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### Regulation as Respect

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# REGULATION AS RESPECT

CRISTIE FORD<sup>1</sup>

## Introduction: GameStop and the gulf between people and regulators

In the so-called “meme stock” phenomenon of early 2021, retail investors acting *en masse* temporarily ran up stocks, including video game nostalgia favorite GameStop, far beyond fundamental values. It was an unexpected, riveting, short-lived, and ultimately tragicomic (or maybe just tragic) event. While it was happening, the extreme volatility in meme stock shares’ values tested the capacity and resilience of markets, forced brokerage firms to restrict or suspend trading in a way that harmed retail investors, and destroyed one large hedge fund (and the assets of the pension funds, mutual funds, and other pooled investment vehicles that were its only clients).<sup>2</sup> It also shone a light on how discount brokers were employing digital engagement practices – the “gamification” of trading – to incentivize people to trade more, and in riskier ways, ultimately to many peoples’ great detriment.<sup>3</sup> The meme stock phenomenon was the product of many things including an unprecedented retail investor movement that gathered enormous scale in a short period of time thanks to

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<sup>1</sup> I am grateful to Julie Cohen, Ari Waldman – exceptional editors! – Ryan Calo, Hoi Kong, Marc Schneiberg, and Jodi Short for their very insightful comments on this essay. Errors, of course, remain my own.

<sup>2</sup> On Melvin Capital’s clients see <https://wallmine.com/adviser/229576/melvin-capital-management-lp>; on the impact of the phenomenon see, e.g., US SEC, “Staff Report on Equity and Options Market Structure Conditions in Early 2021,” (October 14, 2021), <https://www.sec.gov/files/staff-report-equity-options-market-struction-conditions-early-2021.pdf>.

<sup>3</sup> Specifically, because the business model of Robinhood – the discount broker at the center of the meme stock events – depended in part on receiving payments for directing its retail investor order flow to other large capital market players, it had an interest in encouraging retail investors to trade more, and to trade on margin. The “payment for order flow” (PFOF) business model generated the conditions that led to gamification. Digital engagement practices are described in SEC Release Nos. 34-92766, File No. S7-10-21, “Request for Information and Comments on Broker-Dealer and Investment Adviser Digital Engagement Practices, Related Tools and Methods, and Regulatory Considerations and Potential Approaches; Information and Comments on Investment Adviser Use of Technology to Develop and Provide Investment Advice,” <https://www.sec.gov/rules/other/2021/34-92766.pdf>. On its harms, see Dennis M. Kelleher, Jason Grimes, and Andres Chovil, *Securities – Democratizing Equity Markets with and without Exploitation: Robinhood, GameStop, Hedge Funds, Gamification, High Frequency Trading, and More*, 44 W. New Eng. L. Rev. 51 (2022), <https://digitalcommons.law.wne.edu/lawreview/vol44/iss1/4>. The fact that people, or rather their data, are the “product” here is familiar in what Julie Cohen describes as “informational capitalism.” JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* (2019).

social media,<sup>4</sup> and regulators' failure to respond effectively to a new business model.<sup>5</sup> But it was also, on some level and for some investors, a political protest: grassroots "voice" in the form of online stock purchases. And, it caught regulators utterly flat-footed.

In this respect, the meme stock phenomenon points to a larger lesson about the profound disconnect between peoples' sense of alienation from public institutions, and the perspectives of the regulators who are supposed to be safeguarding their interests. Regulators missed the immediate, investor-specific harms of gamification because they were not attuned to the investor experience. They were also caught by surprise – as people everywhere were mere days earlier by an attack on the US Capitol on January 6, 2021 – by the outpouring of rage and disaffection the meme stock phenomenon represented.<sup>6</sup> This disconnect places the problem of regulatory managerialism at the center of any attempt to reconceive the state. This is so because popular/ist feelings of disempowerment are tied directly into regulators' apparent inability across the last few decades to recognize, respect, or respond to the non-elite public. This problem of disconnect, of which the meme stock phenomenon is just one idiosyncratic example, extends well beyond financial regulation and deserves our urgent attention.

The modern regulatory state does not have effective mechanisms for absorbing public perspectives in all their variety and nuance. Notice and comment rulemaking is a bust for ordinary people who want to be heard; structural reforms to inject more public voice into regulatory agencies have gone nowhere; and broadly deliberative, civic republican reform recommendations are not – have never been – a solution. Yet the problem goes deeper than just the need for some new communication tool. In recent decades, regulators' responsibilities for exercising subject matter expertise have come to be lodged within a broader managerialist model, which evaluates success not by outcomes for ordinary people, but rather by reference to a separate layer of compliance metrics, private sector-derived methods, and a correspondingly hollowed-out normative mandate. Within this paradigm, non-expert knowledges and instincts have tended to be marginalized, discredited, and ignored; or else pulled into the gravitational field of managerialism, to be absorbed and digested into something tamed, tidy, and therefore false and incomplete.

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<sup>4</sup> Subreddit #WallStreetBets played a huge and unprecedented role in creating identity, sharing information, mobilizing retail investors and amplifying the trend.

<sup>5</sup> The SEC enhanced disclosure obligations around PFOF through amendments to its Rule 606 of Regulation NMS, in November 2018, but did not link the new model to the incentives to encourage increased investing through gamification. SEC Final Rule 17 CFR Parts 240 and 242, Release No. 34-84528, "Disclosure of Order Handling Information," <https://www.sec.gov/rules/final/2018/34-84528.pdf>.

<sup>6</sup> GameStop trading volume increased massively beginning on January 13, 2021, with the share price closing at \$7.85, more than \$2.86 above the previous day's close. Share price peaked on January 27, 2021 at \$86.88 and fell quickly thereafter. <https://www.nyse.com/quote/XNYS:GME>

The failings of regulatory managerialism reflect a fundamental sociopolitical problem of our age, which is the wide and expanding distance between the ways we (expertised, “elite” actors) have designed our public and regulatory systems, and the lives and views of the (“regular”) people on whose behalves those systems were meant to have been built. If we are serious about tackling managerialism, we need to start from a more basic inquiry. What would it look like to regulate complex social issues, even those like financial regulation that demand a high level of subject matter expertise, in ways that genuinely put actual humans and their needs at its core? Right now, the distance between expert and lay conversations is so great that it is hard work to even frame this question, let alone answer it. Yet the broader and more bewildering the gap between expertised and outsiders’ ethical and epistemological universes, the more that can be *learned*.

This paper asks what we can learn from peoples’ alienation and anger that can help us transcend the managerialist paradigm that constrains regulation. It articulates the challenge that regulatory managerialism presents, and then proceeds to canvass the reasons why the usual reform recommendations are inadequate if not even bankrupt in justice and equity-seeking terms. It then reaches out to consider human centered design, design justice, and some of the restorative and reconciliatory ways in which societies have tried to beyond historic injustice. Together, these trace a path forward for a more human-regarding, socially competent regulatory approach. I propose that it is time to think of *regulation as respect*.<sup>7</sup> The paper’s last section sets out four preliminary observations geared toward helping to bring this new orientation to the regulatory state.

## Regulatory Managerialism

This volume’s editors have laid out the ways in which regulatory managerialism has embedded systems that are not publicly accountable, and in fact get in the way of the state’s ability to generate inclusive justice and more genuinely democratic outcomes for people. The aspect that bears highlighting here is the way in which the managerialist approach legitimizes certain kinds of *knowledge* – expert knowledge, meaning subject matter expertise but also the managerial scaffolding that surrounds and supports it – at the expense of other kinds.

