Corporate Mechanisms and the Presumption of Accountability

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Abstract

This paper seeks to draw out this focus on form in British public administration reform by focusing on the role that the idea of the corporate form has played in reform. Drawing on the codification of Foundation Trusts in the English NHS, I argue that, while accountability ought to be considered as a 'social space' in which conduct conducive to particular interests emerges, reformers tend to regard accountability as a function of appropriate procedures and forms. The turn to the corporate form relies on a hope that it will deliver various 'accountability' benefits will emerge. This hope, I argue, is misplaced.

Introduction.

Following Raymond Williams (Williams, 1976), Dubnick (Dubnick, 2014) describes accountability as a 'cultural keyword,' where the concept has:

> ...gone from a relatively narrow range of applications reflecting a simple sense of its meaning (typically indicating a condition where one party is answerable to another for some X) to an expansive, ambiguous and often enigmatic term with considerable cultural gravitas cutting across many cultural domains (Dubnick, 2014).[1]

*My thanks to Mel Dubnick, University of New Hampshire for his many insights and comments on this paper. All mistakes are of course my own.

[1] See also discussions in Dubnick & Justice, 2013.

As such, accountability is best understood as a social setting (a 'space') within which organisational relationships are given purpose and expectations are managed. It is, by these lights, 'the administration of administration' (O'Kelly & Dubnick, 2013).

Public sector reform, at least as it pertains to the quest for 'accountability' is in large part an experiment with *forms*: it involves reformers applying organisational forms to particular functions with a view towards the production of 'accountability.' Reformers – for the purposes of this paper, those driving the latest round of New Public Management-style reforms, on which more below – do not regard accountability as a social space in and of itself however, but as a emergent function of the construction of *appropriate spaces*, from which accountability (as they understand it) will emerge. This perspective is essentially *procedural* and *governmental*: it can be manufactured through formal design and from there effects itself upon a cascade of formal and informal functions through which people work.

To an extent, this fascination with design may be itself a product of the tools that reformers have to hand as they build: law lends itself primarily to design projects and regulatory scrutiny to legible interlocutors (as discussed in Scott, 1998). That said, reformers may also be echoing central trends in our time: the privileging of 'leaderism' (see for instance O'Reilly & Reed, 2011, 2010); of juridification (privileging law over, say, ministerial scrutiny) and – most importantly – of procedural and contractual governance as core building blocks of organisational design. 'Construct the appropriate space,' reformers seem to say, 'and accountability will come.'

This paper seeks to draw out this focus on form in British public administration reform by focusing on the role that the idea of the corporate form has played in reformers' imaginations. Drawing on the latest phase in what David Hunter describes as the English National Health Service's twenty-five year (now thirty-year, presumably) process of 'permanent revolution' (Hunter, 2005, p. 209), I discuss the construction of Foundation Trusts as important instances in the design of appropriate procedural spaces from which particular kinds of accountability are hoped to follow.

Specifically, NHS reform aims to cut waste, increase patient and clinician power and simplify the Service's processes, *all by virtue of incoporation.*[2] Instituted under the 2003 and 2006 Acts (Health and Social Care (Community Health and Standards) Act, 2003, National Health Service Act, 2006) and continued under the 2012 Act (Health and Social Care Act, 2012), Foundation Trusts are the 'provision' side of a long reform series initiated by the notional separation of healthcare provision and consumption in the NHS in the early 1990s (see Allen, Bartlett, Perotin, Zamora, & Turner, 2011, p. 78ff). They aim, as the Department of Health put it in 2010, to:

[2]The reforms discussed have have occurred in the *English* National Health Service. The United Kingdom's three other jurisdictions (Scotland, Northern Ireland and Wales) have taken their own paths to reform, largely in response to budgetary pressures imposed from central government in London.

> liberate professionals and providers from top-down control. This is the only way to secure the quality, innovation and productivity needed to improve outcomes. We will give responsibility for commissioning and budgets to groups of GP practices; and providers will be freed from government control to shape their services around the needs and choices of patients. Greater autonomy will be matched by increased accountability to patients and democratic legitimacy, with a transparent regime of economic regulation and quality inspection to hold providers to account for the results they deliver (Department of Health, 2010, p. 27).

In other words, they hope to produce all manner of *functional* effects by imposing a formal design from which those effects are held to flow.

My argument is that this reformer perspective relies upon a profound misunderstanding of the emergence of 'associational forms,' the role that they have played in the history of business, of community-based projects and of resource-allocation within the corporate economy. Reformers misunderstand the logical connections between companies in their various forms and *firms* in their *various functions.* They see the corporate form as a kind of practice (an appropriate space from where accountability will emerge), when in fact it is a mirror to practices largely separate to itself. The corporate form is a codification, a confirmation and a formalisation of administrative accountability practices that already existed in economic, business and social life. Flowing from their misunderstanding of the corporate form, furthermore, reformers are enthralled by an idea of the corporate form in NPM that is sure to lead to disappointment as reform fails to deliver on its promises – once again.

