governance in the Netherlands: an overview of the application of the Tabaksblat Code in 2004. *Corporate Governance: An International Review, 15*(6), 1106-1118.

Alvesson, M., & Kärreman, D. (2000). Varieties of Discourse: On the Study of Organizations through Discourse Analysis. *Human Relations, 53*(9), 1125-1149.

Amason, A. C. (1996). Distinguishing the effects of functional and dysfunctional conflict on strategic decision making: Resolving a paradox for top management teams. *Academy of Management Journal, 39*(1), 123-148.

Anabtawi, I., & Stout, L. A. (2008). Fiduciary Duties for Activist Shareholders. Retrieved February 29, 2008, from http://ssrn.com/paper=1089606

Ansoff, H. I. (1987). *Corporate Strategy* (2nd Revised ed.). London: Penguin.

Arcot, S., Black, J., & Owen, G. (2007). From Local to Global: The rise of AIM as a stock market for growing companies. *London School of Economics* Retrieved May 9, 2008, from http://www.londonstockexchange.com/NR/rdonlyres/4B0DF62A-BE1E-44F5-8616-EA2891873F1D/0/AIMshortreport.pdf

Arcot, S., Bruno, V., & Faure-Grimaud, A. (2010). Corporate governance in the UK: Is the comply or explain approach working? *International Review of Law and Economics, 30*(2), 193-201.

Arcot, S., & Bruno, V. G. (2006). In Letter but not in Spirit: An Analysis of Corporate Governance in the UK. Retrieved July 3, 2009, from http://ssrn.com/paper=819784

Arcot, S., & Bruno, V. G. (2007). One Size Does Not Fit All, After All: Evidence from Corporate Governance. *1st Annual Conference on Empirical Legal Studies* Retrieved March 21, 2008, from http://ssrn.com/paper=887947

Armour, J., Deakin, S., & Konzelmann, S. J. (2003). Shareholder Primacy and the Trajectory of UK Corporate Governance. *British Journal of Industrial Relations, 41*(3), 531-555.
Arnold, M. (2007, August 1). Media enlisted to keep buy-out firms honest. *Financial Times*,
Aspen Institute. (2007). The Aspen Principles: Long-Term Value Creation: Guiding Principles For Corporations and Investors. Retrieved June 27, 2007, from http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/BSP_PRINCIPLESFINALJUNE2007.PDF
Aspen Institute. (2009, December 15). Overcoming Short-termism: A Call for a More Responsible Approach to Investment and Business Management. Retrieved February 27, 2010, from http://www.aspeninstitute.org/sites/default/files/content/images/BSPonlineBroch.pdf
ASX. (2008). Short Selling: ASX Public Consultation. *ASX Australian Stock Exchange* Retrieved June 18, 2008, from http://www.asx.com.au/about/pdf/short_selling_public_consultation_paper.pdf
Atkins, P. S. (2007). Remarks Before the Financial Services Roundtable Lawyers Council 2007 Spring Meeting. *Securities and Exchange Commission* Retrieved May 9, 2008, from http://www.sec.gov/news/speech/2007/spch051007psa.htm
Bainbridge, S. M. (2010). Director Primacy. *UCLA School of Law, Law-Econ Research Paper No. 10-06* Retrieved June 8, 2010, from http://ssrn.com/paper=1615838
Baker Tilly, & Faegre & Benson. (2007). Taking AIM Survey. Retrieved May 9, 2008, from http://www.faegre.com/articles/downform2.asp?doc_num=1&aid=2219
Balkin, D. B., & Gomez-Mejia, L. R. (1990). Matching compensation and organizational strategies. *Strategic Management Journal, 11*(2), 153-169.
Bancroft Family. (2007, May 31). Bancrofts' Statement on Dow Jones Bid. *WSJonline* Retrieved May 31, 2007, from http://online.wsj.com/article/SB118065083352520636.html
Barnea, A., & Rubin, A. (2010). Corporate Social Responsibility as a Conflict Between Shareholders. *Journal of Business Ethics, 97*(1), 71-86.
Barney, J. (1991). Firm Resources and Sustained Competitive Advantage. *Journal of Management, 17*(1), 99-120.
Barriaux, M. (2007, May 1). Quality not quantity: one way for the junior market to grow up. *The Guardian*, from http://www.guardian.co.uk/business/2007/may/01/12
Bartholomeusz, S., & Tanewski, G. A. (2006). The Relationship between Family Firms and Corporate Governance. *Journal of Small Business Management, 44*(2), 245-267.
Battilana, J., & D'Aunno, T. (2009). Institutional work and the paradox of embedded agency. In T. B. Lawrence, R. Suddaby & B. Leca (Eds.), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (pp. 31-58). Cambridge: Cambridge University Press.
Bebchuk, L. A. (2005). The Case for Increasing Shareholder Power. *Harvard Law Review, 118*(3), 833-914.
Bebchuk, L. A., Cohen, A., & Ferrell, A. (2004). What Matters in Corporate Governance? Retrieved March 10, 2008, from http://ssrn.com/paper=593423
Bebchuk, L. A., & Fried, J. M. (2003). Executive Compensation as an Agency Problem. *Journal of Economic Perspectives, 17*(3), 71-92.
Bebchuk, L. A., Grinstein, Y., & Peyer, U. C. (2009). Lucky CEOs and Lucky Directors. *Journal of Finance, Forthcoming* Retrieved July 24, 2009, from http://ssrn.com/paper=1405316

Bebchuk, L. A., & Roe, M. J. (1999). A theory of path dependence in corporate ownership and governance. *Stanford Law Review, 52*(1), 127-170.
Becht, M., Franks, J., Mayer, C., & Rossi, S. (2008). Returns to Shareholder Activism: Evidence from a Clinical Study of the Hermes UK Focus Fund. *Review of Financial Studies, Advanced copy published online, May 28*.
Becht, M., Franks, J. R., & Grant, J. (2010). Hedge Fund Activism in Europe. *SSRN eLibrary* Retrieved June 24, 2010, from http://ssrn.com/paper=1616340
Becht, M., Franks, J. R., Mayer, C., & Rossi, S. (2006). Returns to Shareholder Activism Evidence from a Clinical Study of the Hermes U.K. Focus Fund. *ECGI - Finance Working Paper No. 138/2006* Retrieved June 27, 2007, from http://ssrn.com/abstract=934712
Bell, D. R., Deighton, J., Reinartz, W. J., Rust, R., & Schwartz, G. (2002). Seven Barriers to Customer Equity Management. *Journal of Services Research, 5*(1), 77-85.
Bentham, J. (1789/1904). An Introduction to the Principles of Morals and Legislation. *Library of Economics and Liberty* Retrieved June 8, 2009, from http://www.econlib.org/library/Bentham/bnthPML.html
Berger, P. L., & Luckmann, T. (1967). *The Social Construction of Reality*. New York: Anchor Books.
Berle, A. A., & Means, G. C. (1932/1991). *The Modern Corporation and Private Property* (Revised ed.). New Brunswick, NJ: Transaction Publishers.
Bhagat, S., & Bolton, B. (2008). Corporate governance and firm performance. *Journal of Corporate Finance, 14*(3), 257-273.
Bhaskar, R. (1978). *A Realist Theory of Science* (2nd ed.). London: Verso.
Binmore, K. (2005). *Natural Justice*. New York: Oxford University Press.
Blair, M. M., & Stout, L. A. (1999). A team production theory of corporate law. *Virginia Law Review, 85*(2), 247-328.
Bogle, J. (2003). Speech on Owners' Capitalism to the National Investor Relations Institute annual conference. Retrieved June 28, 2009, from http://www.vanguard.com/bogle_site/sp20030611.html
Bourdieu, P. (1990). *The Logic of Practice*. Cambridge: Polity.
Bovensiepen, N., & Blechschmidt, P. (2005, April 18). Müntefering kritisiert Manager: Bei manchen Unternehmern stimmt die Ethik nicht. *Süddeutsche Zeitung* Retrieved August 8, 2007, from http://www.sueddeutsche.de/deutschland/artikel/468/51417/
Bowie, N. E. (1999). *Business Ethics: A Kantian perspective*. Oxford: Blackwell.
Boyd-Barrett, O. (1980). *The International News Agencies* (Vol. 13th). London: Constable.
Brandeis, L. D. (1913-14). Other People's Money. *Louis D. Brandeis Collection, Louis D. Brandeis School of Law, University of Louisville* Retrieved November 10, 2009, from http://www.law.louisville.edu/library/collections/brandeis/node/191
Brav, A., Jiang, W., Thomas, R. S., & Partnoy, F. (2006). Hedge Fund Activism, Corporate Governance, and Firm Performance. Retrieved February 8, 2009, from http://ssrn.com/paper=948907
Brav, A., & Mathews, R. D. (2011). Empty voting and the efficiency of corporate governance. *Journal of Financial Economics, 99*(2), 289-307.
Brenes, E. R., Madrigal, K., & Requena, B. (2011). Corporate governance and family business performance. *Journal of Business Research, 64*(3), 280-285.
Brick, I. E., Palmon, O., & Wald, J. K. (2006). CEO compensation, director compensation, and firm performance: Evidence of cronyism? *Journal of Corporate Finance, 12*(3), 403-423.

