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Tripartism:

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The features of regulatory encounters that foster the evolution of cooper-ation often also encourage the evolution of capture and corruption. Solutions to the problems of capture and corruption—limiting discretion, multiple-industry rather than single-industry agency jurisdiction, and rotating person-nel—inhibit the evolution of cooperation. Tripartism—empowering public interest groups—is advanced as a way to solve this policy dilemma. A game-theoretic analysis of capture and tripartism is juxtaposed against an empow-erment theory of republican tripartism. Surprisingly, both formulations lead to the conclusion that some forms of capture are desirable. The strengths from converging the weaknesses of these two formulations show how certain forms of tripartism might prevent harmful capture, identify and encourage efficient capture, enhance the attainment of regulatory goals, and strengthen democracy. While the case we make for tripartism is purely theoretical and general in its application to all domains of business regulation, our conclusion is a call for praxis to flesh out the contexts in which the theory is true or false.

I.   THE PROBLEM

Business regulation is often modeled as a game between two players—the regulatory agency and the firm. Naturally the world is more complicated than this. On the state side there are such other players as prosecutors and oversight committees of legislators, while on the business side there are such other players as industry associations. On both sides, individual actors wear many hats. So it is a rash simplification to interpret individual actions as those, on the one hand, of the faithful fiduciary of the profitability interests of the firm and, on the other, the fiduciary of agency interests in securing compliance with its statute.

This article seeks to problematize this simplification somewhat by modeling the idea of capture. Capture is a notion that has enjoyed political appeal among critics of regulation from both the right and left. Among economists, models of regulatory capture have gained wide acceptance.[1] Yet capture has not seemed to be theoretically or empirically fertile to many sociologists and political scientists working in the regulation literature, especially when applied to what Americans call social regulation.[2] Here we will consider whether capture has proved analytically barren for these social scientists because of a failure to disaggregate different forms of capture. Ironically, it is an economic analysis that clarifies the disaggregation needed to enable a more fertile social analysis of capture. The economic and social theories that converge on the efficacy of tripartism are each, standing alone, weak theories. What we hope to show in this article is how the weaker points of one theory are covered by the stronger points of the other.

A.   The Evolution of Cooperation, Corruption, and Capture

While the simplifications involved in modeling regulation as a game between two players with unproblematic interests are transparent, such simple models, with their elegance and clarity, can be the foundations on which we build more subtle and complex accounts. Moreover, simple prisoner's dilemma models of regulation do have some capacity to explain regularities in regulatory outcomes. These are models that construe regulation as a game between two players, each of which can choose between cooperating or defecting from cooperation with the other player. For the firm, defection means law evasion; for the regulator, defection

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1. George J. Stigler, "The Theory of Economic Regulation," 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971); Sam Peltzman, "The Growth of Government," 23 *J.L. & Econ.* 209 (1980).

2. Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (Princeton, N.J.: Princeton University Press, 1981) ("Quirk, *Industry Influence*").

means punitive enforcement. Whatever the other player does, defection results in a higher payoff than cooperation. The dilemma is that if both defect, both do worse than their joint cooperation payoff.

Let us illustrate this explanatory capability and in doing so go to the nub of the theoretical concern of this article. Grabosky and Braithwaite's study of 96 Australian business regulatory agencies found that agencies were more likely to have a cooperative (nonprosecutorial) regulatory practice when they regulated (1) smaller numbers of client companies, (2) a single industry rather than in diverse industries, (3) situations where the same inspectors were in regular contact with the same client companies, and (4) those where the proportion of inspectors with a background in the regulated industry was high.[3]

Grabosky and Braithwaite interpreted these findings as support for Black's notion of formal law[4] increasing as relational distance between regulator and regulated increases and, more ambiguously, as support for capture theory. But equally these findings are just what would be predicted from the theory of Axelrod and Scholz[5] on the evolution of cooperation. This theory shows that the evolution of cooperation should occur only when regulator and firm are in a multiperiod prisoner's dilemma game. Repeated encounters are required for cooperation to evolve because the discount parameter that crucially determines the evolution of cooperation is a product of "the perceived probability in any given round that there will be another round."[6] Thus cooperation should be more likely when the same inspector is repeatedly dealing with the same firm. Similarly, when the agency regulates a small number of firms in a single industry, the chances of repeated regular encounters are greater than they are with an agency that regulates all firms in the economy. And, indeed, an inspectorate recruited from the industry may be in a better position to secure an evolution of cooperation because its members are enmeshed in professional networks that give their relationship more of an ongoing quality.

Yet the fact that such findings can be interpreted in either capture or evolution of cooperation terms goes to the heart of our dilemma. The very conditions that foster the evolution of cooperation are also the conditions that promote the evolution of capture and indeed corruption. A revolving door simultaneously improves the prospects of productive cooperation and counterproductive capture. Where relationships are ongoing, where

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3. Peter Grabosky & John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford University Press, 1986) ("Grabosky & Braithwaite, *Of Manners Gentle*").

4. Donald Black, *The Behavior of Law* (New York: Academic Press, 1976).

5. Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984) ("Axelrod, *Evolution of Cooperation*"); John T. Scholz, "Deterrence, Cooperation and the Ecology of Regulatory Enforcement," 18 *Law & Soc'y Rev.* 179 (1984).

6. Scholz, 18 *Law & Soc'y Rev.* at 189.

encounters are regularly repeated with the same regulator, corruption is more rewarding for both parties: the regulator can collect recurring bribe payments and the firm can benefit from repeated purchases of lower standards. Moreover, ongoing relationships permit the slow sounding out of the corruptibility and trustworthiness of the other to stand by corrupt bargains (and at minimum risk because an identical small number of players are involved each time).

This is why if one is looking for corruption in a police force, one looks for those areas where there is regular contact between police in a particular squad and long-term repeat lawbreakers—prostitution, illegal gambling, other vice squad targets, and organized drug trafficking.[7] It is less likely to be found in police dealings with robbers, burglars, and murderers. The 96-agency Australian regulation study found (via highly speculative data) that corruption was more likely in agencies that had two qualities: they maintained close cooperative relationships with the industry, and engaged in regular sanctioning of the industry.[8] Cooperation corrupts; cooperation qualified by the possibility of defection corrupts absolutely! A third of the agencies in that study might reasonably be described as captured in that they launched no prosecution proceedings whatsoever in the course of the three years of the research. Yet there is little evidence of corruption in these heavily captured agencies.

Classically, enforcement agencies deal with the risks of corruption and capture by regular rotation of personnel.[9] Contrary to the policy prescription required for the evolution of cooperation, the anticorruption policy is to ensure that the suspect confronts different law enforcers on each contact. Officers are rotated between regions and among sites within regions.

Another variant of the same policy dilemma arises with discretion. Wide discretion "presents a real danger of corruption and capture."[10] But narrow discretion results in rulebook-oriented regulation that thwarts the search for the most efficient solutions to problems like pollution control.[11]

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7. Antony E. Simpson, The Literature of Police Corruption 88–108 (New York: John Day Press, 1977).

8. John Braithwaite, Peter Grabosky, & Debra Rickwood, "Research Note: Corruption Allegations and Australian Business Regulation," 19 Australian & New Zealand J. Criminology 179 (1986).

9. Herbert Kaufman, The Forest Ranger: A Study in Administrative Behavior (Baltimore: Johns Hopkins Press, 1960); Grabosky & Braithwaite, Of Manners Gentle 198.

10. Joel F. Handler, "Dependent People, the State and the Modern/Postmodern Search for the Dialogic Community," 35 UCLA L. Rev. 999, 1027 (1988); Kenneth Culp Davis, Discretionary Justice (Urbana: University of Illinois Press, 1969); Theodore Lowi, The End of Liberalism: Ideology, Policy and the Crisis of Public Authority (New York: Norton, 1969).

11. John T. Scholz, "Voluntary Compliance and Regulatory Policy," 6 Law & Pol'y 385 (1984); Bruce A. Ackerman & William T. Hassler, Clean Coal/Dirty Air (New Haven, Conn.: Yale University Press, 1981); Eugene Bardach & Robert A. Kagan, Going by the Book: The Problem of Regulatory Unreasonableness (Philadelphia: Temple University Press, 1982) ("Bardach & Kagan, Going by the Book").

When the reward payoff for cooperation is low as a result of such confining discretion, then the evolution of cooperation is unlikely. Might it be possible, however, to allow discretion to be wide, but to replace narrow rule writing to control capture with control by innovative accountability for the exercise of wide discretion?

This, then, is the policy nut we seek to crack. How do we secure the advantages of the evolution of cooperation while averting the evolution of capture and corruption? Our answer lies in a republican form of tripartism. Tripartism is a process in which relevant public interest groups or nongovernment organizations (NGOs) become the fully fledged third player in the game.[12] As a third player in the game, the NGO can directly punish the firm. NGOs can also do much to prevent capture and corruption by enforcing what Axelrod calls a metanorm—a norm of punishing regulators who fail to punish noncompliance.[13] Here the effect of the NGO on the firm is mediated by the NGO's effect on the regulator; instead of directly punishing firms, it punishes regulators who fail to punish firms. Axelrod's simulations show how the introduction of metanorms can dramatically increase the prospects of stable compliance. The fully fledged tripartism we consider, where NGOs are empowered to punish firms directly, is a more radical option that has been conspicuously unanalyzed, in spite of incipient instances of its implementation in many countries.[14]

B. Who Guards the Guardians?

In another sense this article is about who guards the guardians.[15] The problem of guardianship, as eloquently formulated by Susan Shapiro,[16] is that we tend to deal with failures of trust by accumulating more and more layers of guardianship. The untrustworthiness of nth order guardians is monitored by $n+1$th-order guardians, and so on in infinite regress. NGOs can be captured and corrupted. In the present case, therefore, who will guard the NGOs?

We hope to show that this way of setting up the problem entails a rather too mechanistic conception of guardianship. What we put in its place is a notion of contestable guardianship. The idea of contestable mar-

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12. This differs from the role that Scholz, 18 *Law & Soc'y Rev.* at 216–17, considers for interest groups—influencing regulators as factors in the external environment.

13. Robert Axelrod, "An Evolutionary Approach to Norms," 80 *Am. Pol. Sci. Rev.* 1094 (1986).

14. E.g., W. G. (Kit) Carson & Cathy Henenberg, "The Political Economy of Legislative Change: Making Sense of Victoria's New Occupational Health and Safety Legislation," 6 *Law in Context* 1 (1988).

15. Martin Shapiro, *Who Guards the Guardians? Judicial Control of Administration* (Athens: University of Georgia Press, 1988) ("Shapiro, *Who Guards?*").

16. Susan Shapiro, "The Social Control of Impersonal Trust," 93 *Am. J. Soc.* 623 (1987).

kets arises where there is such a small number of producers in a market as to provide little direct guarantee that they will vigorously compete to hold each other's prices down. According to the theory, firms will nevertheless hold prices down because, so long as there are not formidable barriers to entry, they will fear that high prices will cause the entry of a new competitor who will seize their market share with lower prices.[17]

The trick of institutional design to deal with the problem of regulatory capture, we will suggest, is to make guardianship contestable. This is no easy matter, just as it is no easy matter to render economic markets contestable.[18] Of course, the fact that economic markets rarely fit the theory of contestability says nothing about the possibilities for rendering political influence contestable in a democracy. To secure democracy, what is required is a regulatory culture where information on regulatory deals is freely available to all individual members of a multitude of NGOs. Also required is a vital democracy where NGO politicians are always vulnerable to accusations of capture by competing NGO political aspirants who stand ready to replace them. If talk of competition for NGO influence seems unreal, it is only because we are thinking of arenas where NGOs are powerless; where NGOs are empowered, aspirants emerge to contest the incumbency of NGO politicians.

Contestability can mean more than simply competition within the NGO sector for seats at the bargaining table. It can also mean, in a manner more directly analogous to contestable markets, pro-consumer discipline exercised by the potential of NGO entry into a regulatory domain that NGOs have decided not to enter. In a regulatory culture characterized by consumer groups becoming politically active whenever consumer interests are threatened, the mainstream players of the regulatory game may guard against such consumerist assault by being mindful of consumer interests.[19]

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17. William J. Baumol, John C. Panzar, & Robert D. Willig, *Contestable Markets and Theory of Industry Structure* (New York: Harcourt Brace Jovanovich, 1988).

18. Few markets in modern economies could be characterized as "contestable." For example, while some commentators have suggested that U.S. airline routes might be contestable markets (Elizabeth Bailey & John Panzar, "The Contestability of the Airline Markets during the Transition to Deregulation," 44 *Law & Contemp. Probs.* 125 (1981)), several studies have rejected the empirical implications of contestability (Ian Ayres, "Determinants of Airline Carrier Conduct," 8 *Int'l Rev. L. & Econ.* 187 (1988). G. D. Call & T. E. Keeler, "Airline Deregulation, Fares and Market Behavior: Some Evidence," *in* Andrew F. Daugherty, ed., *Analytical Studies in Transport Economics* (Cambridge: Cambridge University Press, 1985)).

19. This contestability phenomenon can be illustrated by the way the Australian Federation of Consumer Organizations (AFCO) exercised responsibility for putting representatives on Standards Association of Australia (SAA) committees during one of the authors' tenure at AFCO during the early 1980s. AFCO trusted SAA to warn it when a consumer representative might be needed on a particular committee because the standard being written involved product safety or other issues of concern to the consumer movement. The trust was based on a realistic perception that if AFCO was not told up front, it would be likely to find out later and cause political grief for SAA. Because of lack of resources, AFCO accepted invitations on only about 50 standard setting committees at any time. But

C. What Is Tripartism?

Tripartism is defined as a regulatory policy that fosters the participation of NGOs in the regulatory process in three ways. First, it grants the NGO and all its members access to all the information that is available to the regulator. Second, it gives the NGO a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the NGO the same standing to sue or prosecute under the regulatory statute as the regulator.[20] Tripartism means both opening to NGOs the smoke-filled rooms where the real business of regulation is transacted and allowing the NGO to operate as a private attorney-general.

Generally in this article we refer to the simplest model of tripartism where a single NGO is selected by the state (or by a peak council of NGOs) as the most appropriate NGO to counterbalance the regulated actors. That NGO then elects its representative to participate in that regulatory negotiation. Contestability in this simple model is therefore accomplished by (1) different NGOs competing for the privilege of acting as the third player in the regulatory negotiation;[21] and (2) different NGO politicians within

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it also sometimes declined representation "for the time being" and asked to receive draft standards and minutes of minutes to "see how things develop." Such a posture signals contestability at the same time as participation is declined. This notion of contestability is at odds with the view that "what really matters under the interest group theory of administrative law is who actually participates, not who theoretically could." Ross Cheit, *Setting Safety Standards: Regulation in the Public and Private Sectors* 214 (Berkeley: University of California Press, 1990) ("Cheit, *Setting Safety Standards*").

20. This is the idea of the *qui tam* suit relied on heavily in England during the 14th and 15th centuries. *Qui tam* private prosecutions continue to be available under a number of U.S. statutes. The U.S. Congress has recently revitalized the idea under the False Claims Act (31 U.S.C.A. §§ 3729–3731 (West Supp. 1989)). The result has been a rash of private prosecutions largely of defense contractors suspected of defrauding the Federal Treasury (Evan Caminker, "The Constitutionality of Qui Tam Actions," 99 *Yale L.J.* 341 (1989)). Thomas C. Crumplar, "An Alternative to Public and Victim Enforcement of the Federal Securities and Antitrust Laws: Citizen Enforcement," 13 *Harv. J. Legis.* 76 (1975), has supported the *qui tam* idea in the domain of the Securities and Exchange Commission, and Brent Fisse & John Braithwaite, *The Impact of Publicity on Corporate Offenders* 250–54 (Albany: State University of New York Press, 1983), have done so more generally. More broadly, on the concept of the private attorney-general, see Bryant Garth, Ilene H. Nagel, & S. Jay Plager, "The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation," 61 *S. Cal. L. Rev.* 353 (1988).

21. The process of selecting the NGO to be privileged in negotiation raises difficult issues of the legitimacy of exclusion. Joshua Cohen & Joel Rogers, "Secondary Associations in Democratic Governance" (unpublished, University of Wisconsin, Madison, 1990), have argued that the proper solution to this moral dilemma is to make decisions about which NGOs will be accorded a quasi-public status under conditions in which the views of each citizen are accorded equal weight. This can be accomplished by making the choice of NGOs, the criteria of their selection, and the accountability rules NGOs must satisfy, themselves the object of popular political choice through democratic institutions. That is, political parties would be expected to include in their election platforms policies about which NGOs or NGO peak councils would be privileged as representatives of labor, environmental, and consumer groups and how and under what conditions they would be privileged. An alternative arises from Schmitter's proposal for a voucher system of state support for NGOs. Phillipe C. Schmitter, "Corporate Democracy: Oxymoronic? Just Plain Moronic? Or a

each NGO competing for election to the negotiating role. The simplest model will not always be the most appropriate—the appropriate model of tripartism will be an historically and institutionally contingent matter. However, the simplest model has definite attractions: it should minimally delay decision making in arenas where no decision is the worst possible decision. And it should maximize the prospects of genuine dialogue around the table leading to a discovery of win-win solutions, instead of a babble of many conflicting voices. In this article, tripartism is considered as a strategy for implementing laws and regulations that have already been settled. If one wanted to extend its application to the rule-making process itself, an extension that may have merit—then clearly the simple tripartism model would provide too narrow a basis for NGO participation.[22]

But what are the NGOs? Here it is best to resist pleas for a clear definition of the public interest and who represents it. One reason is that what we ultimately favor is a contested, democratic theory of the public interest rather than an account that can be neatly packaged in advance of the operation of democratic process.[23] Second, what we urge democratic polities to do is identify, on an arena-by-arena basis, the group best able to contest (rather than "represent") the public interest embodied in a particular regulatory statute. These groups are thrust into the breach to fight for the public interest the legislature intended to be protected by a regulatory statute; but, in fact, they will more often than not be private interest groups.

