

1 Introduction: How to Rebuild Trust in Distrusting Times

Growing up in a divided society, the borderlands of Northern Ireland, I acquired early the capacity to navigate the physical and invisible boundaries within and between people, place and community. It was training that served me well as an academic and as a television documentary maker. Both professions centre on stories. They require acute sensitivity to one's surroundings. Much of my work is informed by close ethnographic analysis of specific communities of practice and their perception of the application of rules, principles and social norms. It was how we survived and continue to do so.

I have explored this dynamic in settings as diverse as paramilitary organisations and New York trading floors. It has been critical to my work on the trilogy leading from Enron to the global financial crisis (GFC) – *Wall Street on Trial* (O'Brien 2003), *Redesigning Financial Regulation: The Politics of Enforcement* (O'Brien 2007) and *Engineering a Financial Bloodbath* (O'Brien 2009). It also informed a book on the intellectual history and limitations of the disclosure paradigm as a mechanism to ensure accountability and probity of publicly listed corporations, *The Triumph, Tragedy and Lost Legacy of James M. Landis* (O'Brien 2014a). This new work sketches how the corporation has impacted all of our lives at a global level. This Element is about learning to trust, the trade-off between vulnerability and hope and the danger of inaction.

Although I have been based in Australia since 2006, Ireland will always hold a special place for me. Its story permeates this work, not least because the financial dislocation there has reawakened dormant questions of the meaning of trust and the ongoing power of creative ambiguity to weaken it. It is indicative for me that when I return to Ireland, it is to an island eleven kilometres off the west coast, literally and metaphorically. Distance can provide perspective and the elemental power of the North Atlantic a reminder of the fragility of human existence. For those brought up in the British Isles, the daily 'Shipping Forecast' on *BBC Radio 4* is more than a navigational aid. It is an aural cultural icon that takes one on a journey around the divided islands, simultaneously providing a sense of space and serving as a beacon. Now more than ever, however, the danger lies within our divided borders not beyond them. Trust, essential to cooperation and development, is breaking down (Botsman 2017). With it an existential crisis has emerged one can no longer ignore (*Edelman Trust Barometer 2012–2019*). The history of that process and the lack of regard for the unintended consequences are, therefore, among the major research themes of our time: how to rebuild trust in distrusting times.

The collapse of trust can be found across all of our institutions but most of all in finance, a field I have made my professional focus for the past two decades. The wilful neglect of duty and responsibility and how this interacts with narrowly defined rights have led us to this moment. There is nothing inherently irrational in voting for Donald Trump in the United States or in the British people (by the narrowest of margins) placing membership in the European Union on a veritable burning of a bonfire of the vanities. Both sent powerful signals to governing systems that had lost touch with the primary drivers of a fulfilled life: the need for security, trust, purpose, confidence and hope.

Finance is critical to each. It has failed on all counts, with spurious promises to reform and expressions of regret by senior business leaders served up as mere platitudes (Agius 2010). At its core, the GFC and accompanying trust deficit were and remain moral failures. Technical measures alone cannot fix normative problems. Impotence, imprudence and irresponsibility combined to undermine the legitimacy of an entire world order, along with the erroneous theoretical assumptions on which it was based (Ulrich 2008). Now more than ever, there is a profound social, political and corporate imperative to rebuild – if not reimagine – the normative foundations of corporate governance and its regulation. It is essential to deliberate, to ascertain what are the duties and responsibilities as well as the rights of the corporation. Somewhat surprisingly, the quest leads us once again to the Antipodes.

Australia avoided the worst ravages of the initial GFC, more by luck than design. As I traversed the globe from 2007 onwards, the myopia encountered on my return to the so-called lucky country was staggering (O'Brien 2016). Belatedly, a Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was established in 2017, under restricted terms of reference and timelines. Contrary to expectations, the restrictions worked to its advantage. The result is not only an elegant disposition of the ethical malaise. It is also an innovative design based on core normative principles, which, if grasped, have the potential to be transformative, not only in Australia but also across the globe (Royal Commission, *Final Report*, 2019, pp. 8–9).

There are many similarities between building a personal and an institutional relationship, as the late Seamus Heaney (1998, p. 13) reminds us:

Masons, when they start upon a building,
 Are careful to test out the scaffolding;
 Make sure that planks won't slip at busy points,
 Secure all ladders, tighten bolted joints.
 And yet, all this comes down when the job's done,
 Showing off walls of sure and solid stone.