Brickley, J. A., Smith, C. W., Jr., & Zimmerman, J. L. (2003). Corporate governance, ethics, and organizational architecture. *Journal of Applied Corporate Finance, 15*(3), 34-45.
Brink, A. (2010). Enlightened Corporate Governance: Specific Investments by Employees as Legitimation for Residual Claims. *Journal of Business Ethics, 93*(4), 641-651.
Bris, A., Goetzmann, W. N., & Zhu, N. (2007). Efficiency and the Bear: Short Sales and Markets Around the World. *The Journal of Finance, 62*(3), 1029-1079.
Brown, L. D., & Caylor, M. L. (2006). Corporate governance and firm valuation. *Journal of Accounting & Public Policy, 25*(4), 409-434.
Business Roundtable. (1978). *The Role and composition of the board of directors of the large publicly owned corporation: Statement of the Business Roundtable*. Washington: Business Roundtable.
Cadbury, A. (1992). The Financial Aspects of Corporate Governance. Retrieved April 9, 2007, from http://www.ecgi.org/codes/documents/cadbury.pdf
Cadbury, A., & Millstein, I. (2005). A New Agenda for the ICGN. Retrieved April 9, 2007, from http://www.icgn.org/conferences/2005/documents/cadbury_millstein.pdf
Cadbury Archive. (2010). The Cadbury Archive. *Judge Business School, Cambridge University* Retrieved June 13, 2011, from http://www.jbs.cam.ac.uk/cadbury/index.html
Canada, J., Kuhn, J. R., & Sutton, S. G. (2008). Accidentally in the public interest: The perfect storm that yielded the Sarbanes-Oxley act. *Critical Perspectives on Accounting, 19*(7), 987-1003.
Carapeto, M., Lasfer, M., & Machera, K. (2005). Does Duality Destroy Value? *Cass Business School Research Paper* Retrieved June 27, 2008, from http://ssrn.com/paper=686707
Caswell, J. A. (1984). An Institutional Perspective on Corporate Control and the Network of Interlocking Directorates. *Journal of Economic Issues, 18*(2), 619.
CED. (2007). Built to Last: Focusing Corporations on Long-Term Performance. Retrieved June 27, 2007, from http://www.ced.org/docs/report/report_corpgov2007.pdf
CFA Institute. (2005). Code of Ethics and Standards of Professional Conduct. Retrieved June 22, 2008, from http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2005.n8.4568
Chandler, A. D., Jr. (1977). *The Visible Hand: The managerial revolution in American Business*. Cambridge, MA: Belknap Press.
Chang, E. C., Cheng, J. W., & Yu, Y. (2007). Short-Sales Constraints and Price Discovery: Evidence from the Hong Kong Market. *The Journal of Finance, 62*(5), 2097-2121.
Charkham, J. (1994). *Keeping Good Company: A study of corporate governance in five countries*. Oxford: Oxford University Press.
Charkham, J. (2005). *Keeping Better Company: Corporate governance ten years on*. Oxford: Oxford University Press.
Charny, D. (2004). The Politics of Corporate Convergence. In J. N. Gordon & M. J. Roe (Eds.), *Convergence and Persistence in Corporate Governance* (pp. 293-309). Cambridge: Cambridge University Press.
Charoenrook, A., & Daouk, H. (2005). A Study of Market-Wide Short-Selling Restrictions. Retrieved June 21, 2008, from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=687562

Chhaochharia, V., & Grinstein, Y. (2007). Corporate Governance and Firm Value: The Impact of the 2002 Governance Rules. *Journal of Finance, 62*(4), 1789-1825.
Chia, R. (2000). Discourse Analysis Organizational Analysis. *Organization, 7*(3), 513-518.
Child, J. W., & Marcoux, A. M. (1999). Freeman and Evan: Stakeholder Theory in the Original Position. *Business Ethics Quarterly, 9*(2), 207-223.
Chizema, A., & Kim, J. (2010). Outside Directors on Korean Boards: Governance and Institutions. *Journal of Management Studies, 47*(1), 109-129.
Chua, J. H., Chrisman, J. J., & Sharma, P. (1999). Defining the Family Business by Behavior. *Entrepreneurship: Theory & Practice, 23*(4), 19-39.
Clegg, S. R. (2010). The State, Power, and Agency: Missing in Action in Institutional Theory? *Journal of Management Inquiry, 19*(1), 4-13.
Clegg, S. R., Courpasson, D., & Philips, N. (2006). *Power and Organizations*. London: Sage.
Clifford, C. P. (2008). Value creation or destruction? Hedge funds as shareholder activists. *Journal of Corporate Finance, 14*(4), 323-336.
Coase, R. H. (1937). The Theory of the Firm. *Economica, 4*(16), 386-405.
Coates, J. C. (2007). The Goals and Promise of the Sarbanes-Oxley Act. *Journal of Economic Perspectives, 21*(1), 91-116.
Collier, P., & Zaman, M. (2005). Convergence in European Corporate Governance: the audit committee concept. *Corporate Governance: An International Review, 13*(6), 753-768.
Committee on Capital Markets Regulation. (2007). The Competitive Position of the U.S. Public Equity Market. Retrieved May 8, 2008, from http://www.capmktsreg.org/pdfs/The_Competitive_Position_of_the_US_Public_Equity_Market.pdf
Conyon, M., Judge, W. Q., & Useem, M. (2011). Corporate Governance and the 2008–09 Financial Crisis. *Corporate Governance: An International Review, 19*(5), 399-404.
Conyon, M. J. (1994). Corporate Governance Changes in UK Companies Between 1988 and 1993. *Corporate Governance: An international review, 2*(2), 87-100.
Cooper, D. J., Ezzamel, M., & Willmott, H. (2008). Examining 'institutionalization': A critical theoretic perspective. In R. Greenwood, C. Oliver, K. Sahlin & R. Suddaby (Eds.), *The Sage Handbook of Organizational Institutionalism* (pp. 673-701). London: Sage Publications.
Cooper, D. J., Hinings, B., Greenwood, R., & Brown, J. L. (1996). Sedimentation and Transformation in Organizational Change: The Case of Canadian Law Firms. *Organization Studies, 17*(4), 623-647.
Cousins, J., & Sikka, P. (1993). Accounting for Change: Facilitating Power and Accountability. *Critical Perspectives on Accounting, 4*(1), 53-72.
Creed, W. E. D., Dejordy, R., & Lok, J. (2010). Being the Change: Resolving Institutional Contradiction through Identity Work. *Academy of Management Journal, 53*(6), 1336-1364.
Cromme Commission. (2002/2007). German Corporate Governance Code. Retrieved June 20, 2007, from http://www.corporate-governance-code.de
Crowther, D., & Caliyurt, K. T. (Eds.). (2004). *Stakeholders and Social Responsibility*. Kuala Lumpur: Ansted University Press.
Crystal, G. S. (1992). *In Search of Excess: The Overcompensation of American Executives*. New York: W.W. Norton.
Curtis, A., & Fargher, N. L. (2008). Does Short-Selling Amplify Price Declines or Align Stocks with Their Fundamental Values? Retrieved June 18, 2008, from http://ssrn.com/paper=817446

Czarniawska, B. (2007). Has Organization Theory a Tomorrow? *Organization Studies, 28*(1), 27-29.
Czarniawska, B., & Joerges, B. (1996). The travel of ideas. In B. Czarniawska & G. Sevon (Eds.), *Translating Organizational Change* (pp. 13-48). Berlin: de Gruyter.
Dahya, J., & Travlos, N. G. (2000). Does the one man show pay? Theory and evidence on the dual CEO revisited. *European Financial Management, 6*(1), 85-98.
Daily, C. M., Dalton, D. R., & Cannella, A. A., Jr. (2003). Corporate governance: Decades of dialogue and data. *Academy of Management Review, 28*(3), 371-382.
Daily, C. M., Dalton, D. R., & Rajagopalan, N. (2003). Governance through ownership: centuries of practice, decades of research. *Academy of Management Journal, 46*(2), 151-158.
Dalton, C. M., & Dalton, D. R. (2005). Boards of Directors: Utilizing Empirical Evidence in Developing Practical Prescriptions. *British Journal of Management, 16*(s1), S91-S97.
Dalton, D. R., & Dalton, C. M. (2011). Integration of Micro and Macro Studies in Governance Research: CEO Duality, Board Composition, and Financial Performance. *Journal of Management, 37*(2), 404-411.
Davis, G. F., & Marquis, C. (2005). Prospects for Organization Theory in the Early Twenty-First Century: Institutional Fields and Mechanisms. *Organization Science, 16*(4), 332-343.
Davis, J. H., Schoorman, F. D., & Donaldson, L. (1997). Toward a Stewardship Theory of Management. *Academy of Management Review, 22*(1), 20-47.
Davis, S., Lukomnik, J., & Pitt-Watson, D. (2006). *The New Capitalists: How Citizen Investors are Reshaping the Corporate Agenda*. Boston: Harvard Business School Press.
De Cock, C. (2000). Essai: Reflections on Fiction, Representation, and Organization Studies: An Essay with Special Reference to the Work of Jorge Luis Borges. *Organization Studies, 21*(3), 589-609.
de Rothschild, E. (2008, May 9). Ethical standards must be restored in finance. Retrieved May 10, 2008, from http://www.ft.com/cms/s/0/8b7d255a-1d62-11dd-82ae-000077b07658.html
Deephouse, D. L., & Carter, S. M. (2005). An Examination of Differences Between Organizational Legitimacy and Organizational Reputation. *Journal of Management Studies, 42*(2), 329-360.
DEFRA. (2006). Environmental Key Performance Indicators: Reporting Guidelines for UK Business. Retrieved June 20, 2007, from http://www.defra.gov.uk/environment/business/envrp/envkpi-guidelines.pdf
del Brio, E. B., Maia-Ramires, E., & Perote, J. (2006). Corporate governance mechanisms and their impact on firm value. *Corporate Ownership & Control, 4*(1), 25-36.
DiMaggio, P. (1988). Interest and agency in institutional theory. In L. G. Zucker (Ed.), *Institutional patterns and culture* (pp. 3-32). Cambridge, MA: Ballinger.
DiMaggio, P. J., & Powell, W. W. (1983). The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. *American Sociological Review, 48*(2), 147-160.
Doble, M. (1997). The Impact of the Cadbury Code on Selection of Directors and Board Composition in UK Newly-quoted Companies, 1990-1994. *Corporate Governance: An international review, 5*(4), 214.
Donaldson, T., & Dunfee, T. W. (1994). Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory. *Academy of Management Review, 19*(2), 252-284.
Donaldson, T., & Preston, L. E. (1995). The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications. *Academy of Management Review, 20*(1), 65-91.