Regulatory managerialism is a complex, contingent, but broadly internally coherent meaning-making system, within which managerialist and expertised power is diffused and re-enacted through the levels and joints of the regulatory system. As Julie Cohen and Ari Waldman note in their Introduction to this volume, regulatory

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<sup>7</sup> I am riffing on David Dyzenhaus, whose somewhat different notion of “deference as respect” has been very influential (if not always faithfully reflected) in Canadian administrative law. David Dyzenhaus, *The Politics of Deference: Judicial Review and Democracy*, 279-307 at 286 in MICHAEL TAGGART, ED., *THE PROVINCE OF ADMINISTRATIVE LAW* (1997).

managerialism is fully a mode of governmentality.<sup>8</sup> As Gil Eyal points out, expertise does not operate at the level of abstraction: it is instantiated in processes, networks, decisions, assumptions, problem frames; and as mediated through ritual, hierarchy, scripts, and time itself.<sup>9</sup> This means of course that choices about technique are not neutral or inconsequential. Just as the logic of managerialism functions comprehensively to valorize certain kinds of knowledge, it subjugates the knowledges, value systems, lived experiences, and also the emotions of those outside it. In practice this means that it may delegitimize these external perspectives, or else read them out, or else read them down and thereby co-opt them.

This is not really news. Notice-and-comment rulemaking, for example, as it operates in our managerialist era does not actually work to solicit or process meaningful input from the general public (let alone from the self-described “apes” that act out on subreddit channels.)<sup>10</sup> Managerialist regulators are utterly unequipped to deal with “non-expert” public input, especially in large volumes. This can lead them to frame that input as unhelpful, inconvenient, pointless, or frustrating.<sup>11</sup> At least in financial regulation, we know that esoteric language also acts as a barrier to entry for normal people in providing input on regulation they care about. Add to this the actual mechanics of notice-and-comment, which tend to solicit comments only at a stage where sophisticated responses to specific, narrow, technical questions are salient, and we have a system in which detailed esoteric knowledge is the only kind of input that can gain traction.<sup>12</sup> Better-resourced organizations are also more likely to engage with regulators, to advance more sophisticated comments, and to enjoy more success in shifting the content of federal agency rules.<sup>13</sup> In this context, industry-favoring narratives about complexity, market mechanisms, and

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<sup>8</sup> Julie E. Cohen and Ari Ezra Waldman, *Introduction*, this volume.

<sup>9</sup> GIL EYAL, *THE CRISIS OF EXPERTISE* (2019).

<sup>10</sup> Emily Bremer, *The Undemocratic Roots of Agency Rulemaking* (2023) 108 *Cornell L Rev* \_\_\_\_ (first section describing mass comment letter problems). Bremer’s broader point is that notice and comment rulemaking was not even designed ab initio to do so. Additional influence is exercised in the informal zones around notice and comment rulemaking but in those spaces, “regular” people do not even have the level of voice that notice and comment rulemaking nominally makes available. Frank Pasquale in this issue; Todd Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation* (2000) 52:1 *Admin L Rev* 159-174 at 167; Daniel E Walters, *Capturing Regulatory Agendas?: An Empirical Study of Industry Use of Rulemaking Petitions*, (2019) 43:1 *Harvard Environmental Law Rev* 175-223.

<sup>11</sup> Consider the negative ways in which so-called “mass comment letters” are discussed. E.g., Balla et al., *Lost in the Flood?: Agency Responsiveness to Mass Comment Campaigns in Administrative Rulemaking*, (2022) 16:1 *Regulation & Governance* 293-308; Cynthia R. Farina, Mary Newhart & Josiah Heidt, *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 *Michigan J of Environmental & Admin Law* (2012) 123, at 132-45.

<sup>12</sup> Kim Krawiec, *Don’t ‘Screw Joe the Plummer’: The Sausage-Making of Financial Reform* (2013) 55 *Arizona L Rev* 53.

<sup>13</sup> Daniel Carpenter et al., *Inequality in Administrative Democracy: Methods and Evidence from Financial Rulemaking* (2022) working paper at <https://judgelord.github.io/finreg/participatory-inequality.pdf>.

competitiveness work to limit a regulator's perceived options and even their aspirations.<sup>14</sup>

It is not an accident, then, that human-centered, equity-oriented, or voice-oriented priorities are not front and center in regulatory managerialist systems. There is no grand, conscious conspiracy at work. Managerialism is not utterly totalizing.<sup>15</sup> At the same time, it is the dominant functional orientation of our time. Managerialism is embedded in and instantiates existing hierarchies of power and domination. The system's blinkers and epistemological limits are a function of the managerialist orientation that regulation has adopted, repeatedly, over the last several decades. Well-meaning public-minded regulators, of which there are many, have no choice but to operate within this system of multiple, interacting, mutually reinforcing mechanisms that leave very little space for transformational thinking.

Given that context, it may be remarkable but it is ultimately not surprising that many regulatory regimes – not intentionally, exactly, but as a function of the logic of managerialism – now create information in forms or quantities that cannot be comprehended by ordinary people.<sup>16</sup> We know this, and we know that these problems can make people less safe (e.g., because they cannot make sense of a securities disclosure document but they can watch a TikTok finfluencer's stock-pumping vlog), and they can exacerbate social inequities.

Perhaps we should also not be surprised that regulators have not investigated ways to use technology to better understand the data they are already receiving. They have not, for example, put in place tools to analyze volumes of notice and comment letters filled out by individuals, like those sent in in response to the SEC's proposed gamification rules.<sup>17</sup> They have not taken meaningful steps to ensure that other forms of lay input, such as a "We the Investors" letter that circulated online following the meme stock event – out of time sequence with the SEC's notice and comment process but signed by tens of thousands of people, and engaged directly with the substance of

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<sup>14</sup> Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 Wis. L. Rev. 441 at 458-65; Nolan McCarty, *Complexity, Capacity, and Capture* in DANIEL CARPENTER AND DAVID MOSS, PREVENTING REGULATORY CAPTURE (2014) at 99-123.

<sup>15</sup> As Marc Schneiberg has pointed out, the institutional structures that have come to have force in the world were initially the product of choices made under conditions of uncertainty. As such, "established institutional paths contain within them possibilities and resources for transformation, off-path organization and the creation of new organizational forms." Marc Schneiberg, *What's on the path? Path dependence, organizational diversity and the problem of institutional change in the US economy, 1900-1950* (2007) 5 Socio-Economic Review 47 at 48.

<sup>16</sup> WENDY WAGNER, INCOMPREHENSIBLE! (2019).

<sup>17</sup> See, e.g., Michael Livermore, Vladimir Eidelman & Brian Grom, *Computationally Assisted Regulatory Participation*, (2018) 93:3 Notre Dame LR 977-1034 (arguing that regulators can natural language processing technology to address two key challenges when reviewing public comments: the "haystack" problem of identifying the valuable substantive comments, and the "forest" problem of synthesizing common themes or patterns).

the SEC's proposed rules<sup>18</sup> – can be incorporated effectively into regulatory input analysis.<sup>19</sup>

Perhaps it is not even an accident that virtually all US (and probably other) regulatory agencies do not even have data on the differential distributional and equity effects of their regulations, let alone methods for determining which specific groups of people (especially vulnerable ones, however defined) should be considered as part of any regulatory impact assessment.<sup>20</sup> Nor do they have decision rules for how to determine the balances between benefits and costs when considering disaggregated groups. These gaps highlight the level of abstraction from real humans at which managerialism operates, and they make inequities harder to see.

Not coincidentally, given how self-contained managerialism is, regulation over the last thirty years has also tended to prioritize regulatory technique at the expense of agenda-setting and standard-setting normative work.<sup>21</sup> As time has gone on, expertise in applying continuous improvement metrics and the like have (a) generated a form of expertise that gives the impression that it is measuring something significant even while (b) persistently reading the messiness out for the sake of those same metrics. Put another way, managerialism has come to read even *people* down, to fungible and stylized units of consumers, citizens, or groups in order to fit them, Procrustes-style, into the conceptual spaces the models allocate to them. A lot has been lost in the process, even while the busywork of managerialist technique has made it seem as if more and more is being achieved.