The poetic metaphor is apposite. Commissioner Kenneth Hayne has put in place intellectual scaffolding that can be removed without compromising the integrity of the structure itself. It is a challenge to corporate, regulatory and political communities to put the interests of ‘clients’ (as citizens and fellow human beings) first. Following the emotional and social carnage of the GFC, it is also worth turning to another of Ireland’s winners of the Nobel Prize for Literature, W. B. Yeats and his *The Second Coming* for further inspiration. In it, he warned of the danger of blood sacrifice, the attraction of believing in those prepared to die for a cause, the certainty of belief, the ease with which spurious solutions to manipulated crises can gain superior traction to reasoned argument. While he was referencing war, in uncertain economic times, Yeats (2000, p. 64) still has the capacity to chill:

Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world
The blood-dimmed tide is loosed and, everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

Each poet navigated the violence of his time in a different way. For Heaney, the aim was to hark back to less troubled times. He venerated honest toil where the digging was for crops not graveyards to fill with the patriot dead. A pen not the Armalite was to be the instrument of most utility. Yeats, on the other hand, was avowedly political. The Easter Rising of 1916 and subsequent execution of its leaders were immortalised in the oft-quoted lines that ‘all changed, changed utterly; a terrible beauty is born’ (Yeats 2000, p. 60). This flirtation with violence dissipated as the world slipped towards chaos, the result of rage, resentment and the return of the politics of the strongman. As with the 1930s, there is a profound sense of fin-de-siècle. For Yeats (2000, p. 92), in the end what mattered most in making what he called *The Choice* was a solid emotional core:

When all that story’s finished, what’s the news?
In luck or out, the toil has left its mark:
That old perplexity an empty purse
Or the day’s vanity, the night’s remorse.

Our capacity to make those choices, however, is always informed by trust or its absence. One can be cognisant of the past without being imprisoned by it. It most certainly does not have to predetermine our future. It is not in our interest that it does. In an age in which opinion trumps expertise, all that is left are appeals to common sense and vague replies to questions of substance. This is

fertile ground for the populists of whatever ideological hue, or none, to furrow. In creating foundations of cynicism, they succeed only in building a Potemkin façade. This Element seeks to address those architectural defects. It provides the evidential basis on which the normative claims for a reconfiguration of corporate duty, purpose and obligation are made.

2 The Existential Crisis Facing the Liberal Order

Trust can be defined as having firm belief in the reliability, truth or ability of someone or something not to abuse the vulnerability we put at risk in extending confidence (O'Neill 2002, 2016). The foundation of trust in the Western liberal state, however, is disintegrating (Fukuyama 1995). So too is warranted faith in two critical components of institutional trustworthiness: competence and honesty (Hosking 2014, p. 108). The disdain seeps across all sectors – from business to government, charitable bodies to media (*Edelman Trust Barometer 2012–2019*). Fake news, which that master manipulator Orson Welles reminds us, is as old as the Garden of Eden, is emblematic of an age informed by the corruption of knowledge (Schwartz 2014, p. 51). From meddling in the US presidential election to Brexit and beyond, the capacity to engage in rigorous policy formulation, implementation and evaluation has been compromised by communication channels that amplify and distort (Pomerantsev 2017; Kakutani 2018; Kavanagh and Rich 2018).

We are, as Salvo Žižek (2017) reminds us, living in 'an age of hopelessness'. It is a time and place where

true courage is not to imagine an alternative, but to accept the consequences of the fact that there is no clearly discernible alternative: the dream of an alternative is a sign of theoretical cowardice, functioning as a fetish that prevents us from thinking through the deadlock of our predicament. In short, true courage is to admit that the light at the end of the tunnel is probably the headlight of another train approaching us from the opposite direction. (Žižek 2017, pp. xi–xii)

These are not just the fatalistic pre-occupations of the radical left, which sees in populism an opportunity to re-energise a lost socialist dream (Mouffe 2018). The fears also reflect the pragmatism of the international foreign affairs establishment, the most important journal of which offers dystopian futures ranging from realism, liberalism, tribalism; a return to Marxism; an over-reliance on technology; to the socio-economic and geo-political implications of global warming destroying the planet (*Foreign Affairs* 2018).