Dow Jones & Co. (2007, August 1). Text of Dow Jones Editorial Agreement. Retrieved August 2, 2007, from http://online.wsj.com/article_print/SB118598565803884843.html
Dreman, D. (2000, November 13). The Contrarian: When Buy Means Sell. *Forbes*.
du Plessis, C. J. A. (2008). Ethical Failure Under the Agency Logic. *Group & Organization Management, 33*(6), 781-804.
Duarte, J., Kong, K., Young, L. A., & Siegel, S. (2007). Foreign Listings, US Equity Markets, and the Impact of the Sarbanes-Oxley Act Retrieved May 9, 2008, from http://ssrn.com/abstract=1062641
EALIC. (2004). Letter to William H. Donaldson, Chairman of the US Securities and Exchange Commission. Retrieved May 8, 2008, from http://www.dai.de/internet/dai/dai-2-0.nsf/LookupDL/9C63F02365CF8480C1256E37005BDFDF/$File/Deregistration+Letter+--+Organizations+02+2004.pdf
Eaton, P. (2010a, October 6). Board agree proposed sale. *LiverpoolFC.tv* Retrieved October 26, 2010, from http://www.liverpoolfc.tv/news/latest-news/chairman-addresses-fans
Eaton, P. (2010b, October 15). Exclusive: Chairman on sale. *LiverpoolFC.tv* Retrieved October 26, 2010, from http://www.liverpoolfc.tv/news/latest-news/exclusive-chairman-on-sale
ECGI. (2007). General Assembly, Annual Lecture and Debate: This House believes that long-term shareholders should have double voting rights. *European Corporate Governance Institute* Retrieved June 28, 2007, from http://www.ecgi.org/conferences/agm2007/video/index.php
Economist. (2011, December 15). Euphemisms: Making Murder Acceptable. *Economist.com* Retrieved December 27, 2011, from http://www.economist.com/node/21541767
Edmans, A. (2009). Blockholder Trading, Market Efficiency, and Managerial Myopia. *The Journal of Finance, 64*(6), 2481-2513.
Edmans, A. (forthcoming). Blockholder Trading, Market Efficiency, and Managerial Myopia. *Journal of Finance*.
Edmans, A., & Manso, G. (2009). Governance Through Exit and Voice: A Theory of Multiple Blockholders. Retrieved March 20, 2009, from http://ssrn.com/abstract=1102730
Edwards, R. (1988). *Goodbye Fleet Street*. London: Jonathan Cape.
Einstein, A. (1934). On the Method of Theoretical Physics. [The Herbert Spencer Lecture, June 1933]. *Philosophy of Science, 1*(2), 163-169.
Eisenhardt, K. M. (1989). Agency Theory: An Assessment and Review. *Academy of Management Review, 14*(1), 57-74.
Eisenhardt, K. M., & Zbaracki, M. J. (1992). Strategic decision making. *Strategic Management Journal, 13*(Winter Special Issue), 17-37.
Ellison, S., & Karnitschnig, M. (2007, August 1). Murdoch Wins His Bid for Dow Jones. Retrieved August 1, 2007, from http://online.wsj.com/article_print/SB118589043953483378.html
Elsayed, K. (2007). Does CEO Duality Really Affect Corporate Performance? *Corporate Governance: An international review, 15*(6), 1203-1214.
Emirbayer, M., & Mische, A. (1998). What Is Agency? *The American Journal of Sociology, 103*(4), 962-1023.
Enriques, L., & Volpin, P. F. (2007). Corporate Governance Reforms in Continental Europe. *Journal of Economic Perspectives, 21*(1), 117-140.

Enron. (2000, July). Enron Code of Ethics. *TheSmokingGun.com* Retrieved August 18, 2009, from http://www.thesmokinggun.com/graphics/packageart/enron/enron.pdf
Evan, W. M., & Freeman, R. E. (1993). A Stakeholder Theory of the Modem Corporation: Kantian Capitalism. In T. L. Beauchamp & N. E. Bowie (Eds.), *Ethical Theory and Business* (4th ed., pp. 75-93). Upper Saddle River, NJ: Prentice Hall.
Fahlenbrach, R., Low, A., & Stulz, R. M. (2010). The Dark Side of Outside Directors: Do They Quit When They are Most Needed? *Fisher College of Business Working Paper 2010-03-007* Retrieved April 28, 2010, from http://ssrn.com/paper=1585192
Fairclough, N. (1992). *Discourse and Social Change*. Cambridge: Polity Press.
Fama, E. F. (1980). Agency Problems and the Theory of the Firm. *Journal of Political Economy, 88*(2), 288-307.
Fama, E. F., & Jensen, M. C. (1983a). Agency Problems and Residual Claims. *Journal of Law and Economics, 26*(2), 327-349.
Fama, E. F., & Jensen, M. C. (1983b). Separation of Ownership and Control. *Journal of Law and Economics, 23*(2), 301-325.
Fear, J. (1997). German Capitalism. In T. K. McCraw (Ed.), *Creating Modern Capitalism: How entrepreneurs, companies, and countries triumphed in three industrial revolutions* (pp. 133-182). Cambridge, MA: Harvard University Press.
Fengler, S., & Russ-Mohl, S. (2008). The Crumbling Hidden Wall: towards an Economic Theory of Journalism. *Kyklos, 61*(4), 520-542.
Ferri, F., & Maber, D. (2008). Say on Pay Vote and CEO Compensation: Evidence from the UK. Retrieved July 30, 2008, from http://ssrn.com/paper=1169446
Filatotchev, I., Toms, S., & Wright, M. (2006). The firm's strategic dynamics and corporate governance life-cycle. *International Journal of Managerial Finance, 2*(4), 256-279.
Financial Reporting Council. (2003). Combined Code on Corporate Governance. Retrieved June 20, 2006, from http://www.frc.org.uk/documents/pagemanager/frc/Web%20Optimised%20Combined%20Code%203rd%20proof.pdf
Financial Reporting Council. (2004, February 10). 2003 Annual Review. Retrieved September 2, 2011, from http://www.frc.org.uk/documents/pagemanager/frc/annualreview2003.pdf
Financial Reporting Council. (2010). The UK Corporate Governance Code. Retrieved May 29, 2010, from http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf
Finkelstein, S., & Hambrick, D. C. (1990). Top-Management-Team Tenure and Organizational Outcomes: The Moderating Role of Managerial Discretion. *Administrative Science Quarterly, 35*(3), 484-503.
Finkelstein, S., Hambrick, D. C., & Cannella, A. A., Jr. (2009). *Strategic Leadership: Theory and research on executives, top management teams, and boards*. Oxford: Oxford University Press.
Fletcher, L. B., & Miles, M. P. (2004). The Law of Unintended Consequences: The Effects of the Sarbanes-Oxley Act on Venture Funding of Smaller Enterprises. *Journal of Private Equity, 8*(1), 70-75.
Forbes, D. P., & Milliken, F. J. (1999). Cognition and corporate governance: Understanding boards of directors as strategic decision-making groups. *Academy of Management Review, 24*(3), 489-505.

Ford, J., Harding, N., & Learmonth, M. (2010). Who is it That Would Make Business Schools More Critical? Critical Reflections on Critical Management Studies. *British Journal of Management, 21*, s71-s81.
Ford, J., Harding, N., & Learmonth, M. (2011). Who is it that Would Make Business Schools More Critical? A Response to Tatli. *British Journal of Management, Online First*.
Foucault, M. (1979). *Discipline and Punish: The Birth of the Prison* (A. Sheridan, Trans.). London: Penguin.
Foucault, M. (2002). Governmentality (Robert Hurley and others, Trans.). In J. D. Faubion (Ed.), *Power: Essential Works of Foucault 1954-1984* (Vol. 3, pp. 201-222). London: Penguin.
Fox, M. A., & Hamilton, R. T. (1994). Ownership and diversification: Agency theory or stewardship theory. *Journal of Management Studies, 31*(1), 69-81.
Frankena, W. K. (1963). *Ethics*. Englewood Cliffs, NJ: Prentice-Hall.
Franks, J. R., Mayer, C., & Rossi, S. (2005). Spending Less Time with the Family: The Decline of Family Ownership in the UK. In R. K. Morck (Ed.), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (pp. 581-611). Chicago: University of Chicago Press for NBER.
Freeman, R. E. (1984). *Strategic Management: A Stakeholder Approach*. Boston: Pitman Publishing.
Freeman, R. E. (1994). The Politics of Stakeholder Theory: Some Future Directions. *Business Ethics Quarterly, 4*(4), 409-422.
Freeman, R. E., & Evan, W. M. (1990). Corporate Governance: A Stakeholder Interpretation. *Journal of Behavioral Economics, 19*(4), 337-359.
Freeman, R. E., & Philips, R. A. (2002). Stakeholder theory: A libertarian defense. *Business Ethics Quarterly, 12*(3), 331-349.
Friedman, M. (1970, September 13). The Social Responsibility of Business is to Increase its Profits. *The New York Times Magazine,* 122-126.
FSA. (2008). Short Selling Instrument. Retrieved June 18, 2008, from http://www.fsa.gov.uk/pubs/press/PN0572008_instrument.pdf
FT.com. (2007, August 9). Central banks' aggressive moves stun markets. *Financial Times* Retrieved June 20, 2011, from http://www.ft.com/cms/s/0/569c9418-46a0-11dc-a3be-0000779fd2ac.html#axzz1PjNs9g5z
GC100. (2007, February 7). Companies Act (2006) – Directors' duties. Retrieved August 5, 2011, from http://www.practicallaw.com/8-378-8813
Ghoshal, S. (2005). Management Theories Are Destroying Good Management Practices. *Academy of Management Learning & Education, 4*(1), 75-91.
Gibson, O. (2010, October 15). Liverpool FC finally has a new owner after 'win on penalties'. *Guardian.co.uk* Retrieved October 26, 2010, from http://www.guardian.co.uk/football/2010/oct/15/liverpool-fc-get-new-owner
Giddens, A. (1984). *The Constitution of Society*. Cambridge: Polity Press.
Gillan, S., & Starks, L. (2007). The Evolution of Shareholder Activism in the United States. *Journal of Applied Corporate Finance, 19*(1), 55-73.
Glaser, B., & Strauss, A. (1967). *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Chicago: Aldine.
Glassman, C. A. (2003, July 16). Speech by SEC Commissioner: Remarks Before the Exchequer Club. Retrieved May 10, 2008, from http://www.sec.gov/news/speech/spch071603cag.htm
Glynn, M. A. (2008). Configuring the Field of Play: How Hosting the Olympic Games Impacts Civic Community. *Journal of Management Studies, 45*(6), 1117-1146.