Returning to the meme stock example: in technical regulatory terms, the SEC has responded quickly to the meme stock events. It has produced a staff report on the events and proposed new rules around the payment for order flow business model, gamification, and the like.<sup>22</sup> At the deeper level where justice and voice concerns operate, however, this is unresponsive. To begin with, and perhaps inevitably, the SEC adopted a problem/solution formulation of events in a way that focused on the technical pieces without interrogating the broader status quo. There is no indication that the regulator attended in tangible ways to the sentiments of those that provided comments on their new rule. Indeed the disconnect between the rage we see in those

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<sup>18</sup> The gaming rules are *supra* note 2; the “We the Investors” letter is at <https://www.urvin.finance/advocacy/we-the-investors-pfof-sign-on>

<sup>19</sup> Note that this vehicle for voice was developed by a finance company, Urvin Finance, that hopes to seize on the social component of retail investing that the subredditors revealed, for its own profit. The need for an expertised intermediary that can speak to the SEC in its own language creates opportunities for those that can provide translation services, and also for rent seeking.

<sup>20</sup> Caroline Cecot and Robert W. Hahn, (forthcoming 2023), *Incorporating equity and justice concerns in regulation*, Regulation & Governance <https://doi.org/10.1111/rego.12508>.

<sup>21</sup> CRISTIE FORD, *INNOVATION AND THE STATE* (2017), Chapter 5.

<sup>22</sup> Staff Report *supra* note 2; proposed rules *supra* note 3.



comment letters, and the dessicated tone of the SEC's response, is striking.<sup>23</sup> The SEC has no formal mechanism at all to digest other forms of input, such as the "We the Investors" letter mentioned above, or ongoing dialogue on subreddit and other social media channels.

One way forward could be, essentially, to meet managerialism where it is. We could, for example, insist that regulators be subject to intelligibility requirements, so that regulatory statements and regulatorily required documents, like the disclosure documents that are meant to be geared toward normal people, are actually comprehensible to them.<sup>24</sup> We could require regulators to develop systems that would allow them to digest lay input at scale.<sup>25</sup> We could advocate for directing the managerialist gaze toward measuring distributional effects in more granular and intentional ways. But at the end of the day, these kinds of managerialist reforms are not capable of transcending the managerialist governance paradigm that spawned these managerialist problems. As William Boyd points out in this volume, elaborate regulatory knowledge practices can operate as part of the managerialist agenda, becoming barriers to structural reform.<sup>26</sup>

Moreover, because its processes operate at a remove from actual engagement with the public, the SEC and regulators like it are ill-equipped to even think about the more profound ways in which regular peoples' disengagement with and distrust of expertise, institutions, and authority pose genuinely existential questions for their regulatory models. Among the things that are missed as a result is that people have

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<sup>23</sup> Comments on the SEC's proposed rules are at <https://www.sec.gov/comments/s7-10-21/s71021.htm>.

<sup>24</sup> See WAGNER, *supra* note 16. Consider, e.g., the Civil Resolution Tribunal (CRT) in British Columbia, Canada. All materials, including CRT judgments, are written at a sixth-grade reading level in order to be widely understood. Some essential information is produced in video or audio format for those who have difficulty absorbing written information. Free telephone interpretation services in multiple languages are available, along with written materials in multiple languages and texts. The entire website is available in the *thirteen* most commonly used languages in British Columbia. Shannon Salter and Darin Thompson, *Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal*, McGill Journal of Dispute Resolution, Vol. 3, 2016-2017; Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal*, (2017) Windsor Yearbook of Access to Justice 34(1), 112-129.

<sup>25</sup> See Livermore et al., *supra* note 17. As Cecot and Hahn, *supra* note 20, argue, US Presidential Executive Orders, requiring agencies to conduct more and better distributional analysis and to consider equity in their decision making, could be designed to be more effective in locking in the value of such initiatives. Executive Orders could be a mechanism for requiring comprehensibility in public-facing documents, and could offer incentives or resources to ensure such a transition. Congress could also encourage similar initiatives if it so chose. These – incentives, resources, reporting requirements – are positive forms of accountability, with the potential to ratchet action upward toward more and better regulatory practices. As such, even given that they are managerialist tools, they should be preferred to other managerialist tools like sunset provisions, which are often just opportunities to roll back public sector initiatives.

<sup>26</sup> William Boyd, *With Regard for Persons*, this volume.



flocked to app-ified discount brokers like Robinhood, the one at the center of the meme stock story, as part of a mass move away from, and distrust of, not only traditional retail-facing investment advisers and the like, but also those that are supposed to be regulating them. The possibility that investors are, perhaps permanently, abandoning the structures on which financial regulation has been premised for a century is an unsolvable, almost incomprehensible, problem if seen only from within the managerial mindset. Managerialism's inward-looking, expertise-oriented, technique-oriented nature makes it especially impossible for managerialist regulators to engage with the kinds of exogenous, systems-level critiques that some segments across western liberal democracies have been expressing, increasingly loudly, in the years since the Financial Crisis. How can financial regulators, for example, be expected to respond to normal peoples' frustrated *cris de coeur*, their perceptions of unfair treatment and/or a rigged system, or their desire to push for change that ultimately is distributional or political?

Is there any way to link regulatory managerialist practices to the actual lived experiences and priorities of diverse normal people without reading those people down to flattened, "manage-able" units? The answer is probably no: regulatory managerialism itself is the ideology that needs to be dislodged.

## The Spectrum of Familiar Reforms

Prior efforts to improve regulation's engagement with and accountability to the public can be imagined along a spectrum from least structurally ambitious to most. At the least structurally ambitious end are the instrumental, cosmetic changes to the ways in which the administrative state engages with people. For example, regulators could probably do a better job of communicating the importance of what they do. The SEC could, for example, publicize its financial literacy initiatives and celebrate its enforcement successes. Improving the public's knowledge and understanding about regulation would also be useful.<sup>27</sup> Regulators and governments can work to reduce the administrative burdens that programs impose on people, which undermine their sense of being cared for or helped by the state.<sup>28</sup> And regulators could do a better job of incorporating user experience insights into the design of regulatory structures.

As useful as these mechanisms might be in the immediate term, there is a conservatism – could it even be cynicism? – inherent in some of them. These are strategies for bringing the public around to appreciating existing regulatory perspectives, not for taking in criticism on its own terms. There is a fine line between

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<sup>27</sup> See, e.g., See Armen Hakhverdian and Quinton Mayne, *Institutional Trust, Education, and Corruption: a Micro-Macro Interactive Approach* (2012) 73 *Journal of Politics* 739; Tom Christensen and Per Lægveid, *Trust in Government: The Relative Importance of Service Satisfaction, Political Factors and Demography* (2005) 28 *Public Performance & Management Review* 487, at 502.

<sup>28</sup> See, e.g., PAMELA HERD AND DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* (2018).

communicating a regulator's successes and straight-up marketing, performativity, even propaganda. It is also a mistake, and an arrogant one, for regulators (or any of us) to presume that other people would obviously think what we thought, if only we explained it patiently and simply enough times over. People have a keen ear for condescension.