The *Edelman Trust Barometer* (2012–2019) traces the uncertainty to the 2007–2008 GFC and its subsequent management. There is merit in the case

(Muller 2016; Nicholls 2017). The parsimony, however, ignores broader questions about accountability of corporations and the effectiveness of oversight, which necessarily must be evaluated against a defined purpose (O'Neill 2002; Ulrich 2008). These concerns have long informed debate on the ethical challenges of the corporation (Berle and Means 1932; Mason 1960; Friedman 1970; Freeman 1984, 2010; Smith 2005, 2006; Clarke, O'Brien and O'Kelley 2019). Disputes over legal form and discrepancies between legal form and purpose have been ongoing for more than a century (Orts 1993; Halperin 2011). They remain unresolved in both 'law on the books' and 'law in action' if not in the emaciated conception of 'economic man' or the corporation as a mere nexus of contracts (Coase 1937). This is accompanied by a misunderstanding of the philosophical underpinning of Adam Smith's emphasis on 'empathy' rather than 'self-interest' as the driver of social progress (Rothschild 1994; Norman 2018).

By illuminating how the economically rational is in itself a political construct (e.g. Fligstein and Dauter 2007), an admission belatedly accepted by a former chair of the Federal Reserve (Greenspan 2008), this Element deconstructs dangerous myths propagated for narrow political and educational status rather than social advance (Ulrich 2008). Their accretion gave the illusion of substance. Instead, the model buckled under the weight of its own internal contradictions (Bell 1996; Judis 2016; Sunstein 2018). In so doing, it revealed the idealistic yet hidden ideologically driven assumptions of the law and economics and institutional economics traditions. Each maintained a focus on the transactional over the relational through an emaciated reading of political theory (Frank 2001; Frazer 2010; Kuttner 2018). Each also confused economic assertion with empirical fact on the legal parameters in which the corporation operates and its underlying purpose and control (Berle 1931; Dodd 1932; Weiner 1964; Stone 1981; Orts 1993; Stout 2007).

The status of the corporation and what are or ought to be its rights, duties and responsibilities within this legal framework have waxed and waned since its initial status as a grant of royal prerogative. Limited liability, facilitated by political dispensation, gave both impetus and extended power, which have intensified with the rise of globalism and the information technology that facilitates it. It is deeply ironic that virtual communities have been shaped by Silicon values, imbued with a libertarian ethos that combines naiveté with calculation (Cohen 2017, p. 4). A misreading of Hayek's (1943) emphasis on market solutions and a disregard for how disconnecting the state from the market is a political choice (Polanyi 1944) lead to a facile veneration of 'creative destruction' (Schumpeter 1943). What is lost is the prophetic warning that the stock market is

a poor substitute for the Holy Grail (Schumpeter 1943, p. 129), and that capitalism's main threat come from within. This Element ties together these disparate strands to weave a narrative of practical and theoretical value, with applicability across the disciplines.

Advances in corporate governance theory, presupposing a 'communitarian' turn (Millon 1995; Mitchell 1995) or a 'team-production model' (Blair and Stout 1999), while laudable, have failed to situate the corporation as an institution within a wider context of social responsibility in conceptual (Miller 2017), philosophical (Parfit 2011) or practical terms. Ulrich (2008, p. 2) asserts it is 'not markets but citizens [who] finally deserve to be free in modern society. The market economy must, therefore, be civilized in a literal sense.' Indeed, within the management if not economics literature, this precise failing was identified nearly six decades ago (Mason 1960, p. 19). Each move to reform, however, was occasioned not by acceptance of responsibility. Instead, responses to crises and scandal were reactive and minimal (Rossouw and van Vurren 2003). What then, as Lenin (1902), famously exhorted, is to be done?

In a previous era, the Italian Marxist theorist Antonio Gramsci (1971, p. 35) advocated policies designed to raise the consciousness of the nation. This was the *raison d'être* of the political party, deemed by Gramsci, following Machiavelli, to be 'The Modern Prince'. Today, as Sheldon Wolin (2016, p. 616) reminds us, the task is not a retreat to the failed politics of nationalism but a regeneration of what ought to be the foundational requirements of public socio-economic security (see also Piketty 2017, 2018).

Sustainability requires an acknowledgement that citizenship is not a passive administrative right. It brings with it a series of duties and responsibilities, of which electoral participation in a human sense and influence through corporate spending are only component parts. How does one make the necessary deliberative governance legitimate and effective? At stake is an unavoidable and indeterminate conflict within and between varieties of capitalism. Critical to this process is a mapping and navigation of the turbulent relationship between the corporation and the multiple societies it impacts. Before we can address a pervasive sense of hopelessness, we have to first understand it.