Glynn, M. A., & Lounsbury, M. (2005). From the Critics' Corner: Logic Blending, Discursive Change and Authenticity in a Cultural Production System. *Journal of Management Studies, 42*(5), 1031-1055.
Goergen, M., Manjon, M. C., & Renneboog, L. (2008). Is the German system of corporate governance converging towards the Anglo-American model? *Journal of Management and Governance, 12*(1), 37-71.
Gomez-Mejia, L. R., Tosi, H., & Hinkin, T. (1987). Managerial Control, Performance, and Executive Compensation. *Academy of Management Journal, 30*(1), 51-70.
Gompers, P., Ishii, J., & Metrick, A. (2003). Corporate governance and equity prices. *Quarterly Journal of Economics, 118*(1), 107-155.
Goncharov, I., Werner, J. R., & Zimmermann, J. (2006). Does Compliance with the German Corporate Governance Code Have an Impact on Stock Valuation? An empirical analysis. *Corporate Governance: An international review, 14*(5), 432-445.
Gordon, J. N., & Roe, M. J. (Eds.). (2004). *Convergence and Persistence in Corporate Governance*. Cambridge: Cambridge University Press.
Gourevitch, P. A., & Shinn, J. (2005). *Political Power and Corporate Control: The New Global Politics of Corporate Governance*. Princeton, NJ: Princeton University Press.
Graafland, J. J. (2002). Profits and Principles: Four Perspectives. *Journal of Business Ethics, 35*(4), 293-305.
Green, O. (1992, June 9). Personal View: Why Cadbury leaves a bitter taste. *Financial Times,* p. 19, from http://global.factiva.com
Green, S. E., Jr. (2004). A rhetorical theory of diffusion. *Academy of Management Review, 29*(4), 653-669.
Green, S. E., Jr., Li, Y., & Nohria, N. (2009). Suspended in self-spun webs of significance: A rhetorical model of institutionalization and institutionally embedded agency. *Academy of Management Journal, 52*(1), 11-36.
Greenbury, R. (1995). Directors' Remuneration: Report of the Study Group. *European Corporate Governance Institute* Retrieved October 27, 2008, from http://www.ecgi.org/codes/documents/greenbury.pdf
Greenwood, R., & Hinings, C. R. (1996). Understanding Radical Organizational Change: Bringing Together the Old and the New Institutionalism. *Academy of Management Review, 21*(4), 1022-1054.
Greenwood, R., & Suddaby, R. (2006). Institutional entrepreneurship in mature fields: The Big Five accounting firms. *Academy of Management Journal, 49*(1), 27-48.
Greenwood, R., Suddaby, R., & Hinings, C. R. (2002). Theorizing change: The role of professional associations in the transformation of institutionalized fields. *Academy of Management Journal, 45*(1), 58-80.
Guthrie, J., & Parker, L. D. (1989). Corporate Social Responsibility: A Rebuttal of Legitimacy Theory. *Accounting and Business Research, 19*(76), 343-352.
Halberstam, D. (1979). *The Powers That Be*. New York: Alfred A. Knopf Inc.
Hambrick, D. C., & Finkelstein, S. (1987). Managerial Discretion: A bridge between polar views of organizations. In L. L. Cummings & B. M. Staw (Eds.), *Research in Organizational Behavior*. Greenwich, CT: JAI Press.
Hambrick, D. C., & Mason, P. A. (1984). Upper Echelons: The Organization as a Reflection of Its Top Managers. *Academy of Management Review, 9*(2), 193.
Hampel, R. (1998). Committee of Corporate Governance - Final Report. Retrieved April 25, 2008, from http://www.ecgi.org/codes/documents/hampel.pdf
Hampson, S. (2007, January 30). Why values must still matter to tomorrow's companies. *Financial Times* Retrieved June 20, 2007, from http://www.tomorrowscompany.com/uploads/hampsonarticle.doc

Hansmann, H., & Kraakman, R. H. (2004). The End Of History For Corporate Law. In J. N. Gordon & M. J. Roe (Eds.), *Convergence and Persistence in Corporate Governance* (pp. 33-68). Cambridge: Cambridge University Press.
Hardy, C., & Maguire, S. (2010). Discourse, Field-Configuring Events, and change in Organizations and Institutional Fields: Narratives of DDT and the Stockholm Convention. *Academy of Management Journal, 53*(6), 1365-1392.
Hasnas, J. (1998). The Normative Theories of Business Ethics: A Guide for the Perplexed. *Business Ethics Quarterly, 8*(1), 19-42.
Hawkins, D. E. (2006). *Corporate Social Responsibility: Balancing Tomorrow's Sustainability and Today's Profitability*. Basingstoke, Hants: Palgrave Macmillan.
Haxhi, I., & van Ees, H. (2010). Explaining diversity in the worldwide diffusion of codes of good governance. *Journal of International Business Studies, 41*(4), 710-726.
Healy, P. M., & Palepu, K. (2003). The Fall of Enron. *Journal of Economic Perspectives, 17*(2), 3-26.
Hendry, J. (2001). Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate. *Business Ethics Quarterly, 11*(1), 159-176.
Hendry, J. (2004). *Between Enterprise and Ethics: Business and Management in a Bimoral Society*. Oxford: Oxford University Press.
Hermes, N., Postma, T. J. B. M., & Zivkov, O. (2006). Corporate governance codes in the European Union: Are they driven by external or domestic forces? *International Journal of Managerial Finance, 2*(4), 280-301.
Higgs, D. (2003). Review of the Role and Effectiveness of Non-Executive Directors. Retrieved October 15, 2006, from http://www.ecgi.org/codes/documents/higgsreport.pdf
Hill, C. (2007, July 27). Bancroft Cousin's Letter: 'Paying the Price for Our Passivity'. Retrieved July 28, 2007, from http://online.wsj.com/article/SB118556453898880571.html
Hillier, D., & McColgan, P. (2009). Firm Performance and Managerial Succession in Family Managed Firms. *Journal of Business Finance & Accounting, 36*(3/4), 461-484.
Hillman, A. (2011). Editor's comments: What is the future of theory? *Academy of Management Review, 36*(4), 607-609.
Hillman, A. J., Cannella, A. A., Jr., & Paetzold, R. L. (2000). The resource dependence role of corporate directors: Strategic adaptation of board composition in response to environmental change. *Journal of Management Studies, 37*(2), 235-255.
Hillman, A. J., Shropshire, C., Certo, S. T., Dalton, D. R., & Dalton, C. M. (2011). What I Like About You: A Multilevel Study of Shareholder Discontent with Director Monitoring. *Organization Science, 22*(3), 675-687.
Holderness, C. G. (2009). The Myth of Diffuse Ownership in the United States. *Review of Financial Studies, 22*(4), 1377-1408.
Holm, C., & Schøler, F. (2010). Reduction of Asymmetric Information Through Corporate Governance Mechanisms - The Importance of Ownership Dispersion and Exposure toward the International Capital Market. *Corporate Governance: An International Review, 18*(1), 32-47.
Holm, P. (1995). The Dynamics of Institutionalization: Transformation Processes in Norwegian Fisheries. *Administrative Science Quarterly, 40*(3), 398-422.
Hu, H. T., & Black, B. S. (2006). Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms. *The Business Lawyer, 61*(3), 1011-1070.
ICAEW. (2011). Directors' duties and derivative actions. *ICAEW Technical Resources* Retrieved August 5, 2011, from http://www.icaew.com/en/technical/legal-and-regulatory/modernising-uk-company-law/directors-duties-and-derivative-actions