This paper, as such, is largely diagnostic. In addition to a discussion of Foundation Trusts as codified forms, reformers' misunderstandings of the corporate form is set out by drawing and expanding on socio-legal critiques of 'mainstream' theories of the firm and on historically-driven discussions of the origins of the company.[3] From that, the paper goes on to make some remarks regarding why the idea of the corporate form at play here – and of where accountability can be situated – is unlikely to produce the effects they desire, and indeed may possibly produce effects that are neither intended nor desirable.

Crucially, the argument relies on the following insight: while reformers' see the corporate form as productive of 'accountability:' desirable 'administration of administration' (O'Kelly & Dubnick, 2013), it is better described as *mirroring* practices that were deemed, before they were codified, to 'be accountability' within the context of *highly specific purposes and practices.* Given this, confidence that the imposition of the form onto other highly specific purposes and practices will lead to the emergence of accountability is, at best, misplaced.

[3] I use the terms 'company' and 'corporation' interchangeably in this paper: they denote the legal entity and are opposed to terms like 'firm' and 'assocation:' assemblages of practice oriented towarsd particular business or communal or other ends.

Thinking About the Corporate Form.

Before embarking on this discussion it is worth, for the sake of clarity, making some remarks regarding the corporate form itself. Specifically, the following four points are crucial: 1) the corporation is an autonomous person, granted through law (primarily in the Companies Act, 2006, although, as we see below, corporate forms are also codified in other locations). It can contract on its own behalf, is possessed of identity and agency and owns the assets that have either been transferred to it or that it has acquired on its own behalf. The idea of corporate personhood has been subject to much debate over time (see for instance Hobbes, 1996, chap. XIV; see also List & Pettit, 2011 for a more recent take),[4] but for our purposes it suffices to note that the corporation is not merely a 'convenient fiction,' shorthand for or oriented by neccessity towards the interests of shareholders or other members; 2) the corporation's existence is *constitutional* not *contractual*. The corporate constitution (generally held to exist in the articles of association) establishes the allocation of power over corporate strategy, over decisions involving the allocation of the surplus, and over the corporate purpose (see for instance Bottomley, 2007); 3) the corporation is not *owned (on this point, see Ireland, 1999; Worthington, 2001a, 2001b).* Members may be allocated with shares that give them some limited constitutional rights – limited voting rights over board membership for instance – or they may be associated with the company by means to which other rights and obligations are attached (for instance if the company is limited 'by guarantee' or has is a mutual or friendly society. The company itself is autonomous however. The company's liabilities do not attach to the membership and – beyond what is constitutionally specified – the members have no rights over the company's assets or its governance (this principle that was established very early in the history of company law. See Automatic Self-Cleansing Filter Syndicate Co. Ltd v. Cuninghame, 1906); 4) companies (those limited by shares in this instance) ought not be confused with *firms* (on which, see Robé, 2011). As we see below, firms are productive organisations, perhaps with a global span or with a quite specific focus. They are characterised by assemblages of practices, productive managerial and supervisorial. A single firm – take Apple for instance – may be associated with a large group of companies. Alternatively one company might theoretically be associated with a large group of firms. Firms are businesses (or the like). Companies are legal forms.

People establish companies (or mutual societies etc) because the corporate form is convenient to the kinds of association that they are pursuing. It may suit people, for instance, to transfer shared assets to a company in exchange for an allocation of shares. Or it might be convenient to share a communal endeavour – the distribution of home-ownership for example – to a mutual society.

The social spaces that emerge within firms produce 'accountability'

[4] Hobbes's insights resonate in very interesting ways elsewhere also, for instance in the work of Quentin Skinner (1999, 2005) and of Hannah Pitkin (Pitkin, 1964a, 1964b, 1967).

in the sense that they draw on a variety of practices to promote 'desirable' behaviour (to managers, capitalists, entrepreneurs etc) in order to shape conduct within their bounds. Where they interact with the corporate form they normally (a) formalise some subset of practices that already exist in a particular association (allocation of the surplus arising from a business for example); (b) establish a specific kind of close association (an local credit union, say); or (c) enable a shift in liabilities so that risks to the (hitherto) business owners or the like are minimised and/or that additional investment can be sought. The corporate form itself is at best a secondary contributor to these practices and, historically speaking, has tended not to drive but to mirror the practices, driven in large part by powerful economic actors bringing their interests to bear on the law-making process (on which see for instance Johnson, 2010).

When it comes to the kinds of accountability practices that emerged in commerce and elsewhere the corporate form in and of itself – and the act of incorporation – is, again, secondary at best in their production. It is a form that, where it is convenient, is exploited towards *highly specific ends* and in *very particular circumstances*. And as recent (and not-so-recent) events in the corporate world suggest, it is not a driver of performance or efficiency unless that performance or efficiency was already there. It is not a driver of member sovereignty unless that sovereignty was already there. It is not a driver of transparency unless the will to be transparent already exists or unless a legislative arrangement (mandatory audit for instance) serves some particular interest.