2.1 The Corporation as Problem and Solution

Nowhere is the trust deficit more apparent than in the influence of the corporation both on individual lives and in polities beyond market economies, not least

because of the rise of state capital on capital markets themselves, where entities directly connected to governments are increasingly active players. 'Capitalism has transformed itself, from a system of activities analysable through economic categories to one that has adapted political characteristics and the qualities of a new constitutional blend devoid of democratic substance,' noted Wolin (2016, pp. 587–90). The light coming down the tunnel has proved to be that of an approaching train. The ticket on the journey to globalism is paid for, but its passengers are increasingly subservient to forces beyond their control. As Wolin (2016, p. 588) wrote, 'the cooperation of corporate power is now a vital element of domestic, foreign, and military policies. Competition and rivalry occur less between state and corporations and more between corporations vying for influence over the state or subsidies from it.' Individual self-interest is presented in positive terms as evidence of an entrepreneurial spirit which is both rational and inevitable (Downs 1957, p. 295). It is a beguiling if not bewitching story. It is one that is given added plausibility by technological innovation, which its libertarian founders proclaim would be threatened by any regulatory restriction on moral, cultural or political grounds. The corporation, across multiple sectors, most notably finance and technology, has become both the guardian of economic growth and the locus of democratic vulnerability. If ever it were capable of acting as sentinel, the corporation has never before been so unsuited to the task.

In August 2018, Apple, a once-struggling computer manufacturer, rose from the ashes to make history as the first corporation to reach a market capitalisation of more than 1 trillion US dollars. In all of the plaudits, less remarked upon is the source of that innovation. For Apple, this lies as much in its tax strategy and ability to skirt around regulatory rules designed for a previous epoch as its technological prowess and marketing genius (Senate 2013). Meanwhile, manifestoes to create global virtual communities, encapsulated by protestations from Facebook that 'fake news is not our friend' ring as hollow as the finance industry's apologies. In the ten years since the GFC, technology has indeed changed our world. This has not necessarily been for the better. The recklessness of the financial services sector brought the global economy to a standstill. Maladroit oversight offered in advance, during and after the crisis did much to calcify cynicism in the developed world about regulatory competence. A hardening agent was provided by the alleged democratisation of the news cycle offered by social media.

There is an unnerving similarity in the responses of a financially (if not morally) chastened global finance industry and its tech counterparts to transparency and accountability deficits. Both have proved impervious to effective control. They remain so. Expressing regret is not the same as accepting

responsibility (O'Brien 2014b). Disruption, like innovation, is not a value-neutral noun or concept (Cohen 2017). Everything has a price. Far from complying with generally accepted principles of best-practice corporate governance, these highly mobile, asset-light corporations are adroit at aggressive tax minimisation strategies. These sail uncomfortably close to tax evasion. Illegal state aid facilitates a race to the bottom in the design and application of foreign direct investment strategies, even for those, such as Ireland, that operate under common market rules (European Commission 2017).

The competitive advantage of the multinationals is enhanced by deft exploitation of gaps provided by the non-applicability of traditional systems of oversight. These gaps include lack of responsibility for the curation of hosted content, the ideational privileging of innovation and disruption over stability and the suggestion that curbs on operational independence violate libertarian principles. Cavalier approaches inform methods of data protection, and technical gaming of regulatory rules designed for an industrial economy destined to history because of the rise of artificial intelligence and its impact on the future of work itself display a confidence that borders on hubris (Cohen 2017).

In seeking to restore warranted confidence in corporations and their governance, this Element explores how wealth generation can operate within sustainable frameworks, keeping in creative tension the societally beneficial goals of liberty and equality (Rousseau 2005). Maintenance of social order and progress requires active balancing of both. If equality of opportunity is compromised by a privileging of individual freedom, the social contract disintegrates. This can lead, inexorably, to a corresponding increase in resentment, which is playing out across the developed world. Distrust damages social cohesion and quickens a downward spiral, as Arendt (2017, pp. 4–5) recounts in the seminal *The Origins of Totalitarianism* (see also Adorno 1950).

Arresting this malaise requires a fundamental change in thinking. We all know (or can find legal representation to litigate) our corporate rights. The question of what constitutes duty and responsibility is much more vexed, not least because most corporate constitutions are written in such a way that they include provisions that facilitate the conduct of anything lawful. What is lawful, in turn, depends on whether the definition of lawful conduct is read narrowly or purposively (Braithwaite 2013). Given that so few cases taken by regulatory or prosecutorial agencies are litigated to a judicial conclusion, there is a profound absence of precedent. This has knock-on effects across common law systems (O'Brien 2007; Rakoff 2014, 2019). Administrative agencies have a duty to act as model litigants, meaning they have to have a reasonable belief in the veracity of their case (O'Brien 2013). Without a precedential guide, these agencies are susceptible to accusations of overreach. It is the oldest playbook in

contemporary democracy and has compromised the authority of the administrative process from the beginning (Landis 1938, 1960; O'Brien 2014a).