Independent Association of Publishers' Employees. (2007, May 1). Dow Jones, News Corp. Statements On Murdoch's Acquisition Offer: Employees Union Also Comments on Bid. Retrieved May 1, 2007, from http://online.wsj.com/article/SB117803330235488273.html
Janis, I. J. (1972). *Victims of Groupthink: A psychological study of foreign policy decisions*. Boston: Houghton Mifflin.
Jensen, M. C. (2001). Value maximization, stakeholder theory, and the corporate objective function. *Journal of Applied Corporate Finance, 14*(3), 8-21.
Jensen, M. C., & Meckling, W. H. (1976). Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. *The Journal of Financial Economics, 3*(4), 305-360.
Jørgensen, K. M., & Boje, D. M. (2010). Resituating narrative and story in business ethics. *Business Ethics: A European Review, 19*(3), 253-264.
Judge, W. Q., Douglas, T. J., & Kutan, A. M. (2008). Institutional Antecedents of Corporate Governance Legitimacy. *Journal of Management, 34*(4), 765-785.
Kahan, M., & Rock, E. B. (2006). Hedge Funds in Corporate Governance and Corporate Control. Retrieved June 21, 2008, from http://ssrn.com/paper=919881
Kant, I. (1785/1964). *Groundwork of the Metaphysic of Morals* (H. J. Paton, Trans. 3rd ed.). New York: Harper Torchbooks.
Kaplan, R. S., & Norton, D. P. (1992). The Balanced Scorecard--Measures That Drive Performance. *Harvard Business Review, 70*(1), 71-79.
Keasey, K. (2006). Executive Compensation in the UK. *Journal of Financial Regulation and Compliance, 14*(3), 235-241.
Kerr, G. (2006). Transformation at BTR. *Journal of the International Academy for Case Studies, 12*(3), 79-101.
Khan, F. R., Munir, K. A., & Willmott, H. (2007). A Dark Side of Institutional Entrepreneurship: Soccer Balls, Child Labour and Postcolonial Impoverishment. *Organization Studies, 28*(7), 1055–1077.
Kipperman, F., McAfee, R. P., & Vakkur, N. V. (2008). Non-pecuniary Costs of Sarbanes Oxley. WR-554-CCEG. Retrieved February 6, 2009, from http://www.rand.org/pubs/working_papers/2008/RAND_WR554.pdf
Kirkpatrick, G. (2009). The Corporate Governance Lessons from the Financial Crisis. *OECD Financial Market Trends* Retrieved October 26, 2011, from http://www.oecd.org/dataoecd/32/1/42229620.pdf
Knight, R. F., & Pretty, D. J. (2003). Depositary Receipts: Investing in a world-class asset. Retrieved May 10, 2008, from http://www.adrbny.com/files/OxfordMetrica.pdf
Kraatz, M. S. (2011). Two Cheers for Institutional Work. *Journal of Management Inquiry, 20*(1), 59-61.
Kumar, P., & Sivaramakrishnan, K. (2008). Who Monitors the Monitor? The Effect of Board Independence on Executive Compensation and Firm Value. *Review of Financial Studies, 21*(3), 1371-1401.
Laeven, L., & Levine, R. (2008). Complex Ownership Structures and Corporate Valuations. *Review of Financial Studies, 21*(2), 579-604.
Lane, C. (2003). Changes in corporate governance of German corporations: convergence to the Anglo-American model? *Competition & Change, 7*(2/3), 79-100.
Lane, S., Astrachan, J., Keyt, A., & McMillan, K. (2006). Guidelines for Family Business Boards of Directors. *Family Business Review, 19*(2), 147-167.
Lawrence, T. B. (2008). Power, institutions and organizations. In R. Greenwood, C. Oliver, K. Sahlin & R. Suddaby (Eds.), *The Sage Handbook of Organizational Institutionalism* (pp. 170-197). London: Sage Publications.

Lawrence, T. B., Hardy, C., & Phillips, N. (2002). Institutional effects of interorganizational collaboration: The emergence of proto-institutions. *Academy of Management Journal, 45*(1), 281-290.
Lawrence, T. B., & Suddaby, R. (2006). Institutions and Institutional Work. In S. Clegg, C. Hardy, T. B. Lawrence & W. R. Nord (Eds.), *The Sage handbook of organization studies* (2nd ed., pp. 215-254). London: Sage.
Lawrence, T. B., Suddaby, R., & Leca, B. (2011). Institutional work: Refocusing institutional studies of organization. *Journal of Management Inquiry, 20*(1), 52-58.
Lawrenson, J., & Barber, L. (1985). *The Price of Truth: The Story of the Reuters £££ Millions*. Edinburgh: Mainstream.
Lazonick, W., & O'Sullivan, M. (2000). Maximizing shareholder value: a new ideology for corporate governance. *Economy & Society, 29*(1), 13-35.
Lea, D. (2004). The imperfect nature of corporate responsibilities to stakeholders. *Business Ethics Quarterly, 14*(2), 201-217.
Lee, P. (2002). Not Badly Paid But Paid Badly. *Corporate Governance: An international review, 10*(2), 69-75.
Library of Congress. (2002). H.R.3763, The Sarbanes-Oxley Act. Retrieved October 15, 2006, from http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h3763enr.txt.pdf
Lindblom, C. K. (1994). *The Concept of Organizational Legitimacy and its Implications for Corporate Social Responsibility Disclosure*. Paper presented at the Critical Perspectives on Accounting Conference.
Liverpool FC. (2010, October 15). Liverpool FC sold to NESV. *LiverpoolFC.tv* Retrieved October 26, 2010, from http://www.liverpoolfc.tv/news/latest-news/liverpool-fc-sold-to-nesv
Lok, J. (2010). Institutional Logics as Identity Projects. *Academy of Management Journal, 53*(6), 1305-1335.
Lok, J., & Willmott, H. (2006). Institutional Theory, Language, and Discourse Analysis: A Comment on Phillips, Lawrence, and Hardy. *Academy of Management Review, 31*(2), 477-480.
Lounsbury, M. (2007). A tale of two cities: Competing logics and practice variation in the professionalizing of mutual funds. *Academy of Management Journal, 50*(2), 289-307.
MacAvoy, P., & Millstein, I. (2003). *The Recurrent Crisis In Corporate Governance*. Basingstoke: Palgrave Macmillan.
MacNeil, I., & Li, X. (2006). Comply or Explain: Market Discipline and Non-Compliance with the Combined Code. *Corporate Governance: An international review, 14*(5), 486-496.
Maguire, S., & Phillips, N. (2008). 'Citibankers' at Citigroup: A Study of the Loss of Institutional Trust after a Merger. *Journal of Management Studies, 45*(2), 372-401.
Maharaj, R. (2008). Corporate governance, groupthink and bullies in the boardroom. *International Journal of Disclosure and Governance, 5*(1), 69-92.
Marens, R. (2002). Inventing Corporate Governance: The Mid-Century Emergence of Shareholder Activism. *Journal of Business & Management, 8*(4), 365-389.
Margolis, J. D. (1998). Psychological Pragmatism and the Imperative of Aims: A New Approach for Business Ethics. *Business Ethics Quarterly, 8*(3), 409-431.
Margolis, J. D., & Walsh, J. P. (2003). Misery Loves Companies: Rethinking Social Initiatives by Business. *Administrative Science Quarterly, 48*(2), 268-305.
Marron, M. B., Sarabia-Panol, Z., Sison, M. D., Rao, S., & Niekamp, R. (2010). The scorecard on reporting of the global financial crisis. *Journalism Studies, 11*(2), 270-283.

Martynov, A. (2009). Agents or Stewards? Linking Managerial Behavior and Moral Development. *Journal of Business Ethics, 90*(2), 239-249.
Maslow, A. H. (1943). A Theory of Human Motivation. *Psychological Review, 50*(4), 370-396.
McCall, J. J. (2002). Leadership and Ethics: Corporate Accountability to Whom, for What and by What Means? *Journal of Business Ethics, 38*(1/2), 133-139.
McDonald, M. L., & Westphal, J. D. (2003). Getting by with the Advice of Their Friends: CEOs' Advice Networks and Firms' Strategic Responses to Poor Performance. *Administrative Science Quarterly, 48*(1), 1-32.
McKenzie, M., & Henry, Ó. T. (2007). The Determinants of Short Selling in the Hong Kong Equities Market. Retrieved June 18, 2008, from http://www.economics.unimelb.edu.au/SITE/research/workingpapers/wp07/1001.pdf
McKinsey & Co. (2007). Sustaining New York's and the US' Global Financial Services Leadership. Retrieved May 8, 2008, from http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf
McKnight, P. J., & Weir, C. (2009). Agency costs, corporate governance mechanisms and ownership structure in large UK publicly quoted companies: A panel data analysis. *The Quarterly Review of Economics and Finance, 49*(2), 139-158.
McNulty, T., & Pettigrew, A. (1999). Strategists on the Board. *Organization Studies, 20*(1), 47-74.
McNulty, T., Roberts, J., & Stiles, P. (2003, January 13). Creating accountability within the board: The work of the effective non-executive director. *A report for the Review of the Role and Effectiveness of the Non-Executive Director conducted by Mr Derek Higgs* Retrieved August 21, 2010, from http://webarchive.nationalarchives.gov.uk/tna/+/http://www.dti.gov.uk/cld/non_exec_review/pdfs/stilesreport.pdf/
McNulty, T., Roberts, J., & Stiles, P. (2005). Undertaking Governance Reform and Research: Further Reflections on the Higgs Review. *British Journal of Management, 16*(s1), S99-S107.
Meyer, J. W., & Rowan, B. (1977). Institutionalized Organizations: Formal Structure as Myth and Ceremony. *American Journal of Sociology, 83*(2), 340-363.
Mill, J. S. (1863/1991). Utilitarianism. In J. Gray (Ed.), *John Stuart Mill: On Liberty and Other Essays* (pp. 131-204). Oxford: Oxford University Press.
Miller, D., & Le Breton-Miller, I. (2006). Family Governance and Firm Performance: Agency, Stewardship, and Capabilities. *Family Business Review, 19*(1), 73-87.
Miller, G. S. (2006). The Press as a Watchdog for Accounting Fraud. *Journal of Accounting Research, 44*(5), 1001-1033.
Milne, R. (2005, October 19). Investors open fire on VW's deal with Porsche. *Financial Times*,
Milne, R. (2006, December 18). A chairman with no desire to leave office. *Financial Times*,
Milne, R., Williamson, H., & Tait, N. (2008, May 28). Bitter fight for control of VW moves to the courts. *Financial Times*,
Mintzberg, H. (1987). Crafting Strategy. *Harvard Business Review, 65*(4), 66-75.
Mitchell, A., & Sikka, P. (1993). Accounting For Change: The Institutions of Accountancy. *Critical Perspectives on Accounting, 4*(1), 29-52.
Mitchell, R. K., Agle, B. R., & Wood, D. J. (1997). Toward a theory of stakeholder identification and salience: Defining the principle of who and what really counts. *Academy of Management Review, 22*(4), 853-886.