An environmental group empowered as the third party in environmental regulation may be an NGO largely devoid of private interest. But we include as NGOs trade unions empowered to defend the interests of their members in occupational health and safety regulation. Indeed, it could even be that a suitable group to contest the public interest in a consumer protection statute to guarantee the quality of automobiles could be the industry association of car rental firms.[24] The most knowledgeable group to intervene in a cozy regulatory arrangement that maintains oligopolistic

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Promising Way Out of the Present Impasse?" (unpublished, 1988). All citizens would get vouchers, representing a promise of funds to be paid out of consolidated revenue to NGOs. The state could then be considered to privilege the NGOs that received the most vouchers.

22. The initiatives of U.S. Environmental Protection Agency Administrator Ruckelshaus in introducing "regnegs," tripartite regulatory negotiation over standards, have been generally well received as an advance over litigious rulemaking, but have been criticized for their "closed shop" features. Richard A. Harris & Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Cities* 304–5 (New York: Oxford University Press, 1989) ("Harris & Milkis, *Politics of Regulatory Change*"); Barry Boyer, "The Federal Trade Commission and Consumer Protection," in Keith Hawkins & John Thomas, eds., *Making Regulatory Policy* (Pittsburgh: University of Pittsburgh Press, 1989).

23. John Keane, *Democracy and Civil Society* (London: Verso, 1988).

24. Cheit, *Setting Safety Standards* 77, gives a number of illustrations from the U.S. standard-setting domain: insurance industry representatives pushing for tough standards that control losses; vendors of safety equipment with obvious interests in safety; representatives of gas utilities whose employees must confront the victims of product injuries.

prices for wheat may be the industry association of flour millers.[25]

As Meidinger cogently argues, there is no touchstone, no objective standard, by which we can separate the public interest from private interests. Social life seems "almost always to involve a combination of pecuniary interest-pursuit and citizenship."[26] In practical terms, citizen concerns about themselves motivate their identification of public concerns: "reason is most likely to be applied by passion—in the form of interests."[27] This is not to support the crude "deals thesis" that one sometimes sees in law-and-economics writing.[28] Regulation is largely contested in a public-regarding discourse; it is a shallow analysis to view interest groups as unashamedly using the state regulatory apparatus as no more than a vehicle for advancing their private interests. Certainly, our conclusion will be that this latter form of discourse should be discouraged by our regulatory institutions. Public-regarding discourse, which is already encouraged in many ways by regulatory agencies and the courts, should be further encouraged.[29] As Baar points out, achieving regulatory effectiveness through a balance of control is not about simply striking a compromise of interests.[30] It is about understanding one another's needs and then sharing ideas in the pursuit of risk-management strategies that deliver acceptable protection at acceptable cost. As the negotiation experts have instructed us, we will all do better if we focus less on positions and more on designing new solutions that are responsive to mutually understood needs, on new solutions that may bear no relation to initial bargaining positions.[31]

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25. A related solution is partial industry regulation, where a dominant firm in an industry is regulated, while other firms are free to compete as they like. (Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) (forthcoming) ("Ayres & Braithwaite, *Responsive Regulation*"). The theory here is that regulation of, say, the prices of the dominant firm will be designed to protect the public interest from abuse of market power, while price competition from the unregulated sector will threaten any benefits the dominant firm could obtain by capturing the regulator. The unregulated fringe firms, under this theory, would be the best placed NGOs to guard the workings of the industry from the harms of regulatory capture. Both tripartism and partial industry regulation are forms of regulatory delegation that are underwritten by escalating (and increasingly undelegated) forms of government intervention. In *Responsive Regulation* we propose that certain regulatory tasks might be delegated to private parties (NGOs, the firms' competitors, and even the firms themselves) but that this delegation be reinforced by traditional forms of regulatory fiat—if delegation fails.

26. Errol Meidinger, "Regulatory Culture and Democratic Theory" 30 (Working Paper, Baldy Center for Law and Social Policy, State University of New York, Buffalo, 1987) ("Meidinger, 'Regulatory Culture' ").

27. *Id.* at 31.

28. Richard B. Stewart, "Regulation in the Liberal State: The Role of Non-Commodity Values," 92 *Yale L.J.* 1537 (1983).

29. Jonathan Macey, "Promoting Public-regarding Legislation Through Statutory Interpretation: An Interest Group Model," 86 *Colum. L. Rev.* 223 (1986).

30. Ellen Baar, "A Balance of Control: Defining the Risk Bearer's Role in the Regulatory Equation" (presented to Annual Meeting of the Law & Society Association, Madison, Wis., June 1989).

31. Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreements Without Getting In* (London: Business Books, 1981) ("Fisher & Ury, *Getting to Yes*").

An assumption implicit in our analysis is that for most business regulatory statutes in a democracy, there will be an appropriate NGO. We assume this because we think it unlikely that statutes that threaten the interests of business would ever have been enacted in the absence of an interest group pushing for them. This assumption will not always be true, however, even after empowerment has increased incentives for NGO formation.[32] The question that immediately comes to mind is which NGOs could play the corporate tax enforcement game, say, with the Internal Revenue Service in the United States? Perhaps groups like Citizens for Tax Justice, which have been concerned with the issue of fair corporate tax contributions? But this difficult case may be unusual because tax laws are peculiar in the way they are brought into existence by the state to serve the needs of the state rather than in response to clamorings from external interests.

The simplest arena to understand how tripartite regulation would work is occupational health and safety. In a unionized workplace, the elected union health and safety representative would have the same rights to accompany the inspector in the workplace as the company safety officer. She would have the right to sit in on and ask questions at any exit conference at the end of the inspection and at any subsequent conference. She would receive copies of the inspection report and of any subsequent correspondence between the parties. If she perceived an unwarranted failure to prosecute, to shut down a machine, or to take any other enforcement action, she would have the same standing as the government inspector to pursue that enforcement action herself. With minor variations, this has been the thrust of recent occupational health and safety reform in most Australian states.

Of course, one could usefully grant the same rights to a nonunion safety representative elected at a nonunionized workplace. But that raises issues of where this individual would turn for technical assistance and for legal assistance in going to trial. These problems are remediable in principle by public funding of legal aid, hazardous chemical information bureaus, and the like. Where there is not a power base and an information base for the weaker party, tripartism will not work. The tripartism idea is fundamentally about transcending the shallow liberal notion that all you need to do to solve the problems of weaker parties is to give them legal rights.[33]

Tripartism may also allow us to move to a regulation model from a prohibition model for some areas of the black economy. Corruption has

32. See Jack L. Walker, "The Origin and Maintenance of Interest Groups in America," 77 *Am. Pol. Sci. Rev.* 390 (1983).

33. Roberto M. Unger, *False Necessity* (Cambridge: Cambridge University Press, 1987); Joel F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (New York: Russell Sage Foundation, 1986); *id.*, "Community Care for the Frail Elderly: A Theory of Empowerment" (unpublished, 1989).

always been the fear in allowing cooperation to evolve in de facto police regulation of prostitution. But if conditions are imposed on brothel licenses by a tripartite committee, we might secure an evolution of cooperation in the battles against AIDS, declining amenity for neighborhoods, assault on prostitutes, and ensnarement of teenage girls, while forestalling the evolution of police corruption. A variety of third players might perform this role—the women's movement, the church, a sex workers' union.

In part II, we build on the work of Scholz to develop a game-theoretic notion of capture and then model, game theoretically, the effects of tripartism. After that, we consider the limits of this kind of economic analysis of tripartism. Then we consider an alternative (empowerment) analysis of tripartism and, in turn, examine its limits. Finally, we explore the possibility that a synthesis of the two traditions can leave us with an analysis of tripartism where the weaknesses of one approach are covered by the strengths of the other. Readers who are intimidated by mathematical notation can skim over section II.B. After reading section II.A, they can extract the most important conclusions from section II.B by reading the summary in section II.C.

II. THE ECONOMIC ANALYSIS

A. The Game-theoretic Model of Regulation

In two important articles, John Scholz proposed that agencies might be able to engender "egoistic cooperation" from the firms they regulate if they undertake a regulatory enforcement strategy that is "at once vengeful and forgiving."[34] Building on the seminal work of Robert Axelrod,[35] Scholz reconceived the interactions between an agency and the regulated firm as a repeated prisoner's dilemma game in which the agency and the regulated firm must each choose whether to cooperate in enforcement of regulations. Scholz began with a simple game of pollution regulation set out in figure 1.

The regulated firm must choose whether to "comply with" or to "evade" the regulations; the agency must choose whether to adopt a "cooperative" or "deterrence" enforcement strategy. The social optimum is reached if both the agency and the regulated firm cooperate. For Scholz, a cooperative enforcement strategy from the agency entails less regulatory supervision and monitoring; consequently, the agency will tolerate literal violations of regulations. Joint cooperation is Pareto optimal because the agency does not have to expend as much resources in monitoring and the

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34. Scholz, 18 *Law & Soc'y Rev.* (cited in note 4); *id.*, 6 *Law & Pol'y* (cited in note 11).

35. Robert Axelrod, "Effective Choice in the Prisoner's Dilemma," 24 *J. Conflict Resolution* 3 (1980); *id.*, *Evolution of Cooperation* (cited in note 5).

AGENCY'S ENFORCEMENT OPTIONS

		COOPERATIVE (goal-oriented)	DETERRENCE (rule-oriented)
FIRM'S INITIAL COMPLIANCE OPTIONS	COMPLY	R = 100 TONS VOLUNTARY COMPLIANCE r = -$2 million	T = 125 TONS HARASSMENT s = -$4 million
	EVADE	S = 50 TONS OPPORTUNISM t = -$1 million	P = 75 TONS LEGALISTIC BATTLES p = -$3 million

Agency payoffs (capital letters) represent expected amount of pollution reduced annually.

Firm payoffs (small letters) represent total expected annualized costs of compliance and sanctions.

Cell labels reflect the situation as seen from the firm's perspective.

The dilemma defined: T>R>P>S and t>r>p>s
2R>S+T and 2r>s+t

Reprinted with permission from John T. Scholz, "Deterrence, Cooperation and the Ecology of Regulatory Enforcement," 18 *Law & Soc'y Rev.* 179 (1984).

FIGURE 1

The enforcement dilemma: Payoffs for joint compliance and enforcement decisions.

regulated firm can more efficiently spend its resources on meeting the underlying goals of the regulation instead of meeting the literal rules of the regulation. This is an equilibrium where the agency enjoys the savings of flexible enforcement by overlooking minor or technical violations in return for the firm's extralegal efforts to reduce harm in ways not directly addressed in the regulations. In figure 1, this outcome is depicted with both the agency and the firm receiving their reward outcomes: the agency achieves 100 tons of sulfur being removed from the air, and the firm only has to pay $2 million by implementing an innovative pollution-saving production technique ($R = 100$; $r = -\$2$ million).

Scholz suggested that under certain assumptions about the compliance and monitoring technology, there may be short-run incentives for both the firm and the agency to defect from joint cooperation. If the agency adopts a cooperative strategy, the regulated firm has, under Scholz's assumptions, a short-run incentive to act opportunistically and "evade" both the letter and the spirit of the regulation. Firm defection is represented in the lower left-hand box of figure 1 with the firm receiving the temptation payoff of only paying $1 million in pollution prevention and with the agency having only 50 tons of sulfur removed from the effluent.

Similarly, if the agency knows that the firm is going to cooperate with

the underlying goals of removing sulfur pollution, the agency may have a myopic incentive to defect from its cooperative strategy and require subsequent rule compliance in addition to the cooperatively achieved goal compliance.[36] Scholz thus describes agency defection: "the firm may cooperate by developing and implementing innovative pollution-saving production techniques only to have the agency insist later that the legally required scrubber be installed as well."[37] In figure 1, agency defection gives the agency the temptation payoff of 125 tons of removed sulfur and the hoodwinked firm the sucker payoff of $4 million compliance costs.[38]

The temptations to defect from cooperative behavior can lead to the standard prisoner's dilemma result of Pareto inefficiency, represented in figure 1 by the lower right-hand box. The agency undertakes an inefficiently high amount of monitoring and the regulated firm responds by inefficiently fulfilling the letter of the regulation while bypassing its spirit and forgoing innovative cleaning techniques that, while not meeting the letter of the regulations, are more effective at removing the sulfur. At this inefficient short-sighted equilibrium, the agency succeeds in only removing 75 tons of sulfur, while the firm is forced to spend $3 million on regulatory compliance.

In formal game-theoretic terms, this regulatory game can be repre-

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36. Scholz's model implicitly assumes that the agency and regulated firm move simultaneously. While simultaneity abstracts from real-time enforcement, this assumption is standard in the literature (see Axelrod, *Evolution of Cooperation*). For the single-period game, joint defection would ensue if either the agency or the firm were given the opportunity to move first. In the capture model, one can think of the firm lobbying and choosing to cooperate or defect before the agency moves. Capturing, then, besides changing the agency's payoff, also gives the firm a first-mover advantage.

37. Scholz, 18 *Law & Soc'y Rev.* at 187.

38. We imagine in many regulatory contexts that agencies would not have the temptation incentives to deviate from joint cooperation equilibria—because the temptation payoff from defection would not in fact be higher than an agency's joint cooperation payoff. In such situations, the regulatory game would change from Scholz's (and Axelrod's) "two-sided" prisoner's dilemma. Eric Rasmusen, *Games and Information* 94–96 (New York: Blackwell, 1989) ("Rasmusen, *Games*"). In two-sided prisoner's dilemmas, joint cooperation can be undermined by either side defecting (with the resultant retaliation), while in a one-sided prisoner's dilemma, only one player has an incentive to defect.

One-sided prisoner's dilemma games still will often lead to joint defection equilibria. For example, even if the agency has no incentive to defect from joint cooperation, there will be joint defection via firm defection. The firm may still have incentives to defect from cooperative agency enforcement and the agency will still have incentives to retaliate against such defection. The implications of capture and the evolution of cooperation on such one-sided games are explored below in note 49.

Alternatively, we imagine that the agency defection path to a joint defection equilibrium might be blocked by a firm's reluctance to retaliate. If the firm's punishment payoff (for complying with the letter but not the spirit of the law) is less than its sucker payoff, then the Nash equilibrium will become firm cooperate/agency defect. Scholz's implicit claim is that the firm's punishment payoff will exceed its sucker payoff because agencies will not be able to impose large fines on literal (if not spiritual) compliance. When, however, high punishments deter firm retaliation, firms will retain incentives (as discussed below) to capture regulators to move either to a joint cooperation or a firm defect/agency cooperate equilibrium.

sented by defining the strategies that each player can make and the resulting payoffs for each strategy. For the one-period game,

f_t = the firm's strategy in the tth period;
a_t = the agency's strategy in the tth period;
where
1_t = cooperate and 2_t = defect;
V_{ft} (f_t,a_t) = the firm's payoff for the tth period; and
V_{at} (f_t,a_t) = the agency's payoff for the tth period.
For example, the agency's payoffs in figure 1 would be represented by
V_{at} $(1_t,1_t)$ = 100 tons (reward payoff);
V_{at} $(1_t,2_t)$ = 125 tons (temptation payoff);
V_{at} $(2_t,1_t)$ = 50 tons (sucker payoff); and
V_{at} $(2_t,2_t)$ = 75 tons (punishment payoff).

For a multiperiod game of uncertain duration, the present discounted value of the single period payoffs would be

$$V_f(f,a) = V_{ft}(f_t,a_t) + \delta V_{ft+1}\ (f_{t+1},a_{t+1}) + \delta\ 2V_{ft+2}\ (f_{t+2},a_{t+2}) + \ldots, (1)$$

where δ is the discount parameter,[39] and f and a are the firm's and the agency's respective multiperiod strategies. The discount parameter, δ, is inversely related to the discount (or interest) rate, r: $\delta = 1/(1 + r)$,[40] so that as the discount rate (r) rises, the discount parameter (δ) falls.

Multiperiod strategies determine what choice a player will make in every period of the game: "Strategies may be simple rules such as 'always defect' and 'alternately defect and cooperate' or complex rules which use the history of play."[41] A central insight of Axelrod's research is that for large enough δ a tit-for-tat (TFT) strategy can be an equilibrium strategy for both players in a repeated period prisoner's dilemma that engenders the Pareto optimal jointly cooperative payoffs.[42] In the TFT strategy, a prisoner's dilemma player cooperates until the opponent defects and responds

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39. As Scholz defines it: "The discount parameter is the product of two factors that jointly determine the current value of future payoffs: the first is the standard discount rate used to determine the current value of future rewards, and the second is the perceived probability in any given round that there will be another round." Scholz, 18 *Law & Soc'y Rev.* at 189.
40. Rasmusen, *Games.*
41. Scholz, 18 *Law & Soc'y Rev.* at 188.
42. Scholz attempts to extend Axelrod's result by calculating preconditions of stable cooperation if the firm reevaluates its TFT strategy in midstream after evading. *Id.* at 190. This rather convoluted scenario is homologous to an initial TFT strategy that presumes guilt instead of innocence—by choosing to defect until the opponent cooperates (instead of cooperating until the opponent defects). The game theory literature is rich with alternative assumptions that place alternative restrictions on TFT stability (see, e.g., Robert Boyd & Jeffrey P. Larberbaum, "No Pure Strategy Is Evolutionary Stable in the Repeated Prisoner's Dilemma Game," 327 (6117) *Nature* 58 (1987)). Scholz's and Axelrod's multiperiod formulation is an example of a supergame or metagame that has become a standard way of modeling multiple period strategic interactions. See Julio J. Rotenberg & Garth Saloner, "A Supergame-theoretic Model of Price Wars During Booms," 76 *Am. Econ. Rev.* 390 (1986).

by defecting until the opponent cooperates. Because cheating against a TFT strategy necessarily entails future punishments, if the discount rate is low enough today's temptation is outweighed by tomorrow's punishment.[43]

Scholz, by extending Axelrod's "evolution of cooperation," is able to demonstrate the possibility of efficient agency cooperation. A provokable but forgiving strategy such as TFT in which the agency adopts more discretionary monitoring during episodes of cooperation can thus avoid the prisoner's dilemma inefficiency. However, the very discretion that promotes cooperation may also allow agencies to abdicate their public regarding responsibilities to the interests of the very firms they are regulating. In the next section, Scholz's model is formally extended to explore how capture can destabilize the evolution of cooperation.