2.2 The Rise of Precariousness

In today's globalised world, no physical wall can provide a protective shield. The challenge is, therefore, as much virtual as physical. As the dislocation caused by technological disruption extends and expands, middle-class aspiration becomes increasingly, if paradoxically, unattainable to achieve or to hold. We are witnessing a global rise in 'precariousness' (Standing 2011). Anaemic economic growth and the erosion of economic certainty and job security are advanced within and across the 'gig' economy. These are often presented as positive developments. They are anything but. The author of the term 'precariat' now sees it as an affliction increasingly impacting the professions, including law. In a 2017 interview, Guy Standing argued,

[T]he division of labour has changed. For example, the legal profession has silks at the top, then salariat lawyers and a huge growth of paralegals with basic training, but without a career path through the profession, because there are ceilings. It's the same in the medical and teaching professions. The precariat is not just a reality, it's grown extremely fast in recent years. Unless something is done to improve security and redress the class-based inequalities arising, you're going to get a political monster. (Cited in Johnson 2017; see also Piketty 2018)

The investigation undertaken here to address these problems is explicitly comparative. It enables evaluation of corporate purpose and obligation across jurisdictional and disciplinary boundaries. It focuses on the individuals, functions, processes and purposes through which the corporation is directed and controlled. In so doing, it designs and tests how more granular principles of corporate governance can incorporate essential conceptions of fairness and justice. In technical terms, this is a design blueprint of 'integrative economic ethics' in action: 'an ethically rational [re-]orientation in politico-economic thinking without abandoning reflection in the implicit normativity of "given" economic conditions' (Ulrich 2008, pp. 3–4). This, in turn, displaces transactional approaches that equate efficiency with fairness.

Recalibrating the duties and responsibilities of the twenty-first-century corporation requires a verifiable process of outlining a rationale, ongoing deliberation, implementation, monitoring, assessment and subsequent evaluation. Delivered through evolutionary methods, its success would herald a revolutionary outcome: the reshaping of corporations and markets to deliver inclusive economic growth, leading to better lives in line with the integrative

economic ethics framework suggested by Ulrich (2008). This agenda is not one dreamt up in an ivory tower. It is an agenda recognised as essential by the Organisation for Economic Cooperation and Development (OECD 2018). It is, moreover, an agenda capable of application in non-OECD jurisdictions.

Effective corporate governance and capital market regulation are as much imperatives in Moscow as Frankfurt, London as Beijing, New York as Johannesburg and Brussels as Riyadh. Global in (real) life but national in death, the corporation poses wicked questions to ongoing domestic political legitimacy, irrespective of domain. Whether, where, how and indeed how much tax a corporation pays have profound implications. If taxes are not collected, the trickle-down logic of profit as sole source of purpose evaporates (Friedman 1970). The rise of state capital and expansion of state-owned enterprises and sovereign wealth funds (SWF) as key actors in capital markets further complicate matters. The listing of red chip corporations in Hong Kong, London and New York is as problematic and as politically charged as the shareholder activism of the wider SWF sector (or its private equity equivalents). The governance structures of the Saudi Arabian oil giant Aramco, poised to be the largest single initial public offering in history, plays second fiddle to the fees associated with the transaction. Whether shareholders will have any real power to influence its decision-making is, however, as questionable as control of the technology giants, all of which use differential voting shares to ring-fence and protect the founding leadership. For all the hype surrounding disruption and innovation, we have by default allowed the creation of oligopolies on which we increasingly depend, both physically and mentally. And it is the failure to price this cost that is driving the trust and its discontents narrative.

2.3 The Building Blocks of Normative Value

I propose five core criteria essential to building a sustainable theory of the corporation that holds rights, duties and responsibilities in creative and productive tension. These are closer in roots to Adam Smith's *Theory of Moral Sentiments* (2006) than *The Wealth of Nations* (2005). The latter sets out the minimal conditions required for a functioning market; the former establishes the normative criteria for an examined and fulfilled life lived with integrity (Aristotle 2004). First, I demonstrate the need to rebuild public trust and confidence in corporations and those individuals and organisations responsible for their internal and external oversight. The very fact that much of what happened in the GFC and continued even after extensive bailouts was legal if irresponsible and unethical did much to undermine the foundations of trust within and between political, regulatory and corporate spheres. Notwithstanding the necessity at the time of providing