Monks, R. A. G., & Minow, N. (1991). *Power and Accountability*. New York: HarperCollins.
Montgomery, B. (1989). European Community's Draft Fifth Directive: British Resistance and Community Procedures. *Comparative Labor Law Journal, 10*(3), 429-451.
Mooney, B., & Simpson, B. (2003). *Breaking News: How the Wheels Came Off at Reuters*. Chichester: Capstone.
MORI. (2002). Non-Executive Directors Survey – The Higgs Review Topline Results. Retrieved September 2, 2011, from http://www.ipsos-mori.com/Assets/Docs/Archive/Polls/dti-higgs.pdf
Mullerat, R. (2010). *International corporate social responsibility: the role of corporations in the economic order of the 21st century*. Alphen aan den Rijn, The Netherlands: Kluwer Law International.
Muth, M. M., & Donaldson, L. (1998). Stewardship Theory and Board Structure: A Contingency Approach. *Corporate Governance: An International Review, 6*(1), 5-28.
Nadler, D. A. (2004). Building Better Boards. *Harvard Business Review, 82*(5), 102-111.
Nasdaq. (2002). Summary of NASDAQ Corporate Governance Proposals. Retrieved November 3, 2002, from http://www.nasdaq.com/about/Corp_Gov_Summary101002.pdf
Nasdaq. (2008). Listing on NASDAQ. Retrieved May 8, 2008, from http://www.nasdaq.com/about/listing_information.stm
New York Stock Exchange. (2003). Final NYSE Corporate Governance Rules. Retrieved October 15, 2006, from http://www.ecgi.org/codes/documents/finalcorpgovrules.pdf
Newell, R., & Wilson, G. (2002). A premium for good governance. *McKinsey Quarterly* Retrieved May 28, 2007, from http://www.mckinseyquarterly.com/article_abstract.aspx?ar=1205&L2=39&L3=3
Ng, W., & De Cock, C. (2002). Battle in the boardroom: A discursive perspective. *Journal of Management Studies, 39*(1), 23-49.
Ng, W., & Roberts, J. (2007). 'Helping the family': The mediating role of outside directors in ethnic Chinese family firms. *Human Relations, 60*(2), 285-314.
Nicholson, B. (2008). The role of the regulator. In K. Rushton (Ed.), *The Business Case for Corporate Governance* (pp. 100-118). Cambridge: Cambridge University Press.
Nordberg, D. (2003). Cost of compliance is staggering - DaimlerChrysler CFO. Retrieved May 8, 2008, from http://www.edgevantage.co.uk/categories/article.asp?i=1267
Nordberg, D. (2004). European issuers seek easier delisting from US markets. Retrieved May 8, 2008, from http://www.edgevantage.co.uk/categories/article.asp?i=1720
Nordberg, D. (2005a, May 16). Don't be 'overly cautious' on internal control - SEC Retrieved May 10, 2008, from http://www.edgevantage.co.uk/categories/article.asp?i=2470
Nordberg, D. (2005b). Governance lesson as heads roll at Deutsche Börse. Retrieved May 9, 2005, from http://www.edgevantage.co.uk/categories/article.asp?i=2457
Nordberg, D. (2005c). Private conversation with a former Reuters editor.
Nordberg, D. (2007a). Disclose derivatives if you want transparency – IRS. Retrieved July 24, 2007, from http://www.edgevantage.co.uk/categories/article.asp?i=3673
Nordberg, D. (2007b). Ethics of Corporate Governance. Retrieved July 31, 2007, from http://ssrn.com/paper=1004038
Nordberg, D. (2008a). The Ethics of Corporate Governance. *Journal of General Management, 33*(6), 35-52.

Nordberg, D. (2008b). Waste Makes Haste: Sarbanes-Oxley, Competitiveness and the Subprime Crisis. *Journal of Financial Regulation and Compliance, 16*(4), 365-383.
Nordberg, D. (2010). The Politics of Shareholder Activism. In H. K. Baker & R. Anderson (Eds.), *Corporate Governance: A Synthesis of Theory, Research, and Practice* (pp. 409-425). New York: John Wiley & Sons.
Nowland, J. (2008). The Effect of National Governance Codes on Firm Disclosure Practices: Evidence from Analyst Earnings Forecasts. *Corporate Governance: An international review, 16*(6), 475-491.
NYSE. (2003). Final NYSE Corporate Governance Rules. Retrieved October 15, 2006, from http://www.ecgi.org/codes/documents/finalcorpgovrules.pdf
NYSE. (2008). NYSE Euronext Annual Report and 10-K Filing. Retrieved May 7, 2008, from http://www.nyse.com/pdfs/23542acl.pdf
O'Kelley, C. R. T. (2011). The Theory of the Firm: The Corporation as Sole-Proprietor Surrogate. *SSRN eLibrary* Retrieved June 17, 2011, from http://ssrn.com/paper=1858936
O'Neill, H. M., Saunders, C. B., & McCarthy, A. D. (1989). Board Members, Corporate Social Responsiveness and Profitability: Are Tradeoffs Necessary? *Journal of Business Ethics, 8*(5), 353-357.
O'Rourke, D. (2003). Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring. *Policy Studies Journal, 31*(1), 1-29.
Oakes, L. S., Townley, B., & Cooper, D. J. (1998). Business Planning as Pedagogy: Language and Control in a Changing Institutional Field. *Administrative Science Quarterly, 43*(2), 257-292.
Ocasio, W., & Joseph, J. (2005). Cultural adaptation and institutional change: The evolution of vocabularies of corporate governance, 1972-2003. *Poetics, 33*(3-4), 163-178.
Oliver, C. (1992). The Antecedents of Deinstitutionalization. *Organization Studies, 13*(4), 563.
Orin, R. M. (2008). Ethical Guidance and Constraint Under the Sarbanes-Oxley Act of 2002. *Journal of Accounting, Auditing & Finance, 23*(1), 141-171.
Ottaway, J. (2007a, July 31). Statement from Jim Ottaway. Retrieved August 1, 2007, from http://online.wsj.com/article/SB118592662065184072.html
Ottaway, J. (2007b, May 6). Statements by Jim, Jay Ottaway On News Corp. Bid for Dow Jones. Retrieved May 6, 2007, from http://online.wsj.com/article/SB117847597734093670.html
Pagano, M., & Volpin, P. F. (2005). The Political Economy of Corporate Governance. *American Economic Review, 95*(4), 1005-1030.
Paine, L., Deshpandé, R., Margolis, J. D., & Bettcher, K. E. (2005). Up to Code. *Harvard Business Review, 83*(12), 122-133.
Paley, A. R., & Hilzenrath, D. S. (2008, December 24). SEC Chief Defends His Restraint. Retrieved June 19, 2009, from http://www.washingtonpost.com/wp-dyn/content/article/2008/12/23/AR2008122302765.html
Partnoy, F., & Thomas, R. S. (2006). Gap Filling, Hedge Funds, and Financial Innovation. *Vanderbilt University Law School Law and Economics Working Paper No. 06-21* Retrieved April 14, 2009, from http://ssrn.com/paper=931254
Pass, C. (2006). The revised Combined Code and corporate governance: An empirical survey of 50 large UK companies. *Managerial Law, 48*(5), 467-478.
Paulson, H. M., Jr., Steel, R. K., & Nason, D. G. (2008). Blueprint for a modernized financial regulatory structure. Retrieved May 10, 2008, from http://www.treas.gov/press/releases/reports/Blueprint.pdf