B. A Game-theoretic Model of Capture

In a capture model, through lobbying the regulated firm is able to win the hearts and minds of the regulators. In a sense capture is achieved as the lobbying causes the regulators to care about different things. At the captured extreme the regulators think that "what is good for GM is good for America."

The possibility of capture can be formally included in the enforcement game described above if we define the agency's "captured" single-period payoff as

$$V'_{at}(f_t,a_t) = \alpha\, V_{ft}\,(f_t,a_t) + (1-\alpha)\, V_{at}\,(f_t,a_t), \tag{2}$$

where $1 < \alpha < 0$. The variable α is a measurement of capture. When $\alpha = 0$, the agency's payoff is simply the same as in the original enforcement game (in which implicitly the agency was trying to maximize social welfare). When $\alpha = 1$, however, capture is complete in that the agency payoff is identical to that of the regulated firm. For intermediate values of α, the agency's payoff is a weighted average of the public and private concerns.

To simplify the analysis, let us (1) monetize both the firm's and agency's payoffs (so that the captured weighted average payoff of equation (2) can be more readily calculated); and (2) transform the uncaptured payoffs so that the payoff matrix is symmetric.[44] The uncaptured matrix of payoffs can be generally represented as in figure 2. In this symmetric

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43. Ian Ayres, "How Cartels Punish: A Structural Theory of Self-enforcing Collusion," 87 *Colum. L. Rev.* 295 (1987). Accordingly, joint cooperation will be stable only for sufficiently small discount or interest rates. This makes intuitive sense. If players discount future payoffs (because they have a high discount rate) the threat of future punishment will not deter the temptation of today's defection.

44. The latter assumption implies that
$$V_{ft}(i,j) = V_{at}(j,i) \text{ for all } i \text{ or } j.$$
The assumption of symmetric payoffs does not affect our results. If the agency and

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FIGURE 2

A regulatory game with symmetric agency and firm payoffs

game, efforts to capture cause the agency's temptation payoff to fall ($T' < T$) and the agency's sucker payoff to increase ($S' > S$).

Capture can take three forms that can have strikingly different impacts on firm behavior. In uncaptured multiperiod games, the only plausible equilibria are joint cooperation and joint defection.[45] Hence, we need

firms have asymmetric payoffs so that, for example, $T_f \neq T_a$, then the captured agency's net temptation to defect, Δ_{tempt}, will be

$$\Delta_{tempt} = \alpha(S_f - R_f) + (1-\alpha)(T_a - R_a),$$

which equals the change in the captured agency's payoff for defecting from a joint cooperation equilibrium. Similarly, the captured agency's net incentive to retaliate against firm defection, Δ_{retal}, will be

$$\Delta_{retal} = \alpha(P_f - T_f) + (1-\alpha)(P_a - S_a),$$

which equals the change in the captured agency's payoff for retaliating against a firm defect/agency cooperate equilibrium. Under this more general formulation, increasing degrees of capture (increasing α) reduces both the agency's temptation to defect from joint cooperation and the agency's incentive to retaliate against a defecting firm (both Δ_{tempt} and Δ_{retal} decrease). This parallels in all relevant respects the effects of capture in the symmetric model (increasing S' and decreasing T').

45. If repeated joint cooperation is supportable, then an infinite number of less profitable equilibria will also be stable (e.g., the symmetric strategies of defecting in the first period and playing TFT thereafter would be stable). This result is ensured by the venerable Folk Theorem of game theory (so named because no one can remember who should get credit for it) (Rasmusen, *Games*). We restrict our attention to repeated joint cooperation equilibria on the plausible assumption that the players will choose the supportable equilibrium with the highest payoff.

consider only the effect of capture in moving payoffs and outcomes away from either a joint cooperation equilibrium or a joint defection equilibrium.

An important thrust of the works of Axelrod and Scholz has been to suggest that in a wide range of regulatory contexts, the parameters of the game support the evolution of cooperation. Accordingly, we first analyze situations where the agency's discount rate is sufficiently low that joint cooperation has evolved. If capture increases the sucker payoff for the regulatory agency above its punishment payoff ($S' > P$), then an agency will not retaliate if the firm defects. Capture has changed the payoff matrix from $T > R > P > S$ to $T > R > S' > P$.[46] Because the captured sucker payoff for the agency is higher than its punishment payoff, firm defection will not lead to the joint defection equilibrium but to the firm defect/agency cooperate equilibrium. This inefficient shift away from the Pareto-optimal joint cooperation equilibrium is clearly an undesirable form of capture (which we call inefficient capture) and is the first of our three possible forms of capture.

The other two types of capture take as their starting point the situation in which the agency's discount rate is high enough that the joint TFT strategy is not stable; the equilibrium devolves to joint defection. Understanding how capture affects shifts away from the joint defection equilibrium is not as simple as understanding how it affects the joint cooperation equilibrium. In situations in which multiperiod cooperation is unstable, capture can potentially move the enforcement game from the joint defection equilibrium to either the joint cooperation equilibrium or the firm defect/agency cooperate equilibrium (see fig. 4 below). Now we consider each of these moves in turn.

The movement from joint defection to firm defection/agency cooperation is possible because capture increases the agency's sucker payoff. If the agency's captured sucker payoff increases above the punishment payoff of the joint defection equilibrium ($S' > P$), then the agency will choose to cooperate with even a noncooperating firm. Capture causes the agency's sucker payoff to increase because the captured payoff is a weighted average of the firm's temptation payoff and the agency's uncaptured sucker payoff:

$$S' = \alpha T + (1-\alpha) S = \alpha V_{ft}(2,1) + (1-\alpha)V_{at}(2,1). \tag{3}$$

The movement from the joint defection equilibrium to the firm defect/agency cooperate equilibrium has ambiguous welfare consequences: the firm does better, but the agency (and the rest of society) does worse. Because it is theoretically uncertain whether these gains outnumber the losses, we refer to this movement from joint defection to firm defect/

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46. As stated above, efforts to capture also reduce the agency's temptation payoff. The temptation effect may induce a separate form of capture that we discuss below.

agency cooperate as "zero-sum" capture. The net effect on welfare can theoretically be positive if

$$T+S > 2P.[47]$$

It is likely, however, that $T+S < 2P$ in many regulatory situations. In the pollution context, for example, moving to the firm defect/agency cooperate outcome is likely to hurt the community more than it benefits the firm. In other words, the firm's higher temptation payoff $(T-P)$ may not outweigh the detriment to the rest of society $(P-S)$, so that together $T-P < P-S$, which, adding P and S to both sides, would imply that $T+S < 2P$. The firm's gains from zero-sum capture will thus often represent an inefficient redistribution of assets. Zero-sum capture redistributes from society to the regulated firm, but the process of redistribution is likely to consume resources.[48] Beyond these welfare effects, the movement of zero-sum capture seems clearly inequitable. First, cheating firms get an advantage that law-abiding firms miss. Second, the gain to cheating firms is at the expense of innocent (noncheating) pollution victims.

Now for the third form of capture. A movement from the joint defection equilibrium to the joint cooperation equilibrium is possible because capture reduces the agency's temptation payoff below the reward payoff:

$$T' = \alpha S + (1-\alpha)T = \alpha V_{ft}(1,2) + (1-\alpha) V_{at}(1,2). \tag{4}$$

If the captured temptation payoff falls below the reward payoff of the joint cooperation equilibrium $(T' < R)$, then even in a single-period game, the agency would not have an incentive to defect if the regulated firm is cooperating.[49] If there is no agency defection to be reciprocated by firm defec-

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47. This net improvement would satisfy the Kaldor-Hicks welfare standard. One equilibrium is Kaldor-Hicks superior to another if those receiving more (the "winners") could potentially compensate those receiving less (the "losers") so that, after this hypothetical compensation, no one would be worse off and at least one person would be better off. Richard A. Posner, *Economic Analysis of Law* (Boston: Little, Brown, 1986).

48. At times, the enhanced firm payoffs from zero-sum capture will represent a bare redistribution of wealth from other members of the society; e.g., regulation might increase a corporation's sales (and profits) by displacing or excluding one of its competitors. Yet this redistribution of profits is likely to be accompanied by production inefficiencies. Moreover, the process of lobbying to change the regulator's payoffs will often entail an inefficient consumption of real resources.

49. Pareto-efficient capture may also facilitate the multiperiod evolution of cooperation. Axelrod demonstrated that TFT strategies could only support a joint cooperation equilibrium if the following inequalities were met:
$\delta > (T-R)/(T-P)$,
$\delta > (T-R)/(R-S)$.
Capture can also affect the evolution of cooperation by affecting these inequalities. By decreasing the temptation payoff $(T' < T)$ and increasing the sucker payoff $(S' > S)$, capture may change the range of δ for which joint cooperation is stable. These inequalities imply critical lower-bound values of δ below which cooperation cannot evolve. As before, reducing the temptation payoff facilitates cooperation, and increasing the sucker payoff restricts the opportunities for cooperation. In the multiperiod setting, decreasing the temptation loosens the first inequality so that at the margin certain discount rates that would not support a joint cooperation equilibrium without capture may be sufficiently small once capture has reduced the temptation payoff. Analogously, the second inequality is loosened by

tion, then a source of devolution to joint defection in the multiperiod game will have been averted.[50]

Moving from joint defection to joint cooperation is clearly Pareto efficient. Strikingly, this form of capture will unambiguously increase welfare. How can this be? Remember capture works by getting the agency to care more about the regulated firm's welfare. Although we spoke of the agency's uncaptured payoff as being public regarding, the agency's original, uncaptured payoff's did not reflect complete social welfare because they excluded the effects on one member of society, the regulated firm. This efficient capture has the potential of increasing welfare, because it causes the agency to consider the real harm it can inflict upon the regulated firm.

In equation (4), the agency's captured temptation payoff is reduced because, *cum* capture, the agency begins to consider how its defection will hurt part of society (via the sucker payoff imposed on the cooperating firm). Once the agency's temptation to defect is removed, the firm may be able to move to the joint cooperation equilibrium with impunity.

To understand whether zero-sum or efficient capture is more likely to be manifested, let us return to our earlier discussion. Equations (3) and (4) can be rearranged to solve for critical values of α. From equation (3) zero-sum capture will only be possible if

$$S' = \alpha T + (1-\alpha)S > P.$$

By algebraic manipulation this inequality yields a critical lower bound of zero-sum capture, α^{zs}, that would stabilize a firm defect/agency cooperate equilibrium:

$$\alpha^{zs}=(P-S)/(T-S). \tag{5}$$

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keeping captured S low by social disapproval of regulators who succumb to zero-sum capture. We can thus see a second way that social disapproval reductions to T and S can foster joint cooperation: by extending the range of discount rates where joint cooperation will remain stable in multiperiod games.

Axelrod's dual prerequisites for the evolution of cooperation correspond to the "two-sided" nature of the traditional prisoner's dilemma. If the regulatory game, however, more closely represents the "single-sided" prisoner's dilemma game (discussed above in note 38), then the regulatory players will only need to overcome the first inequality. Accordingly, the evolution of cooperation will be easier to establish in single-sided prisoner dilemma games because the players need to deter only one path to joint defection (firm defection/agency retaliation). Efficient capture will also be much easier to obtain in single period games. As long as a firm can gain a first-mover advantage via capture (see *supra* note 36), then it can choose the higher payoffs of joint cooperation without fear of agency defection.

50. Although reducing the agency's temptation payoff ($T' < R$) can deter agency defection from joint cooperation, joint cooperation will only be an equilibrium if the firm itself is also deterred from defection. This will often be the case because while the agency may be deterred from defection, it will still retaliate if the firm defects. In these situations, the firm is left only with the choice of joint cooperation or joint defection—and clearly prefers the former. In other instances, the process of capture will destroy both the agency's incentive to either defect ($T' < R$) or retaliate ($S' > P$). In these circumstances, capture will not facilitate joint cooperation, as the firm will simply choose to defect. The circumstances under which this will occur are displayed below in fig. 3.

Similarly, from equation (4), efficient capture can only occur if

$$T' = \alpha S + (1-\alpha)T < R.$$

which implies a critical lower bound of capture α^P, below which Pareto-efficient capture would not be stable:

$$\alpha^P = (T-R)/(T-S). \tag{6}$$

An agency maximizing total welfare will maximize the sum of payoffs V_f and V_a. Maximizing the sum is the same as maximizing the simple average (the sum divided by 2). This means that if the degree of capture rises to $\alpha = 1/2$, joint cooperation should be stable because the agency will then be maximizing the total payoffs to society. There will no longer be a temptation payoff for the agency when $\alpha = 1/2$. Indeed, we can prove that α^P will always be less than $1/2$. Our initial assumption that $2R > S + T$ implies

$$-S > T-2R,$$
$$T-S > 2T-2R,$$
$$1/2 > (T-R)/(T-S).$$

To determine which type of capture will take place, we need to say more about how firms capture. We assume that capture is "purchased" by lobbying expenditures, L. Such expenditures include the salaries of vice-presidents for regulatory affairs, the cost of preparing submissions, the time invoked in building friendships with regulators, and the cost of bribes. Under this conception, corruption is just one kind of lobbying technology for securing capture. It is reasonable to assume that the degree of capture, α, is a positive function of lobbying expenditures:

$$d\alpha/dL > 0.$$

Unfortunately, there is no necessary order between α^{zs} and α^P. Comparing (5) and (6), we find α^{zs} will be greater than α^P if and only if

$$P-S > T-R.$$

Since our prior assumptions about these firm payoffs do not necessarily conform with this inequality, either lower bound can be greater, as illustrated in figure 3.

Because the firm clearly prefers zero sum capture to the reward payoff of efficient capture, if the agency is sufficiently captured to support both forms, the firm will always choose zero-sum capture by simply choosing to defect (knowing that the agency will continue to cooperate). Thus, if $\alpha^{zs} < \alpha^P$, as depicted in Part A of figure 3, zero-sum capture will be the only capture.

Conversely, when $\alpha^{zs} > \alpha^P$, either type of capture is possible. The firm may only be willing to lobby enough to establish α^P with its reward payoff or the firm may incur the greater lobbying costs of making α^{zs}, which yields the larger temptation profits.

The lobbying technology will be critical to this choice. Because the $\alpha(L)$ is monotonically increasing, an inverse function exists and the lower

Two possible orderings for lower bounds of zero-sum capture and pareto-efficient capture.
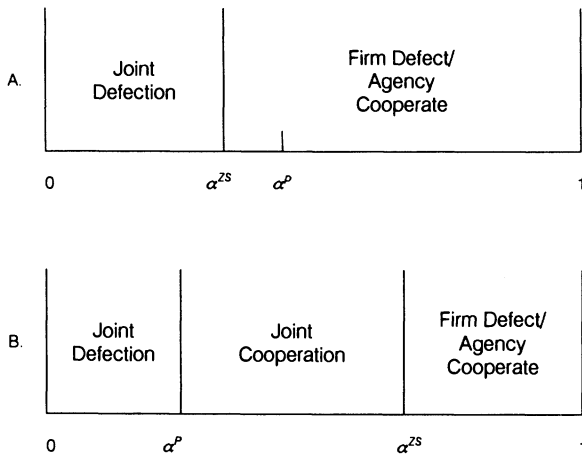
FIGURE 3
Two possible orderings for lowest bounds of zero-sum capture and
Pareto-efficient capture

bounds α^P and α^{zs} have corresponding critical values of L^P and L^{zs}. In
other words, minimum lobbying expenditures will be needed to produce
these minimum amounts of capture.

A firm in deciding whether to invest lobbying expenditures will com-
pare the costs of Pareto-efficient and zero-sum capture, L^{zs} and L^P, respec-
tively, with the increased profits of capture.

In moving from joint defection to joint cooperation the firm receives
the reward instead of the punishment payoff. Accordingly, the firm will
only "purchase" efficient capture if

$R - P > L^P$.

The firm's greater return from zero-sum capture stems from its getting the
temptation payoff. This form of capture will only occur if

$T - P > L^{zs}$.

Most generally, lobbying may be so costly (as represented by a steep αL
function) that neither form of capture is cost effective so that, in choosing
how much to lobby, the firm will maximize

max $[0, T - P - L^{zs}, R - P - L^P]$.

That is, the firm will choose the level of lobbying ($L = 0$, L^P, or L^{zs}) that
generates the highest net payoff, and the highest may be zero. In that case,
no lobbying will be preferable to spending money on L^P, or more money
on L^{zs}.

It is important to note that the foregoing has modeled capture and
lobbying to change simultaneously and symmetrically both the agency's

temptation and sucker payoffs. However, some forms of lobbying may disparately impact these off-diagonal agency payoffs. For example, lobbying the agency not to defect from the joint cooperation equilibrium may be compelling because, as described above, agency defection from joint cooperation reduces total welfare. Lobbying the agency to "be reasonable" and "fair" by rejecting the temptation payoff is likely to be cheaper than lobbying the agency to "sell out" by sitting on its hands when a firm cheats.

There is an interesting policy question here that neatly brings together our economic and cultural analyses. Is it possible to promote a kind of socialization of regulators that renders them more open to lobbying that promotes efficient capture, more resistant to lobbying that promotes zero-sum capture and inefficient capture? It clearly is possible; indeed, what we may be formalizing here is Bardach and Kagan's notion of "regulatory reasonableness."[51] It is possible to inculcate through training and precept a regulatory ethic that construes it as wrong to go for the temptation payoff when the firm is cooperating. Such a posture is socially constructed in the regulatory culture not as capture but as regulatory reasonableness. At the same time, a failure to reciprocate cheating by the firm with agency defection from cooperation is socially constructed as capture or corruption, as selling out.

To preserve the advantages of efficient capture while averting inefficient and zero-sum capture, what we must do is overlay our economic analysis of the incentives of agencies to be captured with a social analysis of how to transform those incentives. Capture that reduces the agency's temptation payoff is welfare enhancing; capture that increases the agency's sucker payoff undermines cooperation and can reduce welfare. What is needed is a regulatory culture that allows the agency's T' to fall by attaching negative social approval sanctions to the temptation payoff (the regulator is disapproved as "unreasonable and uncooperative"). But the regulatory culture also protects S' from rising in response to capture by adding social disapproval sanctions when this happens. In part B of figure 3, social disapproval sanctions that allow the agency's T' to fall while protecting S' from rising will push α^P down and α^{zs} up, leaving a wider range of situations where joint cooperation will prevail. It will push α^{zs} up to a cost that will more likely be prohibitive.