Further along the spectrum from the communication-focused strategies are some of the projects that regulation and governance scholars have proposed. These include tripartism, which would inject a public representative into the regulatory process as a counterweight to industry and regulators.<sup>29</sup> Other scholars have imagined novel organizational and deliberative forms to institutionalize certain kinds of representativeness in governance and decision making.<sup>30</sup> These ideas are more ambitious, but they are still first-order fixes geared toward retooling or rejigging regulatory structures in the service of existing optimization objectives, as currently defined. They build new pieces into the managerialist frame without dislodging it. As a consequence, if history is a guide, we can expect the gravitational pull of managerial systems and routines, informed by private sector-derived metrics and constructions of legal concepts, to read any such initiatives downward to the least ambitious versions of themselves.<sup>31</sup> So, in the meme stock context, we could perhaps imagine the SEC consulting with a designated investor representative before developing its proposed rule.<sup>32</sup> While the content of the rule could be improved through such interactions, that kind of strategy is still unresponsive to the external threat brought by the disconnect between the expertised, institution-trusting regulatory epistemic environment and the one that many people occupy – not just angry subredditors but

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<sup>29</sup> IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992), chapter 3; NEIL GUNNINGHAM AND DARREN SINCLAIR, *LEADERS AND LAGGARDS: NEXT GENERATION ENVIRONMENTAL REGULATION* (2002); in financial regulation, Saule Omarova, *Bankers, Bureaucrats, and Guardians: Towards Tripartism in Financial Services Regulation* (2012) 37: J Corp L at 621-674.

<sup>30</sup> See, e.g., Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 *European Journal of International Law* 47 (2006), <https://doi.org/10.1093/ejil/chi168>; and Dan Walters, *Reclaiming Regulatory Intermediation for the Public*, this volume.

<sup>31</sup> Among others see, e.g., Lauren B. Edelman, Sally Riggs Fuller, and Iona Mara-Drita, (2001) *Diversity rhetoric and the managerialization of law*, 106 *American Journal of Sociology* 1589; Shauhin A. Taleh, (2009) *The privatization of public legal rights: How manufacturers construct the meaning of consumer law*, 43 *Law & Society Review* 527; Ronen Shamir, (2010) *Capitalism, governance and authority: the case of corporate social responsibility*, 6 *Annual Review of Law and Social Sciences* 531; Cristie Ford and David Hess, *Can Corporate Monitorships Improve Corporate Compliance?* (2009) 34 *J Corp L* 679.

<sup>32</sup> In a similar vein, Brian Feinstein suggests that “identity-conscious measures” (which presumably could include retail investor identities) already built into Federal Reserve and SEC structures can also help improve administrative agencies’ decision making and democratic legitimacy. Brian D. Feinstein, *Identity-Conscious Administrative Law*, (2022) 90 *Geo. Wash. L. Rev.* 1.

the much larger groups of people that have been unable to access financial markets or even banking services in the first place.<sup>33</sup>

This brings us to the high end of the structural reform spectrum and the range of civic republican, deliberative democratic, and agonistic theories that share a commitment to the dialectic process and to some level of responsible, serious, “virtuous” citizen engagement in the processes of governance. But public participation is not the cure for what ails regulatory managerialism. The strongest-form democratic deliberative models are based on a romantic image of the agora that cannot be the foundation of sustainable engagement practices, especially around specific regulatory questions. Leaving those aside, it is also hard to “do” public participation “well” even where its ambitions are more limited and subject-specific.<sup>34</sup> And even when done “well,” public participation, especially when used as a strategy for legitimating particular decisions, is not some exogenous force that can intervene, *deus ex machina*, to dissolve the practices and logics of power that generated managerialism in the first place. Inevitably, participatory mechanisms are embedded in the world in which they find themselves.<sup>35</sup> Within our polarized, inequitable, less than fully democratic societies, participatory mechanisms, like any other mechanism, can be operationalized or co-opted. They can end up doing more to entrench authority than to challenge it.<sup>36</sup>

If there were easy solutions to the problem of public accountability in the era of regulatory managerialism, we likely would have landed on them by now. We have not. As Cynthia Farina has said, “Like an intriguing but awkward family heirloom, the legitimacy problem is handed down from generation to generation of administrative law scholars.”<sup>37</sup> So much of the time, many of us accept the current, limited scope for public engagement with the regulatory state as imperfect but not indefensible; as the best of a series of unsatisfactory options; as the trade-off needed to allow for effective, expertised administration within an otherwise democratic society; or perhaps as a relatively insignificant problem compared to the other things going on.

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<sup>33</sup> MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* (2015); MICHAEL S. BARR, *NO SLACK: THE FINANCIAL LIVES OF LOW INCOME AMERICANS* (2012).

<sup>34</sup> See, e.g., King, Feltey and Susel, *The Question of Participation: Toward Authentic Public Participation in Public Administration*, (1998) 58:4 Public Admin Review 317; Brian Adams, *Public Meetings and the Democratic Process*, (2004) 64:1 Public Admin Rev 43.

<sup>35</sup> Lauren B. Edelman et al. (1999) *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 American J. of Sociology 406.

<sup>36</sup> At the same time, the wholesale dismissal of participation as a tool in the service of progressive goals is too facile. An important examination of the concept of participation is CAROLINE W. LEE, MICHAEL MCQUARRIE & EDWARD T. WALKER, *DEMOCRATIZING INEQUALITIES: DILEMMAS OF THE NEW PUBLIC PARTICIPATION* (2015).

<sup>37</sup> Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, (1997) 72 Chicago Kent L Rev 987, at 987.

But a yawning gap has now opened between online investors' worlds (gamified, social, driven by new definitions of status and an almost oppositional sense of collective identity), and the managerial state's assumptions, methods, and responses. The real problem we face is not just a lack of public *accountability* for regulatory decision making; it is the almost metaphysical separation between our governance models and the messy realities of real human lives. Regulatory managerialism operates in a different epistemic world from one that would try to understand real humans, as opposed to stylized "citizens" or "consumers."<sup>38</sup> The structures we have genuinely *do not work* for members of the public who may have deep, if sometimes inchoate, reasons to be unhappy with the way the state seems to operate. Normal peoples' perspectives are denigrated or indigestible within existing frames, in a way that – inadvertently or not – smacks of disrespect. Grafting some new, ultimately instrumental version of public input or accountability into the existing regulatory managerialist frame will be inadequate, in instrumental terms and perhaps in moral ones too.

What would regulation look like if we tried to burst the managerial frame that constrains our thinking – working not by reference to institutions and their processes, but instead starting, with sincerity, curiosity, and respect, from those humans themselves, in all their variety and messiness?

## Regulation as Respect

The idea of regulation as respect derives from the conviction that a flourishing society is one that allows more than one way to be, that permits heterarchic regimes for valuating (and evaluating) worth, and value, and that extends a right to dignity, respect, and inclusion broadly.<sup>39</sup> It is opposed not only to managerialism's instrumental approach to public participation, but also to the notion that it is normatively actually okay to see people as inputs for state purposes in the service of "continuous improvement," rather than as a marvellously ungraspable multitude that the state can only aspire to serving well. In developing the idea of regulation as respect, we can draw on modern trends in design thinking and on restorative and reconciliatory structures such as truth and reconciliation commissions.

Design thinking has evolved over time. It developed as a named project in the 1960s as a lens to help engineers build tools that would work effectively for the diverse audiences that would ultimately use them. With time, various strains have evolved including baseline user design, participatory design, universal design, human

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<sup>38</sup> For an insightful analysis along these lines, considering the ways in which new governance theory operates from theory down rather than humans up, see Amy Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 *Law & Soc Inq* 501(2008).