Pettigrew, A. M., & McNulty, T. (1995). Power and Influence in and Around the Boardroom. *Human Relations, 48*(8), 845-873.
Pfeffer, J., & Salancik, G. R. (1978). *The External Control of Organizations: A Resource Dependence Perspective*. New York: Harper & Row.
Phillips, N., Lawrence, T. B., & Hardy, C. (2004). Discourse and institutions. *Academy of Management Review, 29*(4), 635-652.
Piotroski, J. D., & Srinivasan, S. (2008). Regulation and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings. Retrieved May 9, 2008, from http://ssrn.com/abstract=956987
Popp, A., Toms, S., & Wilson, J. F. (2003). Strategy, Governance and Industrial Organization: Historical Perspectives on the Dynamics of Industrial Clustering in England. *University of Nottingham Business School Working Paper* Retrieved December 28, 2011, from http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.200.9771&rep=rep1&type=pdf
Porter, M. E. (1980). *Competitive Strategy*. New York: Free Press.
Porter, M. E. (1990). *Competitive Advantage of Nations*. New York: Free Press.
Pugliese, A., Bezemer, P.-J., Zattoni, A., Huse, M., Bosch, F. A. J. V. d., & Volberda, H. W. (2009). Boards of Directors' Contribution to Strategy: A Literature Review and Research Agenda. *Corporate Governance: An international review, 17*(3), 292-306.
Purdy, J. M., & Gray, B. (2009). Conflicting logics, mechanisms of diffusion, and multilevel dynamics in emerging institutional fields. *Academy of Management Journal, 52*(2), 355-380.
Pye, A., & Pettigrew, A. (2006). Strategizing and Organizing: Change as a Political Learning Process, Enabled by Leadership. *Long Range Planning, 39*(6), 583-590.
Qian, J., Strahan, P. E., & Zhu, J. L. (2009). The Economic Benefits of the Sarbanes-Oxley Act? Evidence from a Natural Experiment. *Financial Institutions Center, Wharton School Online-Resource (31, [11] S)* Retrieved May 5, 2012, from http://fic.wharton.upenn.edu/fic/papers/09/0941.pdf
Quail, J. (2000). The proprietorial theory of the firm and its consequences. *Journal of Industrial History, 3*(1), 1-28.
Rao, H., & Giorgi, S. (2006). Code Breaking: How Entrepreneurs Exploit Cultural Logics to Generate Institutional Change. *Research in Organizational Behavior, 27*, 269-304.
Rao, H., Monin, P., & Durand, R. (2005). Border Crossing: Bricolage and the Erosion of Categorical Boundaries in French Gastronomy. *American Sociological Review, 70*(6), 968-991.
Rappaport, A. (1986). *Creating shareholder value: The new standard for business performance*. New York: Free Press.
Rawls, J. (1999). *A Theory of Justice* (Revised ed.). Cambridge, MA: Belknapp Press.
Read, D. (1992). *The Power of News: The History of Reuters 1849-1989*. Oxford: Oxford University Press.
Reay, T., & Hinings, C. R. (2009). Managing the Rivalry of Competing Institutional Logics. *Organization Studies, 30*(6), 629-652.
Reuters. (2004, October 7). Reuters Inaugurates Its New Facility In Bangalore. Retrieved August 3, 2007, from http://about.reuters.com/pressoffice/pressreleases/index.asp?pressid=2355
Reuters. (2007 update). Independence & Trust Principles. Retrieved August 3, 2007, from http://about.reuters.com/aboutus/overview/independence.asp
Rhodes, C., & Brown, A. D. (2005). Writing Responsibly: Narrative Fiction and Organization Studies. *Organization, 12*(4), 467-491.

Roberts, J. (1991). The possibilities of accountability. *Accounting, Organizations and Society, 16*(4), 355-368.
Roberts, J. (2001). Trust and Control in Anglo-American Systems of Corporate Governance: The Individualizing and Socializing Effects of Processes of Accountability. *Human Relations, 54*(12), 1547-1572.
Roberts, J. (2005). Agency Theory, Ethics and Corporate Governance. In C. R. Lehman (Ed.), *Corporate Governance: Does One Size Fit Any? Advances in Public Interest Accounting* (pp. 249-269). London/Amsterdam: Elsevier.
Roberts, J. (2009). No one is perfect: The limits of transparency and an ethic for 'intelligent' accountability. *Accounting, Organizations and Society, 34*(8), 957-970.
Roberts, J., McNulty, T., & Stiles, P. (2005). Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom. *British Journal of Management, 16*(S1), S5-S26.
Roberts, J., Sanderson, P., Barker, R., & Hendry, J. (2006). In the mirror of the market: The disciplinary effects of company/fund manager meetings. *Accounting, Organizations and Society, 31*(3), 277-294.
Rodriguez-Dominguez, L., Gallego-Alvarez, I., & Garcia-Sanchez, I. M. (2009). Corporate Governance and Codes of Ethics. *Journal of Business Ethics, 90*(2), 187-202.
Roe, M. J. (2003). *Political Determinants of Corporate Governance: Political Context, Corporate Impact*. Oxford: Oxford University Press.
Romano, R. (2005a). Quack Corporate Governance. *Regulation, 28*(4), 36-44.
Romano, R. (2005b). The Sarbanes-Oxley Act and the Making of Quack Corporate Governance. *Yale Law Journal, 114*(7), 1521-1611.
Rorty, R. (1989). *Contingency, Irony, and Solidarity*. Cambridge: Cambridge University Press.
Rust, R. T., Lemon, K. N., & Zeithaml, V. A. (2004). Return on Marketing: Using Customer Equity to Focus Marketing Strategy. *Journal of Marketing, 68*(1), 109-127.
Sacconi, L. (2006). A Social Contract Account for CSR as Extended Model of Corporate Governance (Part I): Rational Bargaining and Justification. *Journal of Business Ethics, 68*(3), 259-281.
Sacconi, L. (2007). A Social Contract Account for CSR as an Extended Model of Corporate Governance (II): Compliance, Reputation and Reciprocity. *Journal of Business Ethics, 75*(1), 77-96.
Sanderson, R., & Burgess, K. (2010, May 28). Directors must be elected annually. *FT.com* Retrieved May 28, 2010, from http://www.ft.com/cms/s/0/6fa115c2-69ef-11df-a978-00144feab49a.html
Schäfer, D., & Mackintosh, J. (2009, March 15). Hedge funds may sue Porsche over VW. *Financial Times* Retrieved June 26, 2009, from http://www.ft.com/cms/s/0/ac72c164-1188-11de-87b1-0000779fd2ac.html
Schmidt, R. (1977). The board of directors and financial interests. *Academy of Management Journal, 20*(4), 677-682.
Scholes, L., Wright, M., Westhead, P., & Bruining, H. (2010). Strategic changes in family firms post management buyout: Ownership and governance issues. *International Small Business Journal, 28*(5), 505-521.
Schudson, M. (2002). The news media as political institutions. *Annual Review of Political Science, 5*(1), 249.
SEC. (2004). 17 CFR Parts 240, 241, and 242: Short Sales; Final Rule and Notice 'Regulation SHO'. Retrieved June 18, 2008, from http://www.sec.gov/rules/final/34-50103.pdf

SEC. (2007a). Release No. 34-55540; Termination of a foreign private issuer's registration of a class of securities; final rule. Retrieved May 8, 2008, from http://www.sec.gov/rules/final/2007/34-55540.pdf

SEC. (2007b). Release Nos. 33-8879; 34-57026; Acceptance from foreign private issuers of financial statements prepared in accordance with international financial reporting standards without reconciliation to U.S. GAAP; Final rule. Retrieved May 8, 2008, from http://www.sec.gov/rules/final/2007/33-8879.pdf

Seidl, D., & Sanderson, P. (2009). Applying 'comply-or-explain': Conformance with codes of corporate governance in the UK and Germany. Retrieved June 29, 2009, from http://www.jbs.cam.ac.uk/news/events/governancesymposium/downloads/seidl.pdf

Seo, M.-G., & Creed, W. E. D. (2002). Institutional contradictions, praxis, and institutional change: A dialectical perspective. *Academy of Management Review, 27*(2), 222-247.

Shabbir, A. (2008). To Comply or Not to Comply: Evidence on Changes and Factors Associated with the Changes in Compliance with the UK Code of Corporate Governance. Retrieved July 6, 2008, from http://ssrn.com/paper=1101412

Sharfman, B. S. (2010, January 20). When Shareholder Primacy Does Not Apply. *SSRN eLibrary* Retrieved January 27, 2010, from http://ssrn.com/paper=1518597

Sherman, S. (2002). Enron: Uncovering the Uncovered Story. *Columbia Journalism Review, 40*(6), 22-28.

Shipilov, A. V., Greve, H. R., & Rowley, T. J. (2010). When do interlocks matter? Institutional logics and the diffusion of multiple corporate governance practices. *Academy of Management Journal, 53*(4), 846-864.

Shleifer, A., & Vishny, R. W. (1997). A Survey of Corporate Governance. *Journal of Finance, 52*(2), 737-783.

Simon, H. A. (1955). A Behavioral Model of Rational Choice. *Quarterly Journal of Economics, 69*(2), 99-118.

Simon, H. A. (1959). Theories of Decision-Making in Economics and Behavioral Science. *American Economic Review, 49*(3), 253-283.

Singer, A. (2010). Integrating Ethics and Strategy: A Pragmatic Approach. *Journal of Business Ethics, 92*(4), 479-491.

Smith, R. (2003). Audit Committees Combined Code Guidance. Retrieved December 29, 2008, from http://www.ecgi.org/codes/documents/ac_report.pdf

Smith, R. (2010, August 19). Liverpool must win their battle to oust Tom Hicks and George Gillett. *Telegraph.co.uk* Retrieved October 26, 2010, from http://blogs.telegraph.co.uk/sport/rorysmith/100011780/liverpool-must-win-their-war-on-tom-hicks-and-george-gillett/

Smith, S. (2010, October 15). Timeline: Liverpool FC ownership battle. *FT.com* Retrieved October 26, 2010, from http://www.ft.com/cms/s/0/cc9bedcc-d864-11df-a7b4-00144feabdc0.html

Stiles, P. (2001). The Impact of the Board on Strategy: An Empirical Examination. *Journal of Management Studies, 38*(5), 627-650.

Stiles, P., & Taylor, B. (1993). Benchmarking corporate governance: The impact of the Cadbury Code. *Long Range Planning, 26*(5), 61-71.

Stiles, P., & Taylor, B. (2001). *Boards at Work – How Directors View Their Roles and Responsibilities*. Oxford: Oxford University Press.