Social disapproval, through changes to T and S, can also encourage joint cooperation in multiperiod games by extending the range of discount rates where tit-for-tat joint cooperation will remain stable.[52] Hence, for example, joint cooperation can emerge from lower perceived probabilities that there will be another round or that firm and agency will continue to influence each other's payoffs into the future.

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51. Bardach & Kagan, *Going by the Book* (cited in note 11).
52. See our discussion of discount rates above in notes 39 and 49.

C. Summary: The Game-theoretic Analysis of Capture

Using simple algebra, we have attempted to model the effects of lobbying to capture or bribing to corrupt a regulatory agency. We have shown that when capture causes agencies to start caring about the welfare (payoffs) of regulated firms, the evolution of cooperation can be either enhanced or undermined. Specifically, the game-theoretic analysis has disaggregated capture into three distinguishable forms (fig. 4):

1. *Inefficient capture*: where joint cooperation shifts to a firm defect/ agency cooperate equilibrium.
2. *Zero-sum capture*: where joint defection shifts to a firm defect/ agency cooperate equilibrium.
3. *Efficient capture*: where joint defection shifts to a joint cooperation equilibrium.

The first is the most sinister form of capture: the welfare effects of moving away from Pareto-optimal, joint cooperation are unambiguously negative. The third has unambiguously positive welfare effects in moving from joint defection to joint cooperation. The second, zero-sum capture, has ambiguous welfare effects but clearly unfair distributive effects in advantaging cheaters over noncheaters.

Attempts to capture agencies operate crucially through changes in the agency's temptation and sucker payoffs. In both the single and multiperiod contexts, capture that tends to reduce the agency's temptation payoff is welfare enhancing; capture that tends to increase the agency's sucker payoff undermines cooperation and can reduce welfare. This result matches the simple intuition of the prisoners' dilemma: reducing the agency's myopic temptation to defect increases cooperation; and increasing the sucker payoff makes the agency less provokable. As Axelrod has eloquently explained, the threat of TFT retaliation is credible only if defection provokes your opponent's ire.[53]

Empirically there can be no doubt that regulatory agencies cooperate much more than they defect.[54] This evidence, by itself, indicates that

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53. It is interesting that we usually do not think about the possibility of reverse capture—that of the agency capturing the firm to increase the agency payoffs. Analytically both firms and agencies are controlled by managers who are agents for unconcentrated and rationally ignorant principals. Reverse capture would take three analogous forms—e.g., reverse zero-sum capture would lead to a firm cooperate/agency defect equilibrium—in which the agency defects to strict rule enforcement without retaliation from the firm. This conspicuously unanalyzed possibility of reverse capture is especially surprising since in other contexts, such as takeovers, policymakers can easily conceive of managers taking actions that deviate from shareholders' interests. Possibly agencies' moral exhortations to corporate managers are a subtle way of convincing the board that conversely what is good for America is good for General Motors.

54. See, e.g., more than 30 studies cited by Keith Hawkins, *Environment and Enforcement Regulation and the Social Definition of Pollution* 3 (Oxford: Clarendon Press, 1984). A third of the 96 Australian regulatory agencies studied by Grabosky and Braithwaite had not insti-
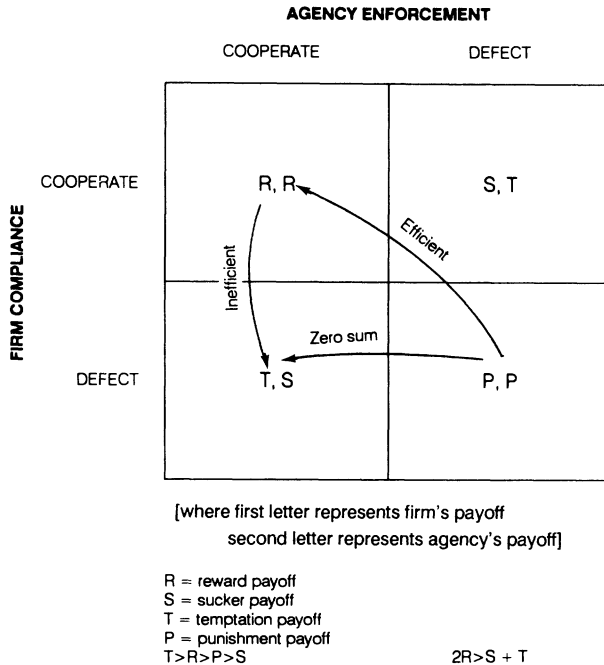
AGENCY ENFORCEMENT

COOPERATE   DEFECT

COOPERATE   R, R   S, T

FIRM COMPLIANCE

Efficient

Inefficient

Zero sum

DEFECT   T, S   P, P

[where first letter represents firm's payoff
         second letter represents agency's payoff]

R = reward payoff
S = sucker payoff
T = temptation payoff
P = punishment payoff
T > R > P > S   2R > S + T

FIGURE 4
Three types of capture

something is working to overcome the prisoner's dilemma and move the regulatory equilibrium away from joint defection. Our analysis, however, goes beyond Scholz and Axelrod to suggest that some "solutions" to the prisoner's dilemma may actually make society worse off. For although we suggest that one form of capture (i.e., efficient) reinforces the evolution of cooperation, we have shown that two other forms of regulatory capture (i.e., inefficient and zero-sum) may reduce social welfare.

Empirically it is natural, then, to ask where (in which box) are the current regulatory equilibria and why. Joint cooperation can be caused by either the pure multiperiod effects of the evolution of cooperation or the temptation-reducing effects of efficient capture. A firm defect/agency cooperate equilibrium can be caused by either zero-sum or inefficient capture. These are areas for further research. While we believe that a majority of regulated firms join the agency in cooperation, we are agnostic as to whether joint cooperation is caused by efficient capture or the evolu-

tuted a prosecution in three years. Even for the most punitive of regulatory agencies, the overwhelming majority of detected violations are not dealt with by punishment. Moreover, the attitudinal evidence of an ideological predisposition to cooperation is overwhelming. Grabosky & Braithwaite, *Of Manners Gentle* 192–93 (cited in note 3).

tion of cooperation.[55] For those instances in which the agency fails to retaliate against firm defection, there are good reasons for believing that inefficient capture of one type or another is responsible.[56] For most agencies, firm defection must be of extraordinary proportions to overcome the attitudinal resistance of regulators to punishment. Failure of regulators to defect from cooperation to retaliate against cheating firms is likely to be the predominant regulatory problem[57] and the focus of our proposed tripartism reform.

Finally, we have argued that to solve the policy problems the economic analysis has uncovered, we must complement an understanding of economic institutions with an understanding of socializing institutions. It is possible to promote a socialization of regulators which renders them more open to lobbying that promotes efficient capture and more resistant to lobbying that promotes zero-sum and inefficient capture. A regulatory ethic can be engendered that construes it as wrong to go for the temptation payoff when the firm is cooperating and wrong to acquiesce in cheating. When we add to the economic model the social- and self-disapproval sanctions from a regulatory culture that is reasonable but firm in this way, efficient joint cooperation can be accomplished in a wider range of situations.

In the next section, we seek to show that tripartism dramatically increases the costs of capture in the economic analysis. This is all to the good when tripartism deters inefficient and zero-sum capture. However, as with regulators, so with NGOs we do not want to deter efficient capture. Because we seek a social rather than an economic solution to preserving the benefits of efficient capture, we must design institutions to involve NGOs as well as regulators in a tripartite culture of regulatory reasonableness. As we move into a republican analysis of regulation in the following sections, we show how it is both desirable and plausible that republican tripartism will discourage NGOs from seeking the temptation payoff.

D. Deterring Capture with Tripartism

Empowering NGOs with standing to enforce agency regulations can serve as a powerful deterrent to the various forms of capture discussed

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55. The issue is whether agencies' current attitude against defecting to the temptation payoff is the by-product of firm lobbying.

56. The issue here is whether the uncaptured equilibrium would be one of joint cooperation (as implied by inefficient capture) or joint defection (as implied by zero-sum capture).

57. On the other hand, it must be said that because $T-R$ is greater than $T-P$, the incentives for this first form of capture, inefficient capture, are less than the incentives for zero-sum capture. However, the base of cases of joint defection from which the stronger incentives for zero-sum capture can operate is so small that it is implausible that zero-sum capture could ever become more widespread than inefficient capture.

above. To extend the capture model to include the possibility of NGOs, consider a model with N NGOs, each receiving the same payoffs as the un-captured agency, V_f. The NGOs have payoffs that are public regarding. But, as stressed above, these payoffs exclude the firm's profitability. The strategy set of each NGO consists of whether to enforce the law or not. In terms of the original model, the decision to enforce is equivalent to strict rule enforcement or noncooperative defection. Any individual NGO by liti-gation can effectively substitute for the agency defecting from cooperation. Indeed, cooperative enforcement will pertain only if neither the agency nor any of the individual NGOs choose to defect. Any individual NGO can cause defection.

NGOs crucially affect the regulated firm's ability to capture, because in the presence of empowered NGOs the firm must capture NGOs as well as the agency to be effective. But as the foregoing analysis has indicated, the different forms of capture have different equitable and efficiency effects. Public policy should seek to deter agency defection from the joint coopera-tive equilibrium, but should enhance the ability of agency and NGOs to defect from the agency cooperate/firm defect equilibrium. Consequently, as shown in figure 5, policy should be set to discourage NGOs from defect-ing from the joint cooperative equilibrium while simultaneously facilitating their capacity to defect when the firm has done so. To accomplish this, we will want to render NGOs susceptible to the same social- and self-disap-proval sanctions discussed earlier in relation to agencies. We will want NGOs to be full participants in a culture of regulatory reasonableness—a culture that rewards those who are "fair but firm." We will have more to say on this later in our discussion of republican tripartism wherein all play-ers are given an interest in working together to discover options for mu-tual gain—to empathize with the needs of the other.

By focusing on agency defection from the firm defect/agency cooper-ate quadrant, public policy can deter the inequity and questionable effi-ciency of zero-sum capture and the clear inefficiency of inefficient capture without undermining the welfare enhancement of Pareto capture.

If the N NGOs are given standing to enforce the law, a firm will only be able to achieve zero-sum or inefficient capture if it captures the NGOs' indi-vidual payoffs as well as the agency's. We can thus consider that each NGO could be lobbied and captured independent of agency lobbying. In formal terms, let the payoff for the ith NGO be $V_i = a_i V_f + (1 - \alpha_i) V_a$, where α_i, the level of NGO capture, is a positive function of the lobbying expenses, L_i, devoted to the ith NGO.

In order to accomplish zero-sum capture, the regulated firm must not only raise the agency's degree of capture (now termed α_a to distinguish it from the NGOs) above α^{zs}, but the degree of capture for each NGO must be above this magnitude as well.

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                    COOPERATE              DEFECT


            COOPERATE        R, R              S, T
   FIRM COMPLIANCE



              DEFECT        T, S              P, P
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[where first letter represents firm's payoff
    second letter represents agency's payoff]

R = reward payoff
S = sucker payoff
T = temptation payoff
P = punishment payoff
T>R>P>S   2R>S + T

FIRM COMPLIANCE

FIGURE 5
Public policy responses to two forms of agency defection

The firm's degree of effective capture, α_e, will accordingly be as low as that which it has achieved with the least captured NGO:

$$\alpha_e = \min (\alpha_a, \alpha_i) \text{ for } i = 1, N. \tag{7}$$

To accomplish zero-sum capture, the level of effective capture must exceed α^{zs}.

$$\alpha_e > \alpha^{zs},$$

which implies

$$\alpha_i > \alpha^{zs} \text{ for } i = 1, N.$$

As in the bilateral model, there will be a L_i^{zs} associated with each α. Further, to minimize costs, a firm interested in establishing a certain level of capture will lobby to establish that same amount with each NGO, since lobbying to capture one NGO more than another cannot, from equation (7), affect the capture equilibrium and thus would entail needless lobby expense. If each NGO has the same lobbying technology function as the agency,

$$\alpha_i(L) = \alpha_a(L) \text{ for all } L.$$

then to establish zero-sum capture for any individual NGO will entail lobbying expenses of

$L_i^{zs} = L_a^{zs}$ for $i = 1, N$.

To effectuate zero-sum capture under these assumptions would require

$L_e^{zs} = (N + 1)L_a^{zs}$,

as a firm would need to invest L_a^{zs} lobbying expenses in the agency and each (of the N) NGOs.

Tripartism (and beyond) can thus dramatically increase the costs of capture as can be seen in the increased slope of the effective lobbying technology:

$d\alpha_e/dL_a = (N + 1)d\alpha_a/dL_a$.

The firm's benefits from inefficient or zero-sum capture are fixed at T-R and T-P, respectively. Introducing multiple NGOs raises the cost of capture without increasing its benefits. Because a rational firm will not spend more on lobbying agencies and NGOs than it can potentially gain, tripartism offers the hope of retarding deleterious forms of capture.

In fact, the simple assumptions of our model understate the potential impact of tripartism here in two ways. First, if the idea of contestable guardianship is right, then it is not enough to capture only all relevant NGOs presently on the scene. Assume NGO capture is achieved by paying a bribe to all relevant NGO politicians. Under conditions of contestability, this capture will give reason for other NGO members to replace their unfaithful fiduciaries. Or if they cannot succeed in this, it will give them reason to resign and form a new NGO. Indeed, conditions of across-the-board capture of NGOs will create opportunities and incentives for citizens presently uninvolved in NGOs to set up new NGOs with a reform agenda. Thus, perfect contestability means that the number of bribes to be paid is not N but ∞.

Second, the assumption that each NGO has the same lobbying technology function will usually be wrong, and wrong in an interesting way. There exist individuals who for all practical purposes are incorruptible and immune to all available forms of capture. Such individuals are particularly likely to be found among NGO activists. What company would be foolish enough to consider offering Ralph Nader a bribe? The point is that as N (the number of NGOs) rises, the risk increases that one of them will be immovable by any level of lobbying expenditure. Then the lobbying expenditure on all the others will have been wasted.

E. Types of NGOs

In this section we will summarize what has been suggested so far about four ideal types of NGO behavior. This will lead us to open up what will be our major concern about tripartism: the zealous NGO.

The Rational NGO: We assume that it is possible to identify NGOs whose mission is the same as that embodied in a regulatory statute: envi-

ronmental groups for environmental statutes, animal welfare groups for animal welfare statutes, civil liberties groups for privacy statutes, women's groups for affirmative action legislation, and so on. If this assumption is correct, the rational NGO will behave in the same way as a rational regulator. If TFT is the rational way to play the game, as Scholz and Axelrod suggest it so often is,[58] then the rational NGO will monitor to ensure that the regulator is playing the game that way. When the captured regulator cooperates in a temptation payoff for the firm, the NGO will know this (because tripartism has given it access to the same information as the regulator). The rational NGO would then seek in the courts the deterrence payoff the rational regulator should have sought. Sticking with the simplistic motivational account of the rational actor model, if we assume the judge to be a rational uncaptured upholder of the public interest embodied in the law, then the judge will enforce the law on accurate evidence of law evasion supplied by the NGO. The judge will replace the temptation payoff the firm has achieved through capture with the confrontation payoff. Thus, the firm can no longer escape the prisoner's dilemma by capturing the regulator.

The Captured NGO: However, the firm can capture all the NGOs as well, and then escape the prisoner's dilemma. The captured NGO will behave in the same way as the captured agency. But we have shown that it is unlikely to be profitable or even possible under conditions of tripartism for the firm to spend an amount on capture that will enable it to defect with impunity.

The Tempted NGO: We have shown that there is a form of capture, efficient capture, which increases welfare. For regulatory agencies, we showed that we can encourage efficient capture by reducing the agency's temptation payoff. Similarly, we can encourage efficient capture by reducing its temptation payoff. In the case of agencies, we saw that to achieve this result we must supplement the economic analysis with an analysis of incentives derived from regulatory socialization (regulators are disapproved of when they are "unreasonable" and "uncooperative"). There is reason for optimism that regulatory socialization can and does steer agencies away from seeking the temptation payoff; empirically, it has been shown that regulators are mostly "of manners gentle."[59] There is no such empirical basis for optimism that NGOs will be of manners gentle. Firms have good reason to be nervous that NGOs will prove both uncapturable and so ill-mannered that they will readily succumb to the temptation payoff.

The Zealous NGO: The problem of the tempted NGO is so far un-

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58. Scholz, 18 *Law & Soc'y Rev.* (cited in note 4); Axelrod, *Evolution of Cooperation* (cited in note 5).

59. Grabosky & Braithwaite, *Of Manners Gentle.*

solved. But the problem may be worse than one of simple rational tempta-
tion. Certain facts about NGO socialization might be just the opposite of
those of regulator socialization; NGOs may be socially selected to be com-
bative rather than cooperative and well-mannered. Hence, NGOs may zeal-
ously seek the temptation payoff even when this is irrational according to
the parameters of our simple model.

F. The Problem of the Zealous NGO

One empirical study is consistent with this analysis of the problem of
the zealous NGO (but contrasts the discussion below of NGO spinelessness
from the studies of Rees and Carson and Henenberg).[60] Scholz himself
sought to predict the effectiveness of the Occupational Health and Safety
Administration (OSHA) in preventing worker injuries in 34 states.[61] Con-
sistent with his hypothesis that "vengeful and forgiving" TFT enforcement
will maximize compliance, he found that states with what he called cooper-
ative enforcement (firm enforcement concentrated on the "bad apples")
had more effective enforcement. However, he also found that labor in-
volvement in regulation reduced the effectiveness of enforcement.