<sup>39</sup> See, e.g., Michèle Lamont, *Toward a Sociology of Valuation and Evaluation*, 2012 38 *Ann Rev Sociol* 201.

centered design, and design justice. They share an emphasis on designing systems *with* users based on consultation, contribution, collaboration, and co-design. Design thinking requires rethinking each step on the path to administrative or regulatory initiatives. For example, where traditional approaches might identify the need for a new initiative in administrative justice as a function of the top-down policy interests of the government of the day plus some degree of political compromise, design approaches would seek to identify needs through a bottom-up process of “collective, transparent, and empathetic needs assessment” across a broader and more representative cross-section of the public. The same is true for the process of setting out the purposes and principles of a new or reformed administrative body: the first approach would draw on top-down policy priorities for this purpose, while the second would flow from user-oriented needs assessments, refined through ongoing consultation and participation. In developing processes for achieving those purposes, traditional administrative law systems tend toward inward-looking, technique-oriented methods. User-centered design instead emphasizes continual engagement with and testing by users in the service of ensuring that the design actually serves the users it is meant to.<sup>40</sup>

Human-centered design operates from what its advocates call a “beginner’s mindset” – an approach that begins from sincere curiosity, without the aim of slotting individuals’ experiences into pre-existing legal or social categories, and for the purpose of deriving narrative, not aggregating preferences.<sup>41</sup> Human centered design also emphasizes empathy, and a dynamic process of ongoing engagement and iteration between humans and built systems. As Clarke and Craft put it, the problem exploration phase “demands deep research into users, their context, and their lived experiences with services, organizations, processes, and products, and draws on a range of methodologies ... including: ethnographic research, service journeys, behavioral insights, environmental scanning, participant observation, open-to-learning conversations, mapping, and sense making.”<sup>42</sup> The process is an iterative one, based on ongoing engagement with people and co-creation with them.<sup>43</sup>

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<sup>40</sup> Lorne Sossin, *Designing Administrative Justice* (2017) 34 Windsor Yearbook of Access to Justice 87-111, <https://doi.org/10.22329/wyaj.v34i1.5007> (contrasting administrative law and design thinking approaches to regulatory design).

<sup>41</sup> Elizabeth B.-N. Sanders & Pieter Jan Stappers (2008). *Co-creation and the new landscapes of design*, 4 CoDesign 5.

<sup>42</sup> Amanda Clarke and Jonathan Craft, 2019, *The Twin Faces of Public Sector Design* (2019) 32 Governance 5 (internal citations omitted), doi:10.1111/gove.12342. This is not the same as the important work of Sofia Ranchordás and others in arguing for empathy as a core administrative law value. Ranchordás advocates for empathy to address some of the shortcomings of digital bureaucracy, and to make possible ex post fixes to honest mistakes. I advocate for empathy and curiosity ex ante, when we are determining on which problems to train the expertise and resources of the administrative state. Sofia Ranchordás, *Empathy in the Digital Administrative State*, 71 Duke L.J. 1341-1389 (2022).

<sup>43</sup> Christian Bason & Robert D. Austin (2022) *Design in the public sector: Toward a human centred model of public governance*, 24 Public Management Review 1727, at 1736-42.

The choice of which users to center in these processes is significant, and political. Without attention, designers are likely to default unconsciously to their own baselines.<sup>44</sup> The various forms of contemporary design thinking would agree that this tendency to lean toward the “norm” must be anticipated and countered. This is because they share the high-level conviction that systems or technology should “empower human skills and ingenuity, not limit them,”<sup>45</sup> even if they may have different understandings of what that conviction entails. For example, relative to the broader category of user-centered design, human centered design and universal design both aim to put the most vulnerable users, or those facing the greatest barriers, at the center of the design process. The assumption is that if the design works for those users, it will work for everyone.

Design justice goes further than human-centered or universal design, by making explicit those approaches’ implicit equity-seeking agendas, and by extending them.<sup>46</sup> Design justice injects an anti-domination ethos into the design process. It starts from the presumption that a matrix of domination based on categories including race, class, gender, and heteronormativity is “hard-coded” into design systems, and distributes penalties and privileges accordingly.<sup>47</sup> It centers the most vulnerable users, as universal design does, but for different reasons. Rather than presuming that there will be one universal design that will work well for everyone, design justice intentionally prioritizes design work that “shifts advantages to those who are currently systematically disadvantaged within the matrix of domination.”<sup>48</sup>

Arguing for inclusive design of regulatory agencies, Amy Widman emphasizes the need for agencies to have input from a variety of sources. This requires intentionally building relationships with communities underserved and marginalized by agency agenda-setting; recognizing the value of non-lawyer input in responding to peoples’ justice problems; expanding the ways in which agencies reach out to people rather than expecting people to be in touch with the agency; expanding roles for participation, especially in the pre-rulemaking process (where, as discussed above, crucial and essentially invisible work takes place); and taking advantage of technology to engage more participants.<sup>49</sup>

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<sup>44</sup> On the ways in which design can intentionally and unintentionally discriminate and perpetuate privilege, see SASHA COSTANZA-CHOCK, *DESIGN JUSTICE: COMMUNITY-LED PRACTICES TO BUILD THE WORLDS WE NEED* (2020) at 36-44, 54-65, 77-84.

<sup>45</sup> Mike Cooley, *Human Centered Design*, in ROBERT JACOBSON, ED, *INFORMATION DESIGN*, (2000).

<sup>46</sup> Describing related approaches including universal design, participatory design, and human-centered design see COSTANZA-CHOCK *supra* note 44 at 46-54, 85-91.

<sup>47</sup> COSTANZA-CHOCK *ibid.*, at 25.

<sup>48</sup> COSTANZA-CHOCK *ibid.*, at 53; also Design Justice Network Principles, at <https://designjustice.org/read-the-principles>.

<sup>49</sup> Amy Widman, *Inclusive Agency Design*, (2022) 74:1 Admin LR 23-67. Prominent design justice or human-centered design experiments in the legal sector include work being undertaken by



Regulation as respect, almost by definition and especially when grappling with managerialism, must not perpetuate systems that unconsciously reproduce existing inequities. It demands the anti-domination lens that design justice offers.<sup>50</sup> So, what might this look like when transposed to the rulemaking / managerialist context, and the project of tackling the disconnect between the regulatory sphere and the broader human one?

Above all, regulation as respect, like design justice, flips the managerialist agenda on its head. It centers people and their lived experiences, not processes. That is, rather than considering how to incorporate public participation into design, it asks *how design can help support and empower people* and their communities.<sup>51</sup> This inversion has implications for every aspect of process design, and it holds the potential to dislodge the cognitive hold that managerialism has on us. It means starting from the vantage point of people at every stage of design, and centering the experiences of those that are most systemically disadvantaged by the existing managerialist frame. It has implications for how regulators need to think about engagement, access, comprehensibility, feedback, and more. Because means and ends inform each other, we can hope that a justice-oriented focus on frontline administrative accessibility, animated by the idea of regulation as respect, ultimately has the potential to inform substantive policy too.

## On resistance, anger, and pain

The idea of regulation as respect is not utopian. The point is not to romanticize individuals, humanity, civil society, or (certainly!) meme stock investors. Reorienting regulatory processes is difficult at the best of times, but it will be especially difficult where anger and grievance have metastasized and even in some cases become a pillar of peoples' identities. It is easier to imagine a respectful process geared toward people who have experienced systematic discrimination across time. It might be harder to generate empathy for the angry twentysomething white men that led the meme stock charge. The fact that the meme stock phenomenon garnered so much attention (including in this essay), in spite of the longstanding reality that people of color and other marginalized groups have never had equitable access to financial markets or services, only points to how pernicious those inequities are. And yet we cannot ignore even meme stock investors' anger. And though historically marginalized communities and #WallStreetBets subredditors may not have everything in common, for our purposes, we can learn from each of them about a common root problem: the

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Margaret Hagan at Stanford's Legal Design Lab, <https://law.stanford.edu/organizations/pages/legal-design-lab/>, and Matthew Desmond's Eviction Lab, <https://evictionlab.org/>.

<sup>50</sup> The most progressive strains of regulation and governance scholarship also embed an anti-domination ethos, drawn from classic republican theory.

<sup>51</sup> COSTANZA-CHOCK, *supra* note 44, at 84.



ways in which the state, including regulatory unavailability (or worse, contempt) has damaged the bonds between state and all the people it is meant to serve.