Stout, L. A. (2011). New Thinking on Shareholder Primacy *UCLA School of Law, Law-Econ Research Paper No. 11-04* Retrieved February 26, 2011, from http://ssrn.com/paper=1763944

Strauss, A. (1987). *Qualitative Analysis for Social Scientists*. Cambridge: Cambridge University Press.
Strauss, A., & Corbin, J. (1998). *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (2nd ed.). London: Sage.
Suchman, M. C. (1995). Managing legitimacy: strategic and institutional approaches. *Academy of Management Review, 20*(3), 571-610.
Suddaby, R. (2010). Challenges for Institutional Theory. *Journal of Management Inquiry, 19*(1), 14-20.
Suddaby, R., & Greenwood, R. (2005). Rhetorical Strategies of Legitimacy. *Administrative Science Quarterly, 50*(1), 35-67.
Sundaramurthy, C., & Lewis, M. (2003). Control and collaboration: Paradoxes of governance. *Academy of Management Review, 28*(3), 397-415.
Takeover Panel. (2007). The Takeover Code. Retrieved July 24, 2007, from http://www.thetakeoverpanel.org.uk/new/codesars/DATA/code.pdf
Tambini, D. (2010). What are financial journalists for? *Journalism Studies, 11*(2), 158-174.
Tatli, A. (2011). On the Power and Poverty of Critical (Self) Reflection in Critical Management Studies: A Comment on Ford, Harding and Learmonth. *British Journal of Management*, OnlineFirst.
Thompson, P. A. (2009). Market Manipulation? Applying the Propaganda Model to Financial Media Reporting. *Westminster Papers in Communication and Culture, 6*(2), 73-96.
Thornton, P. H., & Ocasio, W. (1999). Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958-1990. *The American Journal of Sociology, 105*(3), 801-843.
Thornton, P. H., & Ocasio, W. (2008). Institutional logics. In R. Greenwood, C. Oliver, K. Sahlin & R. Suddaby (Eds.), *The Sage Handbook of Organizational Institutionalism* (pp. 99-129). London: Sage.
Toms, S., & Wright, M. (2002). Corporate Governance, Strategy and Structure in British Business History, 1950-2000. *Business History, 44*(3), 91-124.
Toms, S., & Wright, M. (2005). Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950-2000. *Business History, 47*(2), 267-295.
Tonello, M. (2006). Revisiting Stock Market Short-Termism. *The Conference Board Research Report No. R-1386-06-RR* Retrieved July 28, 2009, from http://ssrn.com/abstract=938466
Tuggle, C. S., Schnatterly, K., & Johnson, R. A. (2010). Attention patterns in the boardroom: How board composition and processes affect discussion of entrepreneurial issues. *Academy of Management Journal, 53*(3), 550-571.
Tyson, L. (2003). The Tyson Report on the Recruitment and Development of Non-Executive Directors, a report to the UK Department of Trade and Industry. Retrieved April 8, 2007, from http://facultyresearch.london.edu/docs/TysonReport.pdf
UK Government. (2007, June). Companies Act 2006: Directors' duties - Ministers' statements. Retrieved August 5, 2011, from http://www.bis.gov.uk/files/file40139.pdf
UK Parliament. (2006). Companies Act. Retrieved June 20, 2007, from http://www.legislation.gov.uk/ukpga/2006/46/contents
Useem, M. (1979a). The Social Organization of the American Business Elite and Participation of Corporation Directors in Governance of American Institutions. *American Sociological Review, 44*, 553-572.

Useem, M. (1979b). The Social Organization of the American Business Elite and Participation of Corporation Directors in the Governance of American Institutions. *American Sociological Review, 44*(4), 553-572.
von Holtzbrinck, D. (2007, July 19). Letter On Resignation From Dow Jones Board. from http://www.sec.gov/Archives/edgar/data/29924/000002992407000156/vonhexhibit99.htm
von Werder, A., & Talaulicar, T. (2009). Kodex Report 2009: Die Akzeptanz der Empfelungen und Anregungen des Deutschen Corporate Governance Kodex. Retrieved July 23, 2009, from http://www.bccg.tu-berlin.de/main/publikationen/2009/Kodex-Report%202009.pdf
Walker, D. (2009a, July 16). A review of corporate governance in UK banks and other financial industry entities. *HM Treasury Independent Reviews* Retrieved July 16, 2009, from http://www.hm-treasury.gov.uk/d/walker_review_consultation_160709.pdf
Walker, D. (2009b, November 26). A review of corporate governance in UK banks and other financial industry entities: Final recommendations. *HM Treasury Independent Reviews* Retrieved November 26, 2009, from http://www.hm-treasury.gov.uk/d/walker_review_consultation_160709.pdf
Ward, A. J., Brown, J. A., & Graffin, S. D. (2009). Under the spotlight: institutional investors and firm responses to the Council of Institutional Investors' Annual Focus List. *Strategic Organization, 7*(2), 107-135.
Wearing, R. (2005). *Cases in Corporate Governance*. London: Sage.
Weick, K. E. (1989). Theory Construction as Disciplined Imagination. *Academy of Management Review, 14*(4), 516-531.
Weil Gotshal & Manges. (2002). Comparative Study Of Corporate Governance Codes Relevant to the European Union And Its Member States. Retrieved June 28, 2008, from http://ec.europa.eu/internal_market/company/docs/corpgov/corp-gov-codes-rpt-part1_en.pdf
Weinberg, P. (2006, November 17). Boardroom culture must embrace directors. *FT.com* Retrieved November 18, 2006, from http://search.ft.com/ftArticle?id=061117001294
Wendt, L. (1982). *The Wall Street Journal. The Story of Dow Jones & the Nation's Business Newspaper*. New York: Rand McNally.
Westphal, J. D., & Bednar, M. K. (2005). Pluralistic Ignorance in Corporate Boards and Firms' Strategic Persistence in Response to Low Firm Performance. *Administrative Science Quarterly, 50*(2), 262-298.
Westphal, J. D., & Deephouse, D. L. (2011). Avoiding Bad Press: Interpersonal Influence in Relations Between CEOs and Journalists and the Consequences for Press Reporting About Firms and Their Leadership. *Organization Science, 22*(4), 1061-1086.
Westphal, J. D., & Graebner, M. (2010). A Matter of Appearances: How Corporate Leaders Manage the Impressions of Financial Analysts about the Conduct of their Boards. *The Academy of Management Journal, 53*(1), 15-44.
Westphal, J. D., & Zajac, E. J. (1997). Defections from the Inner Circle: Social Exchange, Reciprocity, and the Diffusion of Board Independence in U.S. Corporations. *Administrative Science Quarterly, 42*, 161-183.
Westphal, J. D., & Zajac, E. J. (1998). The Symbolic Management of Stockholders: Corporate Governance Reforms and Shareholder Reactions. *Administrative Science Quarterly, 43*(1), 127-153.
Wieland, J. (2001). The ethics of governance. *Business Ethics Quarterly, 11*(1), 73-87.

Williams, W. (1908/2005). The Journalist's Creed. *University of Missouri School of Journalism* Retrieved September 3, 2011, from http://journalism.missouri.edu/about/creed.html
Williamson, O. E. (1985). *The Economic Institutions of Capitalism*. New York: Free Press.
Williamson, O. E. (1988). Corporate Finance and Corporate Governance. *The Journal of Finance, 43*(3), 567-591.
Williamson, O. E., & Winter, S. G. (1993). *The Nature of the Firm: Origins, Evolution, and Development*. Oxford: Oxford University Press.
Willmott, H. (2011). 'Institutional Work' for What? Problems and Prospects of Institutional Theory. *Journal of Management Inquiry, 20*(1), 67-72.
Wilson, H. (2010, May 28). Code overhaul set to shake-up UK boards. *Telegraph.co.uk* Retrieved Jun 16, 2010
Wilson, J. F., & Thomson, A. (2006). *The Making of Modern Management: British Management in Historical Perspective*. Oxford: Oxford University Press.
Winter, J. (2002, November 4). Report of the high level group of company law experts on a modern regulatory framework for company law in Europe. Retrieved August 15, 2011, from http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf
Wooten, M., & Hoffman, A. J. (2008). Organizational fields: Past, present and future. In R. Greenwood, C. Oliver, K. Sahlin & R. Suddaby (Eds.), *The Sage Handbook of Organizational Institutionalism* (pp. 130-147). London: Sage Publications.
Zahra, S. A., & Pearce, J. A., II. (1989). Boards of Directors and Corporate Financial Performance: A Review and Integrative Model. *Journal of Management, 15*(2), 291-334.
Zak, P. J. (Ed.). (2008). *Moral Markets: The critical role of values in the economy*. Princeton, NJ: Princeton University Press.
Zattoni, A., & Cuomo, F. (2008). Why Adopt Codes of Good Governance? A Comparison of Institutional and Efficiency Perspectives. *Corporate Governance: An International Review, 16* (1), 1-15.
Zattoni, A., & Cuomo, F. (2010). How Independent, Competent and Incentivized Should Non-executive Directors Be? An Empirical Investigation of Good Governance Codes. *British Journal of Management, 21*(1), 63-79.
Zetzsche, D. A. (2007). An Ethical Theory of Corporate Governance History. *Center for Business & Corporate Law Research Paper Series* Retrieved April 20, 2012, from http://ssrn.com/paper=970909
Zietsma, C., & McKnight, B. (2009). Building the iron cage: Institutional creation work in the context of competing proto-institutions. In T. B. Lawrence, R. Suddaby & B. Leca (Eds.), *Institutional Work: Actors and Agency in Institutional Studies of Organizations* (pp. 143-175). Cambridge: Cambridge University Press.
Zilber, T. B. (2007). Stories and the Discursive Dynamics of Institutional Entrepreneurship: The Case of Israeli High-tech after the Bubble. *Organization Studies, 28*(7), 1035-1054.
Zona, F., & Zattoni, A. (2007). Beyond the Black Box of Demography: board processes and task effectiveness within Italian firms. *Corporate Governance: An International Review, 15*(5), 852-864.
Zucker, L. G. (1987). Normal change or risky business: Institutional effects on the 'hazard' of change in hospital organizations, 1959-79. *Journal of Management Studies, 24*(6), 671-700.