We do not want to dwell on that study because it may be enforcement
ineffectiveness that increases labor involvement, especially since the latter
was measured by the number of complaints per worker filed with OSHA.
Also, needless to say, the right to file a lot of complaints with the regulator
is such a pale form of NGO participation as to approximate NGO exclusion
rather than tripartism, if that is the only participation involved. In fact,
the rather interesting analysis in Scholz's article[62] is based in part on this
very observation. Scholz points out that when NGOs are locked out of
meaningful participation in a regulatory regime, opportunities to invoke
enforcement have the qualities of a one-shot game (which recommend the
temptation payoff). Locked out constituencies are best to lock in tempta-
tion payoffs whenever the law gives them an opportunity to do so. If they
fail to mobilize legalistic enforcement to lock in their preferred outcome,
that preferred outcome will be undone on future occasions when they are
locked out. The implication, from our theoretical perspective, is that dis-
empowered NGOs are likely to be supporters of regulatory inflexibility and
opponents of the regulatory discretion needed to constitute win-win solu-
tions precisely because they are disempowered.

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60. Joseph Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational
Safety* (Philadelphia: University of Pennsylvania Press, 1988) ("Rees, *Reforming the Work-
place*"); W. G. (Kit) Carson & Cathy Henenberg, "Social Justice at the Workplace: The
Political Economy of Occupational Health and Safety Laws," 16 *Soc. Just.* 124 (1990).
    61. John T. Scholz, "Cooperative Regulatory Enforcement and the Politics of Adminis-
trative Effectiveness," 85 *Am. Pol. Sci. Rev.* 115 (1991).
    62. *Id.*

There are good theoretical reasons for expecting that NGOs will not always act as rational maximizers of the public interest embodied in the law, the interest they purport to represent. NGO behavior, like any social action, can be understood in useful and limited ways as both (1) a process of displaying and being faithful to an identity[63] and (2) a rational pursuit of goals. For NGO activists, sustaining the identity of a knight on a white charger may be quite important. A commonplace observation of Australian Labor Party politicians is that NGOs too often indulge the politics of the "warm inner glow" in preference to achieving results. The trade union leader can sometimes win more votes from her constituency by glorious but unsuccessful confrontations with evil capitalists than by cooperatively negotiating satisfying resolutions to conflict. The environmental group that thrives on conflict may suffer a decline in financial contributions or membership if it becomes conciliatory.[64]

This connects with Edelman's theory that diffuse publics get symbolic rewards while concentrated interests get tangible rewards.[65] Consumers, for example, are usually diffuse interests. Concentrated interests have the power (particularly the staying power) to hold out for tangible rewards. Could it be that NGOs so often settle for symbolic rewards because that is all they have the capacity to hold out for? They derive satisfaction from the enactment of a new regulatory law (symbolic reward), when ten years later it is found that the law has never been enforced (the elusive tangible reward).

What then is our theory of why NGOs are sometimes zealots, "irrationally" going for symbolic rewards associated with the temptation payoff? Drawing on Edelman,[66] the theory is that NGOs focus on deriving satisfaction from symbolic victories to the extent that they are excluded from tangible victories. When NGOs are empowered, they will be more focused on the more durable, and ultimately more persuasive, appeal of tangible long-term progress toward goals that are important to their members.[67]

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63. Samuel Bowles & Herbert Gintis, *Democracy and Capitalism* (New York: Basic Books, 1986); Amitai Etzioni, *The Moral Dimension: Toward a New Economics* (New York: Free Press, 1988).

64. Harris & Milkis, *Politics of Regulatory Change* (cited in note 22); see also Quirk, *Industry Influence* (cited in note 2).

65. J. M. Edelman, *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1964) ("Edelman, *Symbolic Uses of Politics*").

66. Id.

67. Joel Rogers has argued that in a world where people have some basic democratic rights but little other power, they may use those rights in destructive ways. Joel Rogers, "The Limits of Legal Liberalism: Implementation and Empowerment in Administrative Regulation" (presented to Law & Society Association Annual Meeting, Madison, Wis., 1989). The conservative response to this destructiveness is to urge reductions in the political resources of less powerful groups. Rogers contends, in contrast, that increasing their political resources is at least as plausible a strategy for dealing with these problems. Instead of seeing adversarial NGO zealotry that reduces social product as a sign of their "excessive" strength, Rogers sees it as "a sign of weakness, testimony to the lack of alternative sanctions

Powerful NGOs, like the contemporary Australian Council of Trade Unions or the Swedish Trade Union Confederation, rarely sacrifice tangible rewards to symbolic rewards; they systematically prefer cooperation with business and government to short-sighted seizure of a temptation payoff.[68] Tripartite empowerment removes the conditions for the irrational zealotry which, in advance of empowerment, seems the strongest argument against tripartism.[69]

One dynamic that underlies this is that NGO politicians are driven to emphasize symbolic rewards because that is all they can deliver to the membership to justify their own reelection or their continued funding. The leadership has an interest in duping the membership into believing that symbolic victories are not Pyrrhic. It follows that communication to the membership of tangible outcomes from the regulatory process will undermine the appeal of symbolic politics. The open-information aspect of tripartism therefore undermines the political foundations of NGO zealotry. The more the regulatory system succeeds in widely communicating knowledge about the benefits secured from cooperation, the more likely that NGO constituents will support rational TFT policies and the more likely that they will remove zealots from office.

A common source of NGO zealotry is that NGO leaders, rather than being faithful fiduciaries for their members, are captured by fourth interests. NGO activists are sometimes captured by political affiliations; their motivation can be less to be a rational fiduciary of the NGO and more to use NGO activism as a stepping-stone into politics. It is possible, for example, for a trade unionist to be captured by a left political party and for this capture to explain "consciousness-raising struggles" that leave members worse off than they would have been through a more cooperative strategy. To the extent that NGO zealotry is explained as capture by fourth interests, again the solution is maximum engendering of awareness among NGO members of the payoffs their agents are delivering on their behalf.

We now develop a further, more formal, argument concluding that

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available to those who would curb the arbitrary exercise of power (people stand on their rights because they have nothing else to stand on)." *Id.* at 3. When organizations have a solid political foundation from which to extract long-term benefits, they are more likely to show the restraint that eschews short-term punch-and-grab strategies that undermine the prospects for long-term cooperative benefits. Weak NGOs, in contrast, "have every incentive to free-ride on their future interests, since they may not have a future." Joel Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws,' " 1990 *Wis. L. Rev.* 1, 5 (1990).

68. Four years of observation by one of the authors of the ACTU leadership dealing with the leadership of the business community and the Australian government around the table of the Economic Planning Advisory Council leaves little doubt about this, at least for the present ACTU leadership.

69. See also Barry Boyer & Errol Meidinger, "Privatizing Regulatory Enforcement: A Preliminary Analysis of Citizen Suits under the Federal Environmental Laws," 34 *Buff. L. Rev.* 833, 962 (1985).

tripartism may be a cure rather than a fillip to seemingly irrational NGO advocacy of the temptation payoff. When the NGO is excluded from information,[70] it is more rational for it to harass the regulated firm, to opt more often for deterrence when the firm is cooperating. Uncertainty makes it more difficult for an NGO to determine whether a firm is cooperating or defecting. Consequently, uncertainty makes it more difficult for the NGO to join the agency in a TFT strategy against the firm. If the NGO is excluded from information, it will only be able to play TFT with error and these errors will tend to destabilize the evolution of cooperation. Because uninformed NGOs will sometimes mistakenly believe that a cooperating firm is defecting, the firm's payoff from cooperating is reduced. Analogously, because uninformed NGOs will sometimes mistakenly believe that a defecting firm is cooperating, the firm's payoff from defecting is increased. Both types of error work to increase firms' incentives to defect. At the extreme, an NGO would have no idea whether the firm was defecting or cooperating—so that from the NGO's perspective the 2x2 matrix would collapse to a 1x2 matrix depicted in figure 6. In figure 6, β is the NGO's estimate of the

NGO

	COOPERATE	DEFECT
FIRM	$\beta R + (1-\beta)S$	$\beta T + (1-\beta)P$

FIGURE 6
Expected payoffs for asymmetrically informed NGO

probability that firm is cooperating. Because $T > R$ and $P > S$, the completely uninformed NGO will prefer defection for any value β ($1 > \beta > 0$).

It follows from our theory that the admitted attraction of NGOs to the adversarial temptation payoff is not a problem that is unleashed by tripartism but a problem reigned in by our conception of tripartism. In addition, one must not lose sight of the fact that under tripartism the combative zealot will end up having to persuade a judge to zealotry against the weight of evidence submitted by the two other players.

Under conditions of full tripartism, NGOs would tend to view going to court in the same way that agencies currently tend to view it—as a last

70. Bendar presents a lucid account of how incomplete information (about whether defection has occurred) can undermine TFT strategies and the evolution of cooperation in a two-person prisoner's dilemma. Jonathan Bendar, "In Good Times and Bad: Reciprocity in an Uncertain World," 31 *Am. J. Pol. Sci.* 531 (1987).

desperate measure to force compliance, as an "admission of failure."[71]   As we will see later, empowered agents have an interest in not handing over that power to courts.   Here it is important to distinguish our tripartism proposal from the trends that have led to the emerging malaise of U.S. administrative law over the past 20 years.[72]   That malaise can be described first as paralysis in dealing with the tough rule-making issues, and second as a shift in power within regulatory agencies "from those who are really concerned about making policies that work to those concerned with defending them in court."[73]

The malaise was largely caused by the U.S. fear of capture; NGOs addressed this fear by fighting legal battles for rules to narrow agency discretion.   Judges who had "read and accepted the literature on agency 'capture'"[74] agreed, and undercut regulatory flexibility.   The tripartism proposal involves accepting wide discretion, allowing flexible regulation but safeguarding against its abuse by NGO participation at the front end of the regulatory process.   Front-end participation in actually negotiating outcomes is more empowering than back-end participation in attempting to reverse these deals in the courts.[75]   Nevertheless, back-end standing is a prerequisite for front-end submissions to be taken seriously.   It requires an extremely pessimistic view of NGO irrationality to believe that NGOs would systematically prefer back-end to front-end participation.   Back-end participation is not only less empowering, it is also more expensive to go to court.

The relevant feature of regulatory problems here is that they tend to be polycentric,[76] so that a solution to any side of the problem will affect how the other sides of it can be solved.   Polycentrism means, first, that formal rule adjudication cannot unravel this complex fabric and, second, that the many sides of the problem can be mutually adjusted to constitute non-zero-sum solutions.   Thus, at the same time that polycentrism undermines the rationality of legalistic adjudication, it also creates the conditions where mutuality can constitute high reward payoffs in the prisoner's dilemma game.

The central message of this section has been that seemingly irrational NGO zealotry is not an inevitable fact of life; it is a product of structural

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71. This way of describing litigation regularly recurs in Braithwaite's field notes of interviews with regulators.

72. Ably described by Shapiro, *Who Guards?* (cited in note 15), and R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington D.C.: Brookings Institution, 1983) ("Melnick, *Regulation*").

73. Shapiro, *Who Guards?* 152.

74. Melnick, *Regulation* 362.

75. However, litigation to change the law may be more cost effective for the NGO than either front-end or back-end participation in enforcing the law as it exists.   Nevertheless, we then need to consider whether front-end tripartite participation in writing the law is more cost effective for the NGO than waiting for back-end litigation to change the law.

76. Lon Fuller, "The Forms and Limits of Adjudication," 92 *Harv. L. Rev.* 394 (1978).

conditions that make zealotry the NGO's best shot. Tripartism might transform those structural conditions.

G. Limits of the Economic Model

We started with a simple economic model that enabled us to see with clarity the different forms of capture and tripartism's possible effects on them. But we quickly came to see that it is a model that only gets us started toward understanding how we can secure the advantages of the evolution of cooperation while averting the evolution of inefficient capture and corruption. It is now time to summarize the limits of the game-theoretic model revealed so far and to add some more.

Notwithstanding its limits, the simple model makes two steps toward greater complexity compared with the Scholz model[77] in that it (1) problematizes the interests of the two original players—from simply pursuing structurally determined unitary interests to being captured by the interests of the other, and (2) adds a third player to the game. However, we have already seen that whether tripartism will cost-effectively advance compliance with the law cannot be assessed without considering the relevance of the capture of regulatory players by fourth interests outside the model. Regulation can be usefully conceived as a simultaneous pursuit of multiple interrelated games. Hence, for example, the regulator plays cooperatively with an employee or subunit of the firm at the same time as it plays confrontationally with the firm itself in communications with its chief executive. As that chief executive plays confrontationally with the regulator, she plays another game cooperatively with the regulator's political masters to bring their influence to bear.

It is often assumed that the problem of the nonunitary nature of the corporation is a source of regulator impotence, but in fact it is not. One of the reviewers of our manuscript advanced this common assumption clearly: "[T]he large corporation suffers from a bifurcation of goals between top management which must play ball with regulators and activists and middle managers who are judged on short-term financial criteria. In fact, the real problem is that middle managers get mixed signals—be socially responsible and maximize business performance in the short run. Of course their career advancement is predicated on the latter." The problem of nonunitariness is in fact a strategic advantage for the regulator. When middle management is irresponsible and adversarial but top management is cooperative, the regulator can choose to switch the venue of regulatory negotiation to the offices of top management. If, as often happens, middle management is more cooperative than top management would want them

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77. Scholz, 18 *Law & Soc'y Rev.* (cited in note 5).

to be, regulatory negotiation can quietly proceed at this lower level of the organization without top management finding out about the nature of the deals that are done. Of course, this venue-shopping advantage often cuts the other way. If the inspector is not captured, the firm can go to the supervisor; if the supervisor is not captured, to the head of the agency and ultimately to her political masters. To the extent that tripartism deters corruption and capture, our hypothesis is that it will have an effect at all levels of the regulatory bureaucracy. To this extent, the effect of tripartism is to curtail the venue-shopping advantage of the firm while leaving the venue-shopping advantage of the regulator untouched.

Having disaggregated capture into its welfare-damaging and welfare-enhancing forms, we have glimpsed the insight that the key to a policy for preserving efficient capture while preventing inefficient capture will lie in a social analysis of regulatory cultures.

We have seen the error of assuming that the lobbying technology function is the same for all NGOs and the importance of this error for underestimating the effects of tripartism in deterring capture. Beneath this error lies a deeper error inherent in economic modeling: the assumption that actors are maximizers, or at least satisficers,[78] of some value. We pointed out that for many NGO fiduciaries the lobbying technology function will have a slope of zero. On some matters some NGOs and some regulators will not be maximizers or satisfiers of some utility, least of all one that can be monetized; they will be deontologists. They will seek to secure some approved state irrespective of the cost, without regard even to the possibility that doing so will worsen attainment of that same value in the long run.

Hence the union will insist that millions of dollars be spent in attempts to dig out miners trapped miles underground even if that will mean there will be no money for subsequent improvements in the safety of the mine that are likely to save more lives. The environmental group will adopt the position that no economic benefit can justify the extinction of a species. Even corporate actors often enough reason deontologically: "This company is committed to complying with the law. Price fixing is against the law. We will refrain from price fixing whatever the cost."[79] It is the case that actors sometimes think this way; and good moral arguments can be advanced as to why actors ought to think this way.[80] We fail

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78. Herbert A. Simon, Models of Bounded Rationality (Cambridge, Mass.: MIT Press, 1982).

79. Of 358 directors of nursing of Australian nursing homes, 42% agreed with the statement, "My proprietor has the attitude that the government's standards and regulations must be met no matter what the costs." John Braithwaite, Toni Makkai, Valerie Braithwaite, Diane Gibson, & David Ermann, The Contribution of the Standards Monitoring Process to the Quality of Nursing Home Life: A Preliminary Report (Canberra: Department of Community Services and Health, 1990).

80. Peter Yeager, "Realms of Reason: Notes on the Division of Moral Labor in Corpo-

to capture this sort of "is" and "ought" with economic models which monetize values that actors are assumed to want to maximize.

A further limitation is in assuming that when capture does occur, it occurs as a result of lobbying expenditure by the firm. Capture may be hegemonic,[81] a product of tendencies for capitalism to inculcate an identification among all citizens of the interests of capital with their own interests. Capture may be the result of a judgment that in a capitalist economy people who believe that "what is good for General Motors is good for America" are the people who get on.[82] In neither case does the firm benefiting from capture have to spend money to gain the benefit.

One of the most plausible noneconomic theories of capture is the most mundane: regulators like to cooperate with firms because they seek a conflict-free work life.[83] Most of us regularly conciliate in circumstances where we could achieve a better result by fighting; we do this because fighting is nasty and unpleasant, especially when fighting means a gladiatorial battle in a court of law. Regulators confront incidents where ugly conflict can flare much more regularly than actors confront in almost any walk of life; little wonder they seek to minimize their exposure to conflict, even when conflict is in the public interest.

Our economic model assumes that noncompliance with the law occurs as a result of calculations to break the law. Often noncompliance will occur as a result of ignorance; if the firm had known what the law was, it would have complied; the costs and benefits of compliance had nothing to do with it. Or they might know what the law is but fail to grasp, or lose sight of, the fact that it applies in particular circumstances.

Noncompliance sometimes occurs because the firms believe the law is a bad thing; they will resist the law even when they know it is economically irrational for them to do so because they are against the law in principle. Obversely, if the regulator can persuade them that it is a good law, they may comply even when it is economically irrational for them to do so. Business executives regularly comply with laws that have such low deterrence payoffs and probabilities associated with them that compliance is almost always economically irrational.[84] Kagan and Scholz define three models of the firm that are relevant here: the amoral calculator, which is

rate Behavior" (presented to Edwin Sutherland Conference on White-Collar Crime, Indiana University, 1990).

81. Antoniono Gramsci, in Q. Hoare & G. Nowell-Smith, eds. & trans., *Selections from the Prison Notebooks of A. Gramsci* (London: Lawrence & Wishart, 1971); Robert Bocock, *Hegemony* (London: Travistock, 1986).

82. Joshua Cohen & Joel Rogers, *On Democracy: Toward a Transformation of American Society* 51–58 (Harmondsworth: Penguin, 1983).

83. Business executives are often captured by regulators for the same reason. To avoid the angst of a confrontation, they may prefer to comply with what they perceive as an unreasonable regulatory demand.