Anger can be illuminating. Some number of people invested in meme stocks precisely in order to “stick it to the shorts” and to “Wall Street.”<sup>52</sup> Among them and those who celebrated their insurgency were people who, from their vantage point, saw banks bailed out after 2008 while they and those they knew had their homes foreclosed upon; whose real wages had not risen in a couple of decades even while inequality clearly had; some of whom also celebrated Donald Trump’s rise as an anti-establishment figure. Thinking about financial regulation and policy from an alienated, politicized, subreddit cynic’s perspective, one can see how both regulators and “Wall Street” are perceived not to have normal peoples’ interests top of mind. The punitive ways in which some subredditors were treated as compared to large investment firms, in the wake of the meme stock events, reinforce that perception.<sup>53</sup> Even rejecting broad conspiracy theories, it is hard to dispute that financial regulators, for example, are embedded right alongside big industry players in a self-referential, managerialist system. Even in a generous light, we can agree that that system is not designed to take normal peoples’ input or perspectives seriously. Viewed less generously, it is not that hard to see that marginalization as a feature, not a bug.

For these meme stock investors, we can understand their conduct as acts of resistance to the status quo by people who feel poorly served by public institutions, including the regulatory system that is meant to take care of them.<sup>54</sup> Some parts of current populist anger are odious. Without ceding ground to nativism, racism, or illiberalism, some other parts of contemporary angry populism are perhaps just extremely impolite. While obviously different in kind, there are parallels to the ACT UP movement. That movement – like Occupy, like BLM, like others – was angry, “uncivil,” to its core.<sup>55</sup> And ACT UP’s anger and theatricality changed regulatory policy. High profile protests were what made it possible to shift what felt like the inalterable trajectory of clinical drug trials, in the interest of a group of historically

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<sup>52</sup> Jonathan Macey, *Securities Regulation and Class Warfare*, (2021) 2021 Colum Bus L Rev 796 at 800-801.

<sup>53</sup> Macey, *supra* note 52 at 809-17 (arguing that the relatively naïve investors posting on Reddit should not be subject to more stringent regulations than the Wall Street hedge funds [notably Citron] who receive expert legal advice about how to post negative comments without attracting the ire of regulators).

<sup>54</sup> PATRICIA EWICK AND SUSAN SILBEY, *THE COMMON PLACE OF LAW* (1995), at 183; also JAMES C. SCOTT, *WEAPONS OF THE WEAK* (1985).

<sup>55</sup> On the ways in which expectations around civility are used to silence protest and reinforce an unfair status quo, see ALEX ZAMALIN, *AGAINST CIVILITY: THE HIDDEN RACISM IN OUR OBSESSION WITH CIVILITY* (2021).

stigmatized people living (and dying) outside the bubble of the regulatory agency.<sup>56</sup> Here, as there, justice-oriented, dignity-oriented, voice-oriented claims are operating.

Paying closer attention could raise the question of whether regulatory expertise is being directed toward the right things, not just for angry subredditors but for everyone. A rebellion like the meme stock event is a signal that something about the existing system, including regulation, is not answering to peoples' deeply felt needs. It may be that financial regulators, for example (encouraged by industry and scholars too) have found themselves valuing innovation too highly, at the expense of concerns like security and dignity. We may have underestimated the psychic toll that precarity imposes, and underappreciated the negative effects of sweeping change on peoples' sense of autonomy and integrity. There is surely more, too – we have valued economic growth at the expense of the environment and future generations' wellbeing – but these are the particular policy lessons that a financial regulator, for example, might draw from genuinely attentive listening to subredditors, who may be speaking for more than just themselves. They are not just questions for the political arena. Paying renewed attention to the toll that a financial crisis imposes on peoples' confidence in the system, for example, is entirely within a regulator's policy mandate.

It also bears remembering that all of us are capable of discounting the pain of those we do not fully respect.<sup>57</sup> Disregard and derision amplify that pain. This is not to say that we must adopt or accept what angry, uncivil others say; only that we should be aware that our own lack of respect may be influencing our judgment. Among other things, disrespect leads us to essentialize or stigmatize people, to reduce their complicated multiple selves to two-dimensional caricatures, and ultimately to foreclose the possibility of change, of surprise, even of overlapping areas of agreement.<sup>58</sup> As Davina Cooper points out, resistance is not exit; it can be communicative and relational.<sup>59</sup> The idea of regulation as respect demands that we continue to pay attention to the relational dimension and to work against disrespect, even when we are the ones engaging in it.

There are some divides that will not be bridged, some compromises that should not be demanded, and some perspectives that a liberal democratic polity simply cannot countenance. There must be guardrails. This does not mean there is no point in recognizing others' lived experiences. Here, the idea of regulation as respect can draw on wisdom from other efforts to transcend difficult divides. Efforts to transcend polarization in the United States over the last several years, such as Braver

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<sup>56</sup> Steven Epstein, *The Construction of Lay Expertise: AIDS Activism and the Forging of Credibility in the Reform of Clinical Trials* 20 *Science, Technology, & Human Values* (1995), at 408-437; STEVEN EPSTEIN, *IMPURE SCIENCE: AIDS, ACTIVISM, AND THE POLITICS OF KNOWLEDGE* (1996).

<sup>57</sup> On this point one still can't do better than ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1987).

<sup>58</sup> On stigma and inequality see Michèle Lamont, *Addressing Recognition Gaps: Destigmatization and the Reduction of Inequality*, 83 *Am Sociol Rev* 419 (2018).

<sup>59</sup> DAVINA COOPER, *FEELING LIKE A STATE* (2019).

Angels, begin their workshops by confronting the stereotypes that politically polarized groups of people have about one another.<sup>60</sup> Truth and reconciliation commissions have been established in dozens of countries worldwide, which seek to move past painful pasts in the transition from civil war and authoritarianism,<sup>61</sup> or to address historic injustices including apartheid and cultural genocide.<sup>62</sup> Truth and reconciliation commissions are sweeping initiatives, of course. They are not perfect, even though they can have meaningful effects.<sup>63</sup> The point here is that in their restorative goals and the service they perform in witnessing and giving voice to peoples' most difficult social and historical experiences, they are consonant with the idea of regulation as respect.

Using design justice and reconciliation as handholds, we can begin to imagine what a genuinely people-centered, anti-managerialist approach might look like in regulation, including core policy and rulemaking, even around topics as technical as the regulation of intangibles like financial instruments. Four concrete observations for moving toward regulation as respect follow below.

## Beyond managerialism, enacting respect

Regulation as respect requires a mindset change. This involves pushing back against the gaslighting of government, as Jodi Short's eloquent and angry contribution to this volume argues that we do: regulators must find ways to step out of the chastened, apologetic crouch into which managerialism has put them.<sup>64</sup> It also calls for reorienting our investigations away from managerial metrics and toward the people those metrics were meant to serve. As noted above, trying to respond to acute

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<sup>60</sup> See, e.g., John Burnett, *Red/Blue Workshops try to bridge the political divide. Do they really work?* NPR, All Things Considered (6 April 2022) <https://www.npr.org/2022/04/06/1090910863/red-blue-workshops-try-to-bridge-the-political-divide-do-they-really-work>; Paul Solman, Lee Koromvokis & Murrey Jacobson, *Political polarization prompts efforts to bridge the gap through shared experiences*, PBS News Hour (22 Jan 2022) <https://www.pbs.org/newshour/show/political-polarization-prompts-efforts-to-bridge-the-gap-through-shared-experiences>.

<sup>61</sup> RUTI G TEITEL, *TRANSITIONAL JUSTICE* (2000); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

<sup>62</sup> SOUTH AFRICA, *TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT* (1999); Canada, National Centre for Truth and Reconciliation, *TRUTH AND RECONCILIATION COMMISSION OF CANADA: FINAL REPORT AND CALLS TO ACTION* (2015) <https://nctr.ca/records/reports/#trc-reports>.