84. See, e.g., Robert A. Kagan, *Regulatory Justice: Implementing a Wage-Price Freeze* (New York: Russell Sage Foundation, 1978).

that assumed in our economic model; the political citizen, which fails to comply because of principled disagreement with a command; and the organizationally incompetent firm, which fails to comply because of poor management systems.[85]

For some laws, there is no temptation payoff for the firm. There is no temptation payoff for a trucking firm that defies the law against driving on the left-hand side of the road. When such laws are broken, which they often are, the explanation is usually incompetence. The prisoner's dilemma model does not incorporate incompetence as an explanation. Social control policies designed to deal only with rational action, to the exclusion of extrarational action, will fail. Theories that preclude alternative modes of reasoning in favor of one narrow version of rationality will mislead.

The key question is the following: If firms behave other than as profit-maximizing monoliths, if regulators have other motivations besides the impartial enforcement of the law, does taking into consideration these alternative motivations make tripartism a better idea or a weaker idea? We will conclude that a consideration of motivational dissensus makes tripartism even more appealing as a policy solution to the contradictions of cooperation and capture.

The economic model assumes a knowledge of compliance outcomes and, implicitly, a level of resources that regulators rarely have. How often does the environmental agency realize how many tons of pollution result from its enforcement decisions? This is not simply a question of information costs naturally being high because of the complexity of the facts. Firms can actively contrive complexity, conceal evidence, and engage in downright deception.[86]

A related error with the simple two-person model is that it implicitly assumes an equality of power between the agency and the firm. A hidden assumption is that the agency will have the same capacity to deliver the deterrence payoff that the firm has, that there are no phenomena such as political interference to prevent the agency from delivering deterrence.

These are not all of the limitations of the game-theoretic modeling of regulation; they are only the most consequential ones for attempts to understand how to secure the advantages of the evolution of cooperation while averting the evolution of corruption and capture.

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85. Robert A. Kagan & John T. Scholz, "The Criminology of the Corporation and Regulatory Enforcement Strategies," in K. Hawkins & J. Thomas, eds., Enforcing Regulation (Boston: Kluwer-Nijhoff, 1984) ("Kagan & Scholz, 'Criminology of the Corporation' ").
86. John Braithwaite, Corporate Crime in the Pharmaceutical Industry (London: Routledge & Kegan Paul, 1984).

III. AN EMPOWERMENT THEORY

What we attempt now is a complementary theory of tripartism, an empowerment theory, which addresses these deficiencies of the economic model. The empowerment theory of tripartism combines both explanatory and normative propositions grounded in the application of a republican theoretical tradition to regulation.[87]

First, we distinguish the empowerment analysis of tripartism as one that assumes inequality of power and seeks to remedy it. Second, we show that empowerment gives regulatory players an interest in building trust, cooperation, and dialogue within regulatory communities. A communitarian tripartism of this sort, we will show, can solve the problems left unsolved by the pure economic interests model of tripartism. It can address problems that are not best understood as an outcome of the rational pursuit of interests; it can advance compliance by engendering a commitment to the rightness of the law and to the unthinkableness of breaking the law; and it can engage in dialogue with the firm for whom the question is not "Should we do the right thing?" but "What is the right thing to do?"[88]

A. The Case for Countervailing Power

We have seen that the Scholz game-theoretic approach implicitly assumes equality of power. The empowerment theory starts from an explicit assumption of inequality of power. This assumption is that regulatory institutions are structured to institutionalize the power of some stakeholders (in particular those who bear the costs) over regulatory outcomes and to exclude the influence of others (those who derive the benefits). The reason, drawing again on Edelman[89] is that beneficiaries are systematically more likely to be diffuse interests while those who bear the costs are more likely to be concentrated interests. The process often goes so far that an industry regulatory system that is theoretically a benefit to consumers and a cost to industry becomes the reverse.[90]

Idealizing, let us assume that we are dealing with a good regulatory

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87. Philip Pettit, "The Freedom of the City: A Republican Ideal," in A. Hamlin & P. Pettit, eds., *The Good Polity* (Oxford: Blackwell, 1989); John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990) ("Braithwaite & Pettit, *Not Just Deserts*").

88. Thomas C. Schelling, "Command and Control," in J. W. McKie, ed., *Social Responsibility and the Business Predicament* (Washington D.C.: Brookings Institution, 1974).

89. Edelman, *Symbolic Uses of Politics* (cited in note 65).

90. Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955); Gabriel Kolko, *Railroads and Regulation, 1877–1916* (Princeton, N.J.: Princeton University Press, 1965).

law that properly reflects the will of a democracy.[91] Limiting of the regulatory game to two effective players profoundly undermines this democratic will. If we assume the regulatory agency is an uncaptured fiduciary of the democratic will embodied in the law, then it will bargain for the level of intervention required by the law. The firm that acts in the profitability interests of shareholders will bargain for a level of intervention lower than required by the law. It will play games with the political masters of regulators to mobilize pressure for such lower intervention. The result of any plausible outcome to bargaining from these starting positions will be a level of intervention higher than the company wants and lower than the law requires.

Now if an NGO becomes a third player in the bargaining game, we assume it will advocate a level of intervention higher than that required by the law. The result of this exercise of countervailing power in the bargaining game will be that the final result will be closer to the democratic will embodied in the law. What are the circumstances where this would not occur? If the starting position of the NGO were more than twice as much above the legal standard as the starting position of the firm were below it, and if the NGO had equal countervailing power to the firm, then the outcome post-tripartism would be further from the legal standard than the outcome pretripartism. This is a highly implausible set of circumstances. It is not only implausible because of the extremity of NGO demands required and the improbability that NGOs will match industry in power but also because liberal legal systems properly make it easier to appeal state interventions beyond that provided by the law than state interventions below that provided by the law.

A complaint of industry against the idea of NGO empowerment, related although not the same as the complaint against NGO zealotry, is that public interest groups will improperly demand a higher standard than that required in the law. It may be that such demands are improper. But the empowerment theory suggests that to the extent that NGOs make them, they will only partially counterbalance the demands made by industry for a lower standard than that provided by the law. The outcome under tripartism should be closer to the legal standard settled on through the democratic process.[92]

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91. This, of course, is an idealization because regulatory laws will often be a product of logrolling and placating special interests.

92. An alternative model here is that regulatory laws are usually set at a standard that everyone, including regulators, understands is too high. Agencies seek that level below the standard in the law that the state accepts as normally appropriate. Then the model unfolds in the same way: the industry bargains for less than this, the NGO for more, so that with the NGO playing the game, the result is more likely near the standard the state accepts as appropriate. Similarly in those situations where the law has lagged behind technological change and the state seeks a standard higher than that embodied in the law, NGO participation will bring the final result closer to that preferred state standard.

The defense of tripartism under the empowerment theory is not only in terms of outcome but also in terms of process. An opportunity for participation by stakeholders in decisions over matters that affect their lives is a democratic good independent of any improved outcomes that follow from it. With the regulation of risk, risk takers and risk bearers should both be involved in decision making about the distribution of risk.[93] Normatively, we require a theory of policy that directs our attention to the equitable distribution of burdens as well as to the maximizing of benefits.

The power of all citizens to vote for those who make their laws is an equalizing institution which gives Western democracies a profound participatory superiority over other existing political systems. But the fact is that this democratic superiority is systematically undermined by unequal power relationships at the implementation stage.[94] Laws which have popular support, which reflect the capacity of ordinary citizens to prevail over powerful corporate interests in the legislative arena, are thwarted by the superior capacity of corporate interests and the inferior capacity of individual citizen interests to be mobilized at implementation. When powerful interests are being regulated, the law in the books will usually be closer to democratic preferences than the law in action, because the law in the books is more directly influenced by the power of ordinary citizens to vote.

It follows that a state with a democratic vision limited to the vote will be a democracy undermined by the powerful. Genuine democratic influence over regulatory institutions requires that we supplement the power to vote for the platitudes of party platforms with innovative participatory mechanisms that follow legislative will through to executive implementation.[95] Empowerment means creating a more vital, active democracy, a democracy less under the thumb of the corporate sector.

Citizens have limited capacities and motivation for participation. For some citizens, environmental protection will be such a vital concern that an empowered environmental movement will give them an opportunity to follow through on their special concern; for others it will be broadcasting regulation; for others, motor vehicle safety, and so on. Tripartism may be a route to a more participatory democracy, a more genuine democracy, but a practical democracy that does not make unrealistic demands of mass participation in all institutional arenas.

The trick here is to steer a course between the practical impossibility of mass participation and the danger of participation only by NGOs which

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93. Nancy Frank, "Risk and Distributive Justice" (presented to Edwin Sutherland Conference on White-Collar Crime, Indiana University, 1990).

94. Handler, 35 *UCLA L. Rev.* (cited in note 10).

95. Meidinger, "Regulatory Culture" (cited in note 26); Boyer & Meidinger, 34 *Buff. L. Rev.* (cited in note 69).

have become oligarchies.[96] That middle course is to be found in the idea of contestable NGO guardianship. It calls for the open communication to NGO constituents that is a defining requirement of our tripartism. The policy of the democratic state should be to deny empowerment to NGOs that are not democratically constituted, to stand ready to disempower NGOs with a declining base of popular support in favor of NGOs with rising popular support. Doing favors for the NGO with the strongest base of support in this way is generally good politics for political leaders in any case. In this sense, contestable tripartism has the strength of some practical political appeal. Judicious NGO empowerment can be good for political survival.

We reject the utopianism of a democracy where all citizens actively participate in decisions regarding the running of their workplace, the administration of their children's schools, the planning of the neighborhoods where they live, the policy planning of the police force that serves them, the framing of the environmental policies to protect the wilderness areas of their nation. None of us could bear the information overload from such participatory demands. However, opportunities should be available for citizens to participate actively in these and all other important spheres. For our theory to work, all that is then required is for enough people to absorb the information made available and take up the opportunities for participation to supply countervailing regulatory power and to render that power contestable.

These demands, we hypothesize, are minimal enough to be realistic. Consider the case of the elected worker health and safety representative who participates in regulatory negotiations, the results of which are reported on workplace notice boards. Will many workers be interested in taking a turn as the health and safety representative? No. Will many workers read the inspection report pinned on the notice board? No. However, will someone be interested in being the health and safety representative? Generally yes, at least in high-risk workplaces. Will some workers read the posted inspection reports and make a fuss if they do not like what they see? Will some workers notice if their representative fails to follow through on their complaints? Again we suspect that the answers to these less demanding questions will often be yes, even if the answer to whether most representatives will initiate enforcement action against their employer is no.[97] For the latter to be realistic, activism by salaried NGO lawyers is probably needed.

In the case of the Australian Federation of Consumer Organizations, which puts consumer representatives onto many significant and not-so-significant government committees, how many consumers read the reports

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96. Robert Michels, *Political Parties* (Glencoe, Ill.: Free Press, 1951).
97. Carson & Henenberg, 16 *Soc. Just.* 124 (cited in note 60).

their representatives are required to produce from those meetings, or the minutes of the meetings? Not many. But during the period when one of the authors headed that federation, some staff and most members of the executive read them in case a debate ensued when they were circulated for an executive meeting. And other constituents, if only constituents who were interested by virtue of being former representatives on the committee, read reports often enough to provoke occasional oustings of representatives.

We do not envision a tripartism where most beneficiaries of regulation participate in NGOs, where most who do participate in NGOs will be interested enough to process the information made available to them, where the incumbency of NGO representatives is often contested. We only assume that incumbency will be contestable, and spasmodically contested, because a sufficient number of citizens will absorb the information required to stir opposition to perceived infidelity to the interests of constituents. The vision of democracy is of extended periods of peaceful apathy punctuated by infrequent ringing of alarm bells occasioning gushes of grass-roots participation and even more infrequent purges.

Democratic organization of diffuse publics that are then empowered achieves two key outcomes. First, the very organization, the defeat of disorganization, is a remedy for the malady of diffuseness which allows concentrated interests to implement capture with impunity. Second, the democratic-participatory potentialities structured into the organization are a remedy to the second-order capture problem of the NGO representative being captured.

B. Empowerment and Trust

The next move in developing the empowerment theory is the proposition that empowerment builds trust and trust builds power. Power and trust are mutually constituting. How does this work in the tripartism case? There is no reason for us to trust those who have no influence over our lives; but once an actor is empowered in relation to us, we are well advised to build a relationship of trust with that actor. The boss may have little reason to build a relationship of trust with a particular worker; but once that worker is elected as health and safety representative with the power to stop production until safe conditions are restored, the prudent employer will seek to build rapport and ultimately establish a relationship of trust. Power constitutes trust.

But how does trust constitute power? In our forthcoming book,[98] we will show that it can do so in three ways. First, players who build trust will

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98. Ayres & Braithwaite, *Responsive Regulation* (cited in note 25).

gain more resources from win-win solutions in non-zero-sum games. Second, when players trust each other, their intentions (as opposed to uncontrolled external contingencies) will better explain outcomes.[99] Third, the complexities and uncertainties of modern societies must be controlled by those who want to be powerful; making trust work for you is the most cost-effective, perhaps the indispensable, route to such mastery.

Trust, as it is conceived here, means a relationship where the other player can be taken at his or her word, where there is a commitment to honest communication, to understanding the needs of the other, to agreed rules of fair play and a preference for cooperation. As a social matter, the fact that cooperation is part of what makes for trust means that trust is threatened whenever regulatory agencies are required to impose a deterrence payoff. The firm will usually try to invoke the symbolic capital of cooperation and trust in these circumstances: "Okay, we made a mistake. We regret it. Let's work together to ensure it doesn't happen again."

An important advantage of tripartism is that it makes it easier for the regulator to sustain cooperation and trust while imposing the required deterrence payoff. The regulator is given a strategic advantage in sustaining cooperative social relationships by occupying a middle ground between countervailing constituencies.[100] She appeals to the firm that it surely understands that unless she invokes the deterrence payoff, the NGO will step in and do so, leaving her open to criticism from her superiors and embroiling all the players in a protracted confrontation. Indeed, the nature of the situation should make it clear to the firm that the agency has no choice but to impose the deterrence payoff, without any need for the agency to verbalize its appeal to this fact. Empirically, even in the absence of tripartism, regulators who want to get tough while maintaining cooperation often leak strategic information to NGOs whom they know will put the agency under outside pressure to act.

Finally, we saw earlier that when the NGO is excluded from information and participation, consistent pursuit of the deterrence payoff is more likely to be its best strategy. Tripartism, we saw, transforms these incentives toward more cooperative preferences. Lock NGOs outside the gates and their best strategy is to hurl missiles across the fence (mostly by scattergun media assaults); invite them inside to sit at the table, and they are

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99. If distrust breaks out, the players will lose the power to decide outcomes to other institutions (like courts of law) and to environmental contingencies that determine who will win out in a test of strength (like fluctuating market conditions which might decide how long the firm or the union can hold out during a strike). To put it another way, under conditions of trust, intentions of the players determine more of the variance in outcomes; under conditions of distrust, outcomes are more in the hands of uncontrolled external contingencies.

100. John Braithwaite, "Getting on with the Job of Understanding Organizational Deviance" (presented to Workshop on Organizational Deviance, Harvard Business School, March 9, 1989).

more likely to find that they do best through cooperative negotiation. In all these ways, therefore, NGO empowerment constitutes trust, cooperation, and communication among the three types of players.

IV. SYNTHESIS

A. Plugging the Gaps in the Economic Analysis

Once we have transcended the game-theoretic notion of cooperation as a simple manifestation of self-interest—when tripartite trust, cooperation, and communication are in place as social phenomena with momentum of their own—we can solve some of the problems we listed with the pure economic model. When the agency enjoys a relationship of trust with the firm, the agency can deal with noncompliance caused by incompetence by playing the role of regulator-as-consultant instead of the role of regulator-as-punisher.[101] Trust is necessary to this enterprise because honest communication of managerial and technological breakdowns is a prerequisite.

When the agency deals with an industry that breaks a law because it thinks the law is silly or because it does not understand its requirements, the agency can use its good channels of communication with the industry to attempt to convince it that there is in fact a good reason for the law, or to bring the industry to an understanding of what the law requires. Similarly, the union safety representative can exploit a communicative relationship with the boss to explain from a shop-floor perspective why compliance with a particular law is necessary. Bringing a different perspective and knowledge base to the problem compared with the other two regulatory players, she will often indeed be able to suggest a more cost-effective way of securing compliance than has crossed the mind of the resistant boss.

More generally, cooperative open communication may produce more efficient regulatory outcomes because bad arguments and bad solutions are less likely to go unchallenged. And genuine communication means that when challenges are advanced, they are listened to. Further, three heads are better than two in ensuring that all the arguments are properly considered.[102] The NGO will bring different experiences and perspectives to enrich regulatory deliberation. As the bedridden president of the residents' council of a U.S. nursing home put it: "A lot of things you have to live it in order to see it." The informational advantages of the NGO at the follow-

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101. Kagan & Scholz, "Criminology of the Corporation" (cited in note 85).
102. Victor H. Vroom, "Industrial Social Psychology," in 5 *The Handbook of Social Psychology* 227–40 (2d ed. Reading, Mass: Addison-Wesley, 1969) ("Broom, 'Industrial Social Psychology' ").

through stage of regulation may be particularly profound. The erroneous assumption of solid agency knowledge of compliance outcomes was identified earlier as an important defect of the economic model. Let us imagine that the nursing home inspector, the proprietor and the residents' council agree on a new system for ensuring that food from the kitchen is not cold by the time it gets to the residents. Because it is the residents who eat the food, and because the inspector only gets back to the nursing home once a year (while residents are there every day), the residents' council is the player best able to monitor whether the agreed solution is implemented and works. It is also in the best position to detect whether routine compliance is combined with intermittent deceit.

The neocorporatists of European political science[103] have identified another advantage that tripartite deliberation can have at the follow-through stage. This has to do with legitimation to secure the governability of capitalist societies. When the state acts as an umpire between interest groups under a liberal-pluralist model, it is hard put to find a general justification that appeals to the plurality of interests, and it generally fails to do so. When the rules are indexical, everyone hates the umpire. Tripartism can solve this problem by differentiating legitimation. In the classic case of the industrial agreement, the trade union uses one set of arguments to explain to the workers why they should stick with the deal; the industry association uses a radically different set of arguments and appeals to different values to secure the consent of its members. When agreements are differentially legitimated in this way, the players are more likely to make the agreement work than when the state is stuck with finding a legitimating message which is generalizable.