<sup>63</sup> In my jurisdiction, for example, the Truth and Reconciliation Commission of Canada's 94 Calls to Action have had meaningful effects even while always falling short of what genuine reconciliation would seem to require. According to a leading research body offering "critical Indigenous policy perspectives" note that 13 of those Calls to Action had been completed by the end of 2022. Eva Jewell & Ian Mosby, eds., *Calls to Action Accountability: A 2022 Status Update on Reconciliation Yellowhead Institute* (December 2022), at 5 <https://yellowheadinstitute.org/wp-content/uploads/2022/12/TRC-Report-12.15.2022-Yellowhead-Institute-min.pdf>

<sup>64</sup> Jodi Short, *Gaslighting Government*, this volume.

regulatory accountability problems by, for example, requiring that regulators find better ways to digest large volumes of lay comments risks simply being absorbed into managerialism's epistemic maw as yet one more set of inputs, to be subject to self-referential managerialist analysis consistent with existing power structures. Like public participation strategies, measurements of distributional effects, for example, are also vulnerable to being instrumentalized and even weaponized in the service of ends other than genuine, respectful, human-oriented and equity-oriented reform.

The goal must be to move fully outside the frame of managerialism. This calls for comprehensively rebuilding the relationship between "normal" people and the regulatory state, with real people rather than managerialism's methods at the center of the project. Far be it for this law professor to try to comprehensively design detailed processes for transformation, but the idea of regulation as respect does suggest four initial considerations.

*First*, regulators need to engage with a different kind of expertise. Specifically, they need help from institutional ethnographers and sociologists, supported at later stages by those with design expertise. In developing the field of institutional ethnography, Dorothy Smith imagined a sociology that started with the individual and moved up through systems, rather than the other way around.<sup>65</sup> The problematic she describes – the disjuncture between theoretical forms and her lived experience – was a source of learning and insight into the ways in which her daily life was embedded into relations, processes, institutions, hierarchies, and normative worlds (that valued, e.g., "rationality"). These are the methods that have the capacity to unearth and name the multiple ways in which managerialism promotes and perpetuates the disconnect between normal people and the regulatory institutions that are meant to serve them.

The concept of regulation as respect sketched out here is aligned with institutional ethnography, as well as with design justice. It centers individuals' and groups' actual lived experiences. In contrast to many deliberative democratic theories, however, it does not rely on a set of thick *ex ante* assumptions about peoples' virtue or the value of public participation. It takes people as and where it finds them. This leaves room for inhabiting the perspectives of full humans, including their periodic good will and wisdom but also their fallibility, bad faith, and sometimes rebellious instincts, for the purpose of understanding how they are embedded within institutional structures, and what opportunities for engagement look like from this bottom-up place.<sup>66</sup>

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<sup>65</sup> DOROTHY E. SMITH, *THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY* (1987); DOROTHY E. SMITH, *INSTITUTIONAL ETHNOGRAPHY: A SOCIOLOGY FOR PEOPLE* (2005).

<sup>66</sup> DOROTHY E. SMITH, ED., *INSTITUTIONAL ETHNOGRAPHY AS PRACTICE* (2006), *Introduction*, at 3-9.

A core part of these experts' mandate will be to understand the specific impacts of managerialism – the ways in which, for example, activists and resisters in the past have been required to develop cultural competence in medicine-speak (or finance-speak or management-speak) in order to be seen as credible by in-group regulatory experts, with the perspectival loss, potential co-optation, and new gatherings-in of power and authority that come with that strategy.<sup>67</sup> Ethnographers are equipped to investigate the broader silencing effect of managerial expertise, and the particular ways in which knowledge and legitimacy claims are framed. This mapping is an essential precondition to moving past these constraints. Ethnographers and others similarly trained are also in a better position to resist the kind of technical solutionism, the problem/solution formulation, that pulls regulatory initiatives back downward into the managerial frame. As tools of public administration, design approaches will need to chart a careful course between being willing to learn from other policy styles, to be sensitive to organizational resource constraints, and to come to appreciate the political and organizational contexts within which policy work happens *without* being pulled into managerialist service.<sup>68</sup> Continually referencing back to an ethnographic mindset that centers people, not processes, will be indispensable there.

We could think of this as a modification to the well-known regulatory concept of tripartism.<sup>69</sup> Unlike the tripartism model, however, this people-centered, managerialism-transcending approach would recognize that it is not in fact possible to designate a representative that could speak for multiple publics, at any particular time or across time. On the other hand, a key benefit of tripartism is that it institutionalizes an essential accountability mechanism. (More on accountability below.) The modified form of tripartism that makes sense here is not a representative one but rather a research one, supported by robust resources and meaningful capacity, to do the ongoing work of tracking discourses, observing the impacts of existing knowledge practices, and ultimately designing more human-centering systems that can acknowledge the contingency, dynamism, tensions, and irreducible multiplicity of the people on whose behalf regulation is meant to operate.

*Second* comes project framing and development, informed by a commitment to instantiating regulation as respect. As noted above, the purpose is to consider how design can be used to support and empower people and their communities – not the opposite sequence, which asks how public participation can be incorporated into design. William Boyd's contribution in this volume, which argues for moving away from complex quantitative risk assessment exercises and instead recentering straightforward harm triggers and regard for persons, is in line with this

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<sup>67</sup> EPSTEIN, *supra* note 36.

<sup>68</sup> Clarke & Craft *supra* note 42.

<sup>69</sup> BRAITHWAITE et al., *supra* note 29

reorientation.<sup>70</sup> Regulation as respect, like institutional ethnography, is anchored in peoples' actual experiences. And, it also incorporates the more programmatic, pragmatic, and political design justice agenda. It aims not just to see but also ultimately to remediate in-built design injustice.

So who, exactly, are these people? Regulatory managerialism, as an ideological stance, ultimately reduces interactions between people to interactions between ostensibly representative managerial actors speaking the in-group language of metrics and analogous knowledge practices. It erases the individual in all their uniqueness, and it erases the social. As such, it is inadequate to answering the question of who these "people" might actually be.<sup>71</sup> But sociology/ethnography might start by observing that even while individual people are multiple and diverse, different arrangements of the social are operating too.<sup>72</sup> So, in the meme stock example, some groups of investors may be already activated and keen on being heard. Some may have fully developed positions or capabilities (like HIV/AIDS treatment activists ultimately did, or perhaps like the We the Investors platform is trying to develop) while others may have only partially coherent or mobilized identities. Some may be focused on resistance for its own sake, or be exceptionally sensitive to concerns about "selling out" or being coopted. Other members of the public may not see themselves as part of such groups. They may be disorganized, they may have few capacities, and they may have different time horizons, different narratives, and/or different political lenses. Learning about them will call for ingenuity and creativity. And others will be even harder to hear: those who are not at all willing to engage or be engaged even as resisters, for any number of reasons ranging from distrust to lack of bandwidth or capacity and beyond.

Regulation as respect requires that designers acknowledge, at a deep level, this plurality and the difficulties that come with learning from this range of different voices. This includes acknowledging how histories of discrimination, oppression, and differential opportunities also inform the ways people communicate, and their beliefs about trust, possibility, and the likelihood that engaging with institutions will make a difference. It requires understanding the multiple ways in which vulnerability and inequality are re-enacted across contexts and engagements. It can be challenging to recognize communities of experience, while not reifying or over-defining them in the process. Thinking about the meme stock investors in particular, it does not seem likely that they will end up being the most vulnerable and marginalized people we are concerned with. Their experience likely does not need to be most central in confronting the disconnect between the state and its people. At the same time, their existence reminds us that vulnerability and inequality are not single-axis phenomena,

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<sup>70</sup> Supra note 26.

<sup>71</sup> WILLARD F. ENTEMAN, *MANAGERIALISM: THE EMERGENCY OF A NEW IDEOLOGY* (1993); *Introduction*, this volume.

<sup>72</sup> I am grateful to Marc Schneiberg for this insight.

and people are complicated.<sup>73</sup> Regulation as respect requires proactively thinking about project scope in a way that is attentive to working against, not amplifying, injustice and domination in its multiple forms.

*Third* is the iterative, ongoing project of co-designing a new process through which regulatory design can be made to support and empower people as it is meant to do. Regulation as respect would start from the human-centered co-creation design models described above. Because the goal is to work against the matrix of domination that underpins the regulatory managerialist system, the design approach should intentionally foreground the most vulnerable or marginalized – speaking for themselves, based on their own non-transferable lived experiences. This includes focusing on accessibility and comprehensibility, tested against intersectional datasets.<sup>74</sup> It involves engaging in careful research and engagement with community members themselves, not just at the front-end ideation stage but throughout. Community advocates could serve as a sort of “regulatory intermediary” where possible.<sup>75</sup> Regulation as respect would start from community-led initiatives, not regulatorily defined ones. It would aim to learn from initiatives like truth and reconciliation commissions and efforts to reach across partisan divides, continually working to remain aware of the effects of power and domination throughout the design process.

Crucially, regulation as respect requires continually paying attention to *who is missing* from the design conversation, and what is lost as a result.<sup>76</sup> Regulation affects everyone and, to be specific, even seemingly esoteric financial regulation affects everyone. Who are the people most impacted by the disconnect between managerial processes and what they need regulation to be doing for them? Looking beyond these peoples’ deficits in their current ability to engage, what assets and perspectives can they contribute to our understanding about what the state should be doing? For example, in financial regulation, what could ethnographically-informed regulators learn from the experiences of migrant workers about how remittances and international payments systems work (or do not work) for them? What might such a regulator learn from precariously housed people, highlighted as a subset of meme stock investors<sup>77</sup> but also more likely to be unbanked and poorly served, about the

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<sup>73</sup> See Michèle Lamont and Paul Pierson, *Inequality Generation & Persistence as Multidimensional Processes: An Interdisciplinary Agenda* 148 *Daedalus* 3, at 5-18. <https://www.amacad.org/publication/inequality-generation-persistence-multidimensional-processes-interdisciplinary-agenda>.

<sup>74</sup> COSTANZA-CHOCK, *supra* note 46, at 55 et seq.

<sup>75</sup> On community engagement strategies, see generally COSTANZA-CHOCK, *supra* note 46, chapter 2; also Salter and Thompson, *supra* note 24.

<sup>76</sup> COSTANZA-CHOCK, *supra* note 46, at 1-5 provides an illuminating example of the way in which gender binaries are encoded in airport security processes and millimeter wave scanners, in a way that would be far less likely if trans and non-binary people had been involved at any stage of the design process.

<sup>77</sup> TOBIAS DEML ET AL., *GAMING WALL STREET* (2022)



specific barriers they face in getting access to non-predatory credit? Liminality can be an advantage as well. People who do not fit well into categories illuminate both the value and the limitations of categorical approaches. Liminal life experiences, as well, can sometimes provide a window into the ways in which different peoples' preferences can overlap. At the same time, a justice lens would remind us that where preferences do not overlap, the goal should be to ensure that design choices do not entrench existing inequities, but rather work against them. Otherwise, inequities will be entrenched by default.

*Fourth*, it will be essential to build in meaningful accountability mechanisms. Formal political accountability, discussed above,<sup>78</sup> can be valuable but will not be sufficient.

The key question is accountability to whom, and through what means. What is required is external, autonomous, potentially destabilizing accountability, to communities and individuals that can operate as a counterweight to the assimilationist pull within the process itself.<sup>79</sup> This calls for developing specific, concrete mechanisms for ensuring external community accountability, based on clear and precise objectives and backstopped by meaningful incentives.<sup>80</sup> This could include providing for enforceable procedural rights to be involved in the design process described above, potentially drawing on examples like the duty to consult and accommodate Indigenous peoples in Canada.<sup>81</sup> It could include developing a rebuttable presumption at law that where a regulator does not make use of respectful design principles, and has not tried to reach beyond the feedback it receives through notice and comment or meetings with industry and their counsel, then its proposed rule should be understood to be responding above all to industry interests. We could imagine other forms of enforceable accountability mechanisms as well, for example around whether a regulator has made its work (and its industry's disclosure) accessible and comprehensible to ordinary people.

Just as importantly, the operating definition of "accountability" needs to shift. Accountability, like other concepts such as "compliance," can be understood in managerialist and/or performative, cosmetic terms. Accountability as used here implies something broader and more sociological: attention to, for example, precisely the ways in which the processes described above, and the accountability process itself, can be subject to being read downward in ambition within the managerialist environment. Accountability also involves querying narratives – recognizing and

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<sup>78</sup> See *supra* note 25.

<sup>79</sup> Consider e.g., Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1016 (2004).

<sup>80</sup> COSTANZA-CHOCK *supra* at 94-99.

<sup>81</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; on its limits see, e.g., Kate Glover Berger, *The Duty of the Administrative State to Consult Indigenous Peoples*, in COLLEEN M. FLOOD & PAUL DALY, EDS., *ADMINISTRATIVE LAW IN CONTEXT*, 4<sup>TH</sup> ED (2022), 233-46.

resisting cooptation (e.g., the idea that diversity should be pursued because it is “good for business,” or regulation, and not as part of a broader normative commitment to human dignity and regulation-as-respect.)<sup>82</sup> Accountability also requires keeping tabs on which parties are at the table and what authority they are claiming, to avoid vanguardism or the entrenchments of designated “voices” or representatives.<sup>83</sup> It involves recognizing that respectful, human-oriented regulation requires more resources, not fewer, than disrespectful regulation and further that implementation matters, perhaps even more than front-end design. It requires ensuring that resources persist across time so that practices can become institutionalized.<sup>84</sup> Articulating an alternative narrative is a first step; turning it into genuine change requires a level of resources, stamina, and intentionality that will not develop simply out of thin air.

## A place to stand

None of this is easy, but nor is it impossible. Archimedes is said to have said, “Give me the place to stand, and I shall move the Earth.”<sup>85</sup> This is what we need, too, in working to push managerialism aside in favor of a more empathetic and human version of the regulatory state.

The concept of regulation as respect offers a firm place to stand, because its convictions and priorities operate fully outside the bounds of managerialism. Engaging from this place with real peoples’ lived experiences of regulation, including their anger and alienation, can be a way not only of seeing more clearly the state we have, but of actually imagining a different kind of state – one that sees, serves, and respects the real people in whose interests regulation is meant to function.<sup>86</sup> From this place, in the hands of a confident, non-gaslit regulator, the ethnographic, design justice-informed, human-centering techniques alluded to above have the potential to reconnect the state with its people, perhaps even setting us on a path to a more relational, empathetic, post-managerialist form of governance.

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<sup>82</sup> See cites supra note 31.

<sup>83</sup> EPSTEIN, supra note 36, emphasizes the ways in which, in the process of learning how to make credible knowledge claims before the FDA and NIH, HIV/AIDS treatment activists almost inevitably found their perspectives moving closer to those experts; see also, e.g., Michael McQuarrie, *No Contest: Participatory Technologies and the Transformation of Urban Authority* in LEE ET AL., supra note 36 at pp 98-116 (recounting how once-radical activists seeking tangible results found themselves forced to compromise); Steve Maguire, Cynthia Hardy, and Thomas B. Lawrence, *Institutional Entrepreneurship in Emerging Fields: HIV/AIDS Treatment Advocacy in Canada* 47 *Academy of Management Journal* (2004) 657 (on how ad hoc, volatile HIV/AIDS activism evolved into tamer formal advocacy organizations and institutionalized practices).

<sup>84</sup> Ford supra note 14; Cristie Ford, *Principles-Based Securities Regulation in the Wake of the Global Financial Crisis*, (2010) 55 *McGill LJ* 257.

<sup>85</sup> <https://en.wikiquote.org/wiki/Archimedes>

<sup>86</sup> COOPER supra note 59.