Conditions of trust and cooperation increase the prospects that the parties will end up with a commitment to making the agreed solution work.[104] As a company safety officer said in the Rees study of worker empowerment in an occupational health and safety self-regulation scheme: "Prior to voluntary self-inspection . . . the employees generally perceived the responsibility for safety as belonging to the company. . . . Now we have employee involvement."[105] The economic model is silent on this matter of commitment, as it is on the more general matter of legitimation. The naive implied assumption is that once the payoff is settled, the agency can walk away from the firm and assume that the payoff will happen. If and when it can do this, it is because of trust.

The original Scholz model assumes that the joint cooperation equilib-

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103. Wolfgang Streeck & Phillipe Schmitter, "Community, Market, State and Associations? The Prospective Contribution of Interest Governance to Social Order," in W. Streek & P. Schmitter, eds., *Private Interest Government* 22–23 (Beverly Hills, Cal.: Sage Publications, 1985).

104. Vroom, "Industrial Social Psychology" 233–37.

105. Rees, *Reforming the Workplace* 135 (cited in note 60).

rium will be the best equilibrium for both players.[106] However, a social process of honest communication is required to constitute this reward pay-off. The reward payoff is no less than a win-win payoff that can only be arrived at by communication. The better, the more honest that communication, the wider the range of creative win-win options that can be explored to further enhance the joint cooperation payoff.[107] In this regard, de Bono sees special merit in having a third party at the negotiation table during a conflict.[108] For de Bono, the advantage of having the third party is not about assisting compromise or consensus. It is about the contribution to the design of solutions. De Bono believes that a three-dimensional exploration of problems leads to better designed solutions than a two-dimensional exploration; his advocacy is of "triangular thinking."

Rees's landmark study of OSHA's Cooperative Compliance Program[109] again casts some empirical light on how superior payoffs can be constituted under cooperative tripartite regulation compared with OSHA command and control regulation. When the latter model applies, OSHA enforces the regulations and the firm contests the legality of this enforcement at every opportunity. Yet according to the designers of the Cooperative Compliance Program, the proportion of lost-time injuries that can be prevented by enforcement of the regulations ranges from 40% to 60%.[110] The tripartite safety committees at the workplaces studied by Rees solved this problem by refusing to be rule bound on "easy cases," and the overwhelming majority of problems that arose were easy cases:

> [An] indication is the tenor of weekly safety committee meetings. Because the task environment readily lends itself to consensual problem solving, "[i]t's very seldom that there's a divergence of opinion at the meetings," says a safety engineer. "Everybody pretty much agrees on what has to be done." "There's not too much discussion on the issues," says a labor representative on another job site. "Usually, we come to a meeting of the minds right away. A guy will bring up a problem, somebody will immediately come up with a solution, everybody looks around and nods, usually nobody says anything against it, and we buy it." Indeed, the safety committee's task environment is so congenial to a strong problem solving ethos, says another labor representative, that on most issues "it isn't even a matter of agreement so much as somebody brings up a problem and we resolve it." Under these congenial conditions there is little if any need to appeal to

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106. Scholz, 18 *Law & Soc'y Rev.* (cited in note 5).

107. I. William Zartman & Maureen R. Berman, *The Practical Negotiator* (New Haven, Conn.: Yale University Press, 1982).

108. Edward de Bono, *Conflicts: A Better Way to Resolve Them* (London: Harrays, 1985).

109. Rees, *Reforming the Workplace* (cited in note 60).

110. *Id.* at 138.

"outside" authorities for guidance, such as OSHA rules; practical sense is authority enough.[111]

While this is the routine reality, disagreements occasionally arise that are beyond the pale of labor-management consensus. When these serious conflicts arose, Rees found that the players became rule bound. Management adopted the position that they would not agree to any change that the workers could not show to be required under the regulations. The workers had no choice but to accept these terms. If they could not agree on whether the desired improvement was required under the regulation, an OSHA umpire could be called in.

The implication of cooperative tripartism here seems to be this. Most of the time, a consensus was reached on a practical solution to secure safety with minimum transaction costs, regardless of whether the solution was required by the law. This constitution of reward payoffs contrasts with traditional bipartite OSHA inspection where (1) the regulations can only be mobilized to solve about half these problems; (2) often it will not even solve that 50% because the evidence acceptable to a cooperative safety committee will not always be acceptable to an adversarial court of law; (3) when the regulations can be mobilized, they will often not mandate the most cost-effective of all possible solutions; and (4) whenever mobilization of the regulations are attempted, transaction costs are high. These are the reasons why cooperative tripartism could constitute higher reward payoffs. Even when conflict erupted and the players became rule bound, they were able to constitute reward payoffs less depleted by transaction costs because it was rare for them to fail to agree among themselves on how the rule applied to the case.

This rosy analysis of the Rees data must be qualified by a concern that when conflict did break out and decisions were made "by the book," management was sometimes domineering and workers deferential to the power of management to decide what the rules required without giving reasons. A labor representative manifests this failure of the republican ideal:

> [T]he reason he [the management rep on the safety committee] is a superintendent is that he's not bashful about making decisions. In his role as a superintendent he doesn't feel the need to explain his decisions. If he had to explain his actions it would weaken his position. So what he would do is just say, "This is the way it is boys." In his dealings with the safety committee the same tone prevailed.[112]

We must be realistic about the difficulties of enabling regulatory empower-

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111. *Id.* at 155.
112. *Id.* at 157–58.

ment policies to swim against the current of class domination or patriarchy or ageism in the power relations of the encompassing social structure. Both the Rees study and the work of Carson and Henenberg[113] and Cheit[114] suggest that it is not NGO zealotry which is the major problem with making tripartism work, but weakness, disorganization, or apathy.[115]

Tripartism is relevant to constituting reward payoffs in another sense. Imagine there are two coherent policy packages to solve an environmental problem: *ABCD* and *WXYZ*. The NGO clamors in the media for the first package because it likes *A* and *B*. The industry lobbies for the second because it likes *Y* and *Z*. The two are bitter adversaries who do not communicate. A likely political compromise is then the incoherent policy package *ABYZ*. Our best hope for dealing with this problem is tripartite communication and understanding. Under such conditions, the NGO and industry might quickly agree that *ABYZ* is so incoherent as to be one of the worst possible solutions.[116] Tripartite communication is a means of constituting high reward payoffs in the prisoner's dilemma game.

A further limitation of our economic model was that it assumed capture to be a result of lobbying expenditure by the firm. We paid particular attention to the plausibility of capture being explained by a distaste for confrontation: people like to be loved, they prefer a smoothly running

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113. Carson & Henenberg, 16 *Soc. Just.* (cited in note 60).

114. Cheit, *Setting Safety Standards* 177 (cited in note 19).

115. See also Charles Noble, *Liberalism at Work: The Rise and Fall of OSHA* (Philadelphia: Temple University Press, 1986).

116. This policy choice is similar to the "Battle of the Sexes" game, a conflict between a man who wants to go to the ballet and a woman who wants to go to a prizefight. While selfish, they are deeply in love and also prefer to be together (Rasmusen, *Games* 34 (cited in note 38)).

The payoffs for such a conflict could be rewritten in terms of the policy conflict:

<p align="center">NGO</p>

		A B	W X
	C D	(2, 1)	(-5, -5)
FIRM			
	Y Z	(-1, -1)	(1, 2)

<p align="center">Payoffs to (NGO, FIRM)</p>

The compromise policy choice of *ABYZ* corresponds to the negative "off-diagonal" payoffs of uncoordinated attendance.

Unlike the prisoner's dilemma, there is no dominant equilibrium for the Battle of the Sexes game. Instead, our argument is that tripartism could improve prospects that a coordinated equilibrium will be reached. Tripartism, indeed, might be able to increase the possibility that the NGO's preference is followed. The multiplicity of NGOs might in some contexts constitute a type of precommittment for their preferred strategy. In the Battle of the Sexes, if one party can precommit to picking a certain strategy, the other player will predictably acquiesce. We will not press this line too far, however, because there is a third player involved—the state, which will ultimately decide whether to reject *ABYZ*.

work life to a conflict-ridden one, and they don't like the extra work associated with fighting battles. Qualitative data from Braithwaite's current study on nursing home regulation suggests that one reason that inspectors leave the industry to take up government service is the pursuit of a job with fewer worries. Now if the reason for capture is a retreat from conflict, this reason evaporates in a tripartite regulatory system where capture means conflict with an NGO.

But the more general point is about the possibility for the communicative attributes of tripartism raised by the empowerment theory to cover for the weaknesses of a narrowly economic model of tripartism. The most general proposition is: To the extent that players identify with different modes of rationality (sometimes deontological, sometimes value maximizing), different conceptions of their interests and their identity, indeed different ways of thinking that bear little resemblance to conceiving of interests and behaving rationally, then the way to best uphold the value embodied in a democratically supported regulatory statute is through cooperative communication.[117] Tripartism opens up prospects for regulatory players to comprehend each other's ways of thinking and to accommodate them so as to avoid mutually harmful outcomes.

This returns us to the insight of the economic analysis that some forms of capture are good. Implicitly we are also recognizing this in the empowerment analysis. We are saying that better outcomes will be achieved if NGOs and agencies are open to internalizing the interests of firms and firms are open to internalizing the interests protected by the law. This reduces to an advocacy of mutual capture, of each player having an α of $1/2$ to multiply by the welfare of the other.

B. Regulatory Communitarianism

Earlier the point was made that the way to allow efficient capture and to prevent inefficient capture is to build a regulatory culture wherein regulators are socialized to be tough on cheaters (armed against inefficient capture) and cooperative with firms that are cooperating. This means reducing the agency's temptation payoff by directing social disapproval within the regulatory culture against regulators who are "unreasonable."

Now we are saying that it is possible (plausible interest configurations make it possible) for NGOs to be susceptible to the same forms of disapproval within the regulatory culture. Even in the United States, hardly the seedbed of tripartism in the modern world, interesting recent regulatory

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117. Joel F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Philadelphia: University of Pennsylvania Press, 1990) ("Handler, *Social Movements*").

scholarship is exploring the existence of regulatory communities that incorporate NGOs as well as agency and industry. Meidinger's work on federal air and water pollution regulation characterizes these arenas as regulatory communities wherein the key players have long-term relationships with one another and seek to retain one another's respect and trust.[118] Meidinger quotes an NGO lawyer:

> I've been in this [air pollution regulation] for a long time, and I plan to be in it for a long time. I'm a firm believer in personal reputations. And I think people need to know who they're dealing with, and when somebody says something to them that they can expect that what they tell you will come true.[119]

It is the notion of regulatory communitarianism that brings the empowerment theory within the republican tradition of normative theory. Liberal theory finds special attraction in market institutions which assume that individuals will behave in a self-interested way; institutions are designed so that such self-interested actions will aggregate to produce the public benefit. Our game-theoretic analysis of tripartism was an exercise in the design of market institutions. While market institutions purport to leave the psychology of individuals untouched, socializing institutions are designed to affect citizens in such a way that they behave as if they were primarily concerned with the public benefit.[120] While liberal theory finds special appeal in market institutions, republican theory finds special appeal in socializing institutions. Socializing institutions seek civic virtue by changing the deliberative habits of citizens. Our analysis of a republican tripartite regulatory culture is an example of institutional design focused on a socializing institution. The regulatory culture advocated seeks to modify the deliberative habits and behavioral dispositions of actors, not just to tinker with payoffs of actors whose psychology is untouched. Through mobilizing social disapproval against those who sell out to cheaters and those who are unreasonable with cooperators, the regulatory culture seeks to foster an internalization of a concern for the other player which is in the public interest.

Note now a special case of why it is important to reform deliberative habits and not just the payoff matrices of unreformed individuals. This is the case of the regulator who takes a bribe to succumb to efficient capture. The normative implication of the pure economic analysis is that this is good because it is welfare enhancing. Yet such a judgment is clearly contrary to our moral intuitions. The normative focus of the republican interpretation of the tripartite institution (on deliberative habits) allows us to

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118. Meidinger, "Regulatory Culture" 25 (cited in note 26).
119. *Id.* at 20.
120. Braithwaite & Pettit, *Not Just Deserts* (cited in note 87).

make a clear distinction not only between efficient and inefficient capture but also between capture and corruption, regardless of whether the corruption has good or bad consequences. The republican is able to say that taking a bribe manifests an unacceptable form of deliberation. In this sense the republican construction of tripartism allows us to reflect a proper moral concern with means as well as ends.

So we need regulatory institutions designed to allow questioning of the commodity values that are inescapably central in market economies— inescapable but not immutable. As Stewart argues, we must seek a society that enhances "the capacities and opportunities of citizens to expand and enrich the available conceptions of the good. This objective requires the nurture of noncommodity values of aspiration, mutuality, civic virtue and diversity."[121]

The republican version of tripartism as a normative theory is built on a different explanatory theory of why actors comply with the law than the deterrence theory at the foundation of the economic model. The republican explanatory theory is that most citizens comply with the law most of the time because it seems wrong to them to break the law. They refrain from crime not because they calculate that the costs of crime exceed its benefits; crime is simply off their deliberative agenda; murder is never thought of as a solution for dealing with an obstinate competitor. It is not that the expected utilities turn out badly; they do not know the sentence and the probability of detection to be able to calculate them. More often, it is just that the offense is unthinkable. The sense of the wrongness of law breaking, and its unthinkability, are constituted by shaming.

Shaming is important as a simple deterrent. When tripartism succeeds in building bonds of trust and respect among business executives, regulators, and NGOs, then they will be able to deter one another by communicating disapproval for breaking the law, for being unreasonable, for selling out. Social disapproval for being captured is more potent when extended by someone whose opinion we respect. But the more important effect of shaming is in constituting consciences, in fostering the internalization of norms.[122] Hence, the most important effect of the mobilization of tripartite disapproval against a company that breaks the law is not the specific deterrent effect on that particular company, nor even the general deterrent effect on other companies that may fear "there but for the grace of God go I." The most important effect is the internalization of a sense of right and wrong among those who observe and participate in the shaming; such internalization is required to constitute a republican regulatory culture. In the same way, republican tripartism can be constituted by the

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121. Stewart, 92 *Yale L.J.* 1563 (cited in note 28).
122. John Braithwaite, *Crime, Shame and Reintegration* (Sydney: Cambridge University Press, 1989a) ("Braithwaite, *Crime, Shame*").

pride when an actor is praised for reasonableness, for provokability, or for obeying the law even when it is costly to do so.

Shaming can also help solve the dilemma of who guards the guardians. The most important point about contestable markets for guardianship is not that corrupt guardians will be ousted and thereby deterred. The important point is that the social process of shaming corrupt guardians constitutes the unthinkableness (for most guardians) of taking a bribe.

C. Strength in the Convergence of Weaknesses

Earlier we catalogued some weaknesses of the pure economic model of capture and tripartism. But the empowerment analysis has its own flaws. Republican ideals of active democracy, of building cooperative regulatory cultures, of trust, honest communication, respect for others and their concerns may be fine ideals, but can they withstand profound economic incentives to free ride, to cheat? Even where the players have strong rational incentives to cooperate, will they do it? Could business executives and NGO activists with a long history of distrust come to cooperate, especially given the tragic possibility that a prisoner's dilemma player who trusts the other may still defect because of fear that the other will not trust her?[123] Isn't trust a psychological disposition conducive to capture? Won't the presence of a third party sometimes chill communication between the other two parties rather than enhance communication?[124] Isn't all this communication expensive? Won't it slow down decision making?

Some of these problems are clearly the obverse of problems identified with the economic model. Communication slows decision making; yet dialogue is a solution to the problem of a decision being made and then reversed by NGO lobbying. Slower progress forward is better than spurting in one direction, stopping, then heading off in another. Building trust is costly, but as Lorenz argues, "lack of trust is more costly still."[125] As

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123. Diego Gambetta, "Can We Trust Trust," in D. Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* 216 (Oxford: Blackwell, 1988) ("Gambetta, 'Trust' ").

124. The resolution to this problem can only be of an institutionally contingent form. We do not see any easy general theoretical resolution. However, one of the authors has certainly participated in Australian regulatory cultures where the problem is solved fairly well by an appropriate mix of opportunities for key players to meet both collectively and in pairs. Indeed many university departments solve this problem pretty well: there are some issues where constructive communication will best be advanced at a full faculty meeting, others where it is better for smaller working groups to meet, others where it is best for the chairperson to communicate individually with all faculty members. So long as the agreements that are the product of a sequence of private discussions are ultimately brought up in a way that gives all parties an opportunity for open communication about them, tripartite process can be constructively advanced by confidential caucusing; see generally Johan P. Olson, "Integrated Organizational Participation in Government" in P.C. Nystrom & W.H. Starbuck, eds., 2 *Handbook of Organizational Design* (Oxford: Oxford University Press, 1981).

125. Edward H. Lorenz, "Neither Friends nor Strangers: Informal Networks of Sub-

Luhmann shows, without heavy reliance on trust, we cannot begin to cope efficiently with the complexity and uncertainties of modern social and economic life.[126] When NGOs have in place a working policy of "trust and (selectively) verify," they will selectively turn down opportunities for participation in circumstances where they believe their trust in the other two players is well placed or where the outcomes are not especially critical. Then costs will fall.

Trust may be a psychological disposition conducive to capture. Yet, the economic analysis, converging with the empowerment analysis, shows that capture up to levels of $\alpha = \frac{1}{2}$ is desirable. And it shows that at any level of α, tripartism increases the punishment of firms who benefit from capture and of regulators who dispense it. Tripartism may therefore foster counterbalancing effects here—increasing a psychological disposition conducive to capture (trust in the empowerment analysis) and increasing the economic disincentives for capture (the provokability effect in the economic analysis).

Our theoretical enterprise is to bring together economic and empowerment theories of tripartism, theories comprised of very different kinds of explanatory and normative claims, yet that converge on tripartism as a route to securing efficient, cooperative regulation which also avoids inefficient capture and corruption. Standing alone, each is a weak theory. But we hope to have shown how the weaker points of one theory are covered by the stronger points of the other.

Our empowerment theory of republican tripartism is a naive idealist theory about actors cooperating to sort out win-win solutions. Our prisoner's dilemma analysis is a crude materialist account that reduces all human motivation to economic rationality. What we have argued, nevertheless, is that the interplay of economic interests in the game-theoretic account can underwrite the idealism of the empowerment theory. Tripartism will increase rational incentives of regulatory actors to cooperate— incentives the game-theoretic work shows to be already quite profound in many contexts. In the context of regulation, actors have incentives to build trust, not only because it solves problems of complexity and uncertainty, but also because it helps to increase their power. Cooperation and trust pay. Even disapproving of cheaters pays, because we all enjoy gossiping about the terrible deeds of others; we all enjoy affirming our own sense of moral uprightness by disapproving the moral inferiority of others. Most crucially, we have shown that cooperation and trust will produce higher payoffs for NGOs under conditions of tripartism than under conditions of

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contracting in French Industry," in D. Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* 209 (Oxford: Blackwell, 1988).

126. Niklas Luhmann, *Trust and Power* (Chichester: Wiley, 1979).

regulatory exclusion, and that agencies get lower returns for inefficient capture and corruption under tripartism.

The economic analysis therefore shows how the interplay of interests constitutes the social conditions that make it possible for the idealism of the empowerment theory to work. Obversely, the workings of the ideals involved in the empowerment theory allow the economic theory to work. Honest communication, we showed, is needed to constitute reward payoffs in the regulatory game; the more trusting that communication, the higher the possible cooperative payoffs. The TFT strategy is "inconceivable in relation to humans without at least a predisposition to trust: when the game has no history a cooperative first move is necessary to set it on the right track, and unconditional distrust could never be conceived as conducive to this."[127]

Trust has to work if the agency is to be assured that an agreed joint cooperation solution will be maintained; the agency cannot afford to return every day to check that it is still in place. More fundamentally, the whole system of exchange that delivers the economic payoffs could not be constituted without trust.[128] There are thus some quite crucial ways that the elements of one theory constitute the possibility of the other theory; the empowerment and economic theories are, at least in part, mutually constituting theories, not just complementary theories.

Yet it is their complementarities that make for the robustness of tripartism as a policy idea. These complementarities are too numerous to repeat. We will just repeat two fundamental ones. The internalization of a commitment to cooperation and reasonableness will build good faith among some of its beneficiaries and be exploited by others. For actors

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127. Gambetta, "Trust" 227.

128. Scholars of a rational choice bent sometimes persist in a disinclination to accept that trust is a precondition for their explanations based on economic interests. Speaking of economic reform, Elster and Moene say this of trust:

> Indeed, some amount of trust must be present in any complex economic system, and it is far from inconceivable that systems with a higher level of general trust could come about. It would be risky, however, to make higher levels of trust into a cornerstone of economic reform. We may hope that trust will come about as the by-product of a good economic system (and thus make the system even better), but one would be putting the cart before the horse were one to bank on trust, solidarity and altruism as the preconditions for reform.

Jon Elster & K. Moene, eds., *Alternatives to Capitalism* (Cambridge: Cambridge University Press, 1988).

But what reform could there be of the securities market, arguably the central institution of a capitalist economy, for which trust was not a precondition? How could a securities market, or its replacement, work efficiently when distrust meant that trades could not be agreed, could not affect prices, until contracts were signed by vendor and purchaser? The very etymology of "security" is grounded in the discourse of trust and confidence; in the *Oxford English Dictionary*, a security is a "pledge for the fulfilment of undertaking." Trust is constitutive of a good economic system and a good economic system is constitutive of trust. Sound institutional design is impossible without taking both economic incentives and trust seriously as preconditions for success.

who are shameless cheaters, tough sanctions with economic bite are needed to sustain the commitment of fair players to the justice of the game and tough incapacitative sanctions (e.g., license revocation) are needed for actors who are beyond deterrence. Regulatory agencies will rarely have the resources to detect, prove, and punish cheating with sufficient consistency for it to be economically rational not to cheat.[129] So it is necessary to build a regulatory culture in which players generally do not want to cheat. Tripartism can increase the punishment of cheaters (the game-theoretic analysis); tripartism can supply the community denunciation of cheating that makes some forms of law breaking unthinkable to most business executives most of the time (the republican analysis).

This is not to deny that there are also contradictions between the economic and the empowerment analyses of tripartism. The economic analysis is grounded in a classical positivist view of interests and rationality as given and structurally determined.[130] Under the empowerment analysis, interests become contingent; their structural sources are problematized as we conceive of capitalists as internalizing the interests in the law, NGOs as internalizing the interests of firms and regulators, and both as having their interests shaped by third and fourth structural linkages. Indeed a virtue of tripartite institutions is that they further foster something that already happens: Interests are discovered by democratic struggle; far from being given, interests are constructed and reconstructed through participation in social action.[131]

Conceived as grist for the democratic struggle over alternative visions of the good and the rational, the opposition between the two models can have virtue. In the domain of consumer product safety, our game-theoretic analysis must monetize human lives lost from unsafe products. Under tripartism one would expect and hope that consumer groups would argue that it is morally wrong to put a dollar value on human life, that economic rationality should not be the mode of reasoning that drives our deliberation on such matters, and perhaps that we should be deontological rather than utilitarian in our approach. Equally, we would expect and hope that business groups more impelled by the economic mode of analysis would argue that it is not in anyone's interests to spend infinitely on reducing consumer product safety risks to zero; that if we do not commodify risk, human lives will not count in forms of deliberation where dollars are important; that courts must put a value on human lives if they are to sanction firms responsible for loss of life.

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129. Charles A. Moore, "Taming the Giant Corporation: Some Cautionary Remarks on the Deterrability of Corporate Crime," 33 *Crime & Delinq.* 379 (1987).

130. Barry Hindess, *Choice, Rationality and Social Theory* (London: Unwin Hyman, 1988).

131. See Errol Meidinger, "Regulatory Culture: A Theoretical Outline," 9 *Law & Pol'y* 355 (1986).

The way a democratic dialogue will and should resolve such a contra-diction is an open question: republican theory raises some interesting ways of reconciling constraint-based and value-maximizing visions of the right.[132] The point is the virtue of struggling for principles of institutional design that do not seek to paper over these contradictions. Rather we should flush them into the open to reconstruct them through democratic dialogue. As Bernstein has argued, however contradictory the visions of Gadamer, Habermas, Rorty, and Arendt, their common central theme is dialogue, communal judgment, reciprocal wooing, and persuasion that is minimally coerced by power relations.[133] For Gadamer, for example, there is no objective knowledge which we can apply to resolve contradictions; but through dialogue citizens can acquire hermeneutical understanding, and the greatest threat to hermeneutical understanding is abdication to experts.[134] As Handler has argued, there is no need to despair in postmodern confusion over the contradictions we perceive:[135] dialogism "can orient our practical and political lives."[136]

V. CONCLUSION

Whether tripartism will work is culturally, institutionally, and histori-cally contingent.[137] All we have done is show that there are some plausible theoretical reasons of a general kind as to why tripartism might foster the evolution of cooperation while preventing the evolution of inefficient cap-ture and corruption. It is not a practical proposal ready for implementa-tion; for that, there is no escape from detailed empirical investigation of the relevant institutional arena and of the implementation modalities it

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132. Philip Pettit, "The Consequentialist Can Recognize Rights," 38 *Phil. Q.* 42 (1988); Braithwaite & Pettit, *Not Just Deserts* (cited in note 87).

133. Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Praxis* (Oxford: Blackwell, 1983) ("Bernstein, *Beyond Objectivism*").

134. Hans-Georg Gadamer, *Truth and Method* (New York: Seabury Press, 1975).

135. Handler, *Social Movements* (cited in note 117).

136. Bernstein, *Beyond Objectivism* 163. Handler has eloquently related the work of these and other post-modern and communitarian scholars to practical programs of reform to work toward dialogic communities. Handler, 35 *UCLA L. Rev.* (cited in note 10), and *id.*, *Social Movements* (cited in note 117). For a related although different approach to reform, see Sciulli's synthesis of Habermas on communicative action and Lon Fuller's procedural-ism. David Sciulli, "Foundations of Societal Constitutionalism: Principles from the Con-cepts of Communicative Action and Procedural Legality," 39 *Brit. J. Soc.* 377 (1988).

137. The idea of tripartism can be applied along with other forms of regulatory delega-tion. NGOs can be involved in self-regulatory enforcement, enforced self-regulation as well as with more escalating forms of traditional government regulation—what we term the en-forcement pyramid. Ayres & Braithwaite, *Responsive Regulation* (cited in note 25). Indeed NGO involvement can strengthen the acceptability of deregulatory shifts by injecting public accountability and resistance to supine enforcement under the softer options. NGO in-volvement can also provide the data on noncompliance that justifies escalation of state regu-latory intervention. In these senses, the ideas of tripartism and the enforcement pyramid are complementary ways of transcending the regulation versus deregulation debate.

enables and forestalls. We have said nothing about the costs of tripartite versus bipartite regulation.[138] Local empirical research is needed to assess the cost effectiveness of, for example, the Australian state of Victoria's 14,000 workplace health and safety representatives versus their 200 government inspectors.

Our preference is to resist the urge to premature specification of the domains where tripartism will succeed and fail. Static analysis can doubtless show many domains where NGO participation in a regulatory process has been a dismal failure because of political weakness, disorganization, or technical incompetence. It would be a mistake to rely on such cases to specify domains where tripartism is bound to fail. Where NGOs now fail because of weakness or disorganization, we cannot be sure that tripartite empowerment would not create the conditions that would make NGOs stronger and more organized. Indeed, we have advanced theoretical grounds for suspecting that just this might happen. Where NGOs now fail because of technical unsophistication, we do not know if this failing would be remedied by suitable resourcing of NGOs from the public purse. Praxis, we will contend in the next section, is the way to advance our understanding of these dynamic questions.

More generally, we think it a theoretical error to embark on a static analysis to define the optimal regulatory strategy for this and that regulatory domain. Elsewhere, we argue that instead of using static regulatory analysis to determine an optimum strategy, regulators do better to display a range of workable strategies and to shift from less to more interventionist strategies according to the response of the industry to the less intrusive options.[139] What is the best strategy therefore depends on a history of relationships among the regulatory players. A dynamic process of dialogue and responsiveness (or lack of it) among the players is a better path to defining regulatory strategy than a static analysis of the conditions for regulatory effectiveness.

A useful way to summarize the reasons why we think tripartism should always be considered as an option in such ongoing regulatory deliberation is to evaluate tripartism against the five types of advice to "participants and reformers" given by Axelrod in the conclusion to his book.[140] Axelrod suggests that to promote cooperation, one should (1) enlarge the shadow of the future; (2) change the payoffs; (3) teach people to care about each other; (4) teach reciprocity; and (5) improve recognition abilities. We sum up with a short paragraph on each of these.

1. Tripartism solves the problems of capture and corruption by

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138. Ross Cheit, "Administrative Procedures and Private Regulation" (presented to Annual Meeting of Law & Society Association, Washington, D.C., 1987).

139. Ayres & Braithwaite, *Responsive Regulation* ch. 2.

140. Axelrod, *Evolution of Cooperation* 126–41 (cited in note 5).

means other than rotation of personnel. The proposal implies the creation of regulatory communities that remain stable until capture or corruption becomes a problem (as opposed to designing transience into regulatory encounters in advance of capture or corruption). Further, we have shown how a tripartite regulatory culture that decreases the temptation and sucker payoffs for regulators will extend the range of discount rates where joint cooperation will remain stable in multiperiod games. In these two ways, tripartism can "enlarge the shadow of the future."

2. Tripartism reduces the temptation payoff the firm can achieve by corruption or capture. When tripartism builds a republican regulatory culture, it also reduces the temptation payoffs of agencies that are "unreasonable," the sucker payoffs of agencies that "sell out," and the reward payoffs for cooperating players who benefit from superior win-win solutions.

3. Tripartite empowerment engenders incentives for regulatory players to develop trust and to reap rewards by learning to be concerned about the interests of the other. The negotiation literature instructs us that to be effective in negotiation, we must learn to understand the needs of the other so that we can move on to invent options for mutual gain.[141] Republican socializing institutions are fundamentally about "teaching people to care about each other." The regulatory communities described in the work of Meidinger[142] are both part of the existing reality of regulation (even in noncommunitarian modern America) and a form of communitarianism to be nurtured.[143]

4. The form of republican tripartism we applaud mobilizes both social disapproval and usurpation of those who fail to be provoked by cheaters. It also teaches reciprocation of cooperation by mobilizing social disapproval against those who are "unreasonable" in pursuit of the temptation payoff.

5. Under tripartism, NGOs can add substantially to the capacity of agencies to monitor outcomes. The eyes and ears available for verification are multiplied. The attraction of the NGOs themselves to cooperative strategies is enhanced by their direct involvement in the game and by the new information they thereby gain. When tripartism succeeds in building trust and honest communication, all players will be better able to recognize when the others are cooperating.

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141. Fisher & Ury, *Getting to Yes* (cited in note 31).
142. Meidinger, 9 *Law & Pol'y* (cited in note 131), and *id.*, "Regulatory Culture" (cited in note 26).
143. Braithwaite, *Crime, Shame* 149–51 (cited in note 122).

VI. PRAXIS

If, as we have suggested, the value of our joint theory of tripartism can only be assessed through praxis in concrete institutional arenas, then how should we do this? The normative thrust of the empowerment analysis supplies a clear answer. It is the same answer as Handler's: "We must create Bernstein's [dialogic] regulative ideal at the bottom end of the structure of power."[144]

Nursing home residents are arguably the least powerful individuals in modern societies. Most of them have been rendered indigent by extended illness. They are mostly unable to vote with their feet as consumers or to give political speeches; they are generally even afraid to complain.[145] They enjoy less freedom of movement than slaves: in the United States, 38% of them are physically restrained,[146] mostly by tying them into chairs, and many more are chemically restrained. As Handler remarks, even prisoners can riot:[147] "dependent clients, and especially the frail, elderly poor, either fail to pursue or even conceptualize grievances; they develop a 'culture of silence.' "[148]

One of the authors is exploring the possibilities for tripartite praxis through an international study of nursing home regulation and a consultancy with the Australian government.[149] The rationale for this choice is methodological as well as normative. The methodological rationale is the virtue of selecting a crucial case study.[150] Crucial case studies test theories against least likely cases—those that can be expected to disconfirm a theory if any case can. There is no group that it is more difficult to empower than nursing home residents; so in this sense nursing home resident empowerment becomes a crucial case study.

The issue, then, is whether we can make tripartism work at the bottom of the power structure by empowering nursing home residents through the election of residents' councils. What might tripartism mean in this context? When state inspectors come to the nursing home, the residents' council and individual residents would become a more important source of information than medical records under the control of the

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144. Handler, 35 *UCLA L. Rev.* 1093 (cited in note 10).
145. Chris Ronalds, *I'm Still an Individual: A Blueprint for the Rights of Residents in Nursing Homes and Hostels* (Canberra: Department of Community Services & Health, 1989).
146. Figures supplied by the Health Care Financing Administration from inspections of all nursing homes with Medicare or Medicaid residents in the United States.
147. Joel F. Handler, "Community Care for the Frail Elderly: A Theory of Empowerment" 5 (unpublished, 1989).
148. Paulo Friere, *Pedagogy of the Oppressed* (New York: Continuum, 1985).
149. Together with Valerie Braithwaite, Diane Gibson, David Ermann, and Toni Makkai.
150. Harry Eckstein, "Case Study and Theory in Political Science," in F. Greenstein & N. Polsby, eds., *Handbook of Political Science*, Vol. 7: *Strategies of Inquiry* (Reading, Mass.: Addison-Wesley, 1975).

institution. A representative, or representatives, of the residents' council would attend the exit conference (with a legal advisor or other advocate if they choose) and participate in negotiation on what plans of action should be put in place to correct noncompliance with the regulations. It would be widely publicized that a report on the inspection and the agreed action plans were available to all residents requesting them. The residents' council would have the same standing to take enforcement action against the nursing home as the inspector. The state would fund advocacy groups to make lawyers available to do the bidding of residents' councils. This funding is important as it would seem a triumph of hope over experience to expect that participation rights will be exercised when they are most needed unless there is active resourcing and collegial support for such participation.

It may be that tripartism in nursing home regulation is politically unachievable and, if achieved, would fail. Attempting to see if this is true will be the first small step of a research program to explore the possibilities for tripartism. We do not imagine that NGOs can secure the resources to put tripartism into effect across the board any more than we imagine that regulators have the resources to put bipartism into effect across the board. Our concern is more modestly with finding out whether tripartism can work, if and when it can be applied.

Future work to address whether tripartism can work must avoid hopelessly utopian aspirations. It would be a triumph of hope over experience to expect that adding a representative of the Australian Federation of Consumer Organizations to the Australian Automotive Industry Authority would change the historical reality of unions and the car industry joining forces to disadvantage consumers by securing high tariff protection for an inefficient industry. What we might hope for, however, is that empowered consumers might occasionally form successful alliances (with antiprotection elements of the bureaucracy, with industries that are also major car purchasers) against car industry unions and employers. We might not hope for a world where such alliances regularly prevail against unions and employers, but for a world in which countervailing power against organized interests is more often deployed than at present. We might hope for a world where sometimes consumers and unions will unite to defeat employers, where sometimes employers and consumers will unite to defeat unions, without having any illusions that most of the time unions and employers will continue to unite against the interests of consumers.

There is little prospect of consumer representatives being as influential as industry technical experts on a committee that writes consumer product standards.[151] However, the mere presence of technically literate consumer group nominees might motivate those who do the technical

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151. Cheit, *Setting Safety Standards* (cited in note 19).

drafting to be more mindful of consumer interests. If they fail to elicit this motivation, the consumer representative might raise an alarm that puts the captured technocrats under pressure from a wider political campaign. Perhaps, then, the realistic aspiration is not for NGOs to become equal partners with industry and government but for them to be enabled to be credible watchdogs.

We see no prospect of a praxis that reveals tripartism as a panacea to the problems of regulatory capture and corruption. Yet we have shown that there are good theoretical grounds for experimentation to ascertain where and how tripartism might contribute to more decent, democratic, and efficient regulatory institutions. Praxis is needed to specify the contexts where tripartism will fail because of the opposing critiques of those who forebode citizen apathy and excessive NGO weakness and those who forebode zealotry and excessive NGO power.