This all matters because the corporate form has become a key tool in the reforming arsenal, in particular as it attaches itself to the NHS. We ought not assume that Foundation Trusts are merely avatars sitting on the provision side of a juridified and manufactured healthcare marketplace.[5] When Anne Davies for instances states, that recent reforms (through the Health and Social Care Act, 2012) have seen the subjection of NHS processes to competition law, the autonomisation of 'front-line' actors and the weak scope of formal 'accountability' mechanisms (Davies, 2013, p. 567), we should remember that it is *corporations* that are the subjects of competition law, that *corporations* are the 'front-line' actors at play in this reform and that *corporations* are the subjects of the accountability mechanisms. The reform is a 'corporatisation' reform. The question I seek to answer in the next sections is: *why?*

Foundation Trusts as Corporate Forms.

NHS Foundation Trusts are "public benefit corporation(s) which [are] authorised ... to provide goods and services for the purposes of the health service in England" (National Health Service Act, 2006, sec.

[5] Juridified in the sense that "the 2012 Act [involving] much greater use of law to structure and regulate the NHS, in place of traditional mechanisms like ministerial direction" (Davies, 2013, p. 567).

30.1). They are one of a range of possible 'authorised providers' of healthcare to the commissioning element in the NHS, marked out by the fact that they have been carved out from the existing vertically-administered NHS (first as NHS Trusts, then, upon application to Monitor, the healthcare regulator, as Foundation Trusts). While Foundation Trusts are sited within the NHS, they are independent of control from the Department of Health in Whitehall. They are not subject to performance management and they can retain their surpluses and put them to their own use. They sit, as alluded to above, as providers in a (simulated in part) healthcare marketplace with their services delivered largely – at the moment – to the Clinical Commissioning Groups, also 'bodies corporate' (Health and Social Care Act, 2012, sec. 10), that commission services on behalf of patients.

As such, Foundation Trusts constitute a unique kind of corporate body, similar but by no means identical to companies limited by shares or by guarantee (Companies Act, 2006) and Community Interest Companies (As constituted in the Companies (Audit, Investigations, and Community Enterprise) Act, 2004, pt. 5). The discussion above focused upon particular corporate forms – the company itself, primarily – Foundation Trusts are incorporated through powers introduced in law for the NHS itself (through the Health and Social Care (Community Health and Standards) Act, 2003, the National Health Service Act, 2006, and the Health and Social Care Act, 2012). That said, their form – and those of Clinical Commissioning Groups on the other side of the NHS's 'market' – is drawn closely from company law.

Modelled on cooperatives and on mutual organisations (for a discussion see Klein, 2006, p. 228ff), Foundation Trusts share at their core important characteristics of other corporate forms, and are subject to the same observations made in the section above. That is, they are autonomous, self-owned persons with all that entails. Where they differ from the company as such, in a sense, is in their origin and the legislative (and reformer) intent underpinning their existence, on which more below. Importantly, their governance structures, though they mirror mutualism on the surface, are traditionally corporate in important respects, specifically regarding their hierarchical and board structures, their legal personalities and their financial reporting and other obligations.

Foundation Trusts as Democratic Entities.

Public participation in the running of local services has been at the fore of British governance since the beginning of the Blair era in the late 1990s (Allen, 2009; For discussions see for instance Allen, Townsend, et al., 2012; Day & Klein, 2005; see also Pratchett, 2004; Tritter, 2011; Veronesi & Keasey, 2011), and has been revisited through the 'big society' initiatives of the Cameron era (see for instance Teasdale, Alcock, & Smith, 2012; Lowndes & Pratchett, 2012; Pattie & Johnston, 2011; Ellison, 2011). Foundation Trusts are situated within this dynamic in their resemblance to companies limited by guarantee and to community interest companies.

In the case of Foundation Trusts, membership is drawn from local residents, employees, and patients and their carers (excluding voluntary or professional carers) (National Health Service Act, 2006, p. Schedule 7, para. 3). Membership is generally available on application, is unpaid and voluntary and brings one within a voting constituency for the Trust's 'board of governors,' a 'supervisory' board elected from within the membership populations (in accordance with a variety of stipulations. See National Health Service Act, 2006, p. Schedule 7, paragraphs 7–14).

The board of governors, in turn, scrutinises and supervises (within its powers) the conduct of both executive and non-executive directors (on this see Monitor, 2010, pt. C. & E., and Monitor 2012) and populating the nominations committee for non-executive director (Monitor, 2012). Foundation Trust governors have statutory duties to represent members and to act in the interests of the Trust etc. They simulate the oversight that an (ideal) population of institutional shareholders might perform in a company limited by shares. They formally appoint directors in general meeting, act as a venue for the dissemination of corporate information by key board members. They ought not, as the healthcare regulator has it, use their powers to obstruct the board of director's role in deciding and acting on the strategic direction of the Trust (Monitor, 2010, para. B.1.9). In a way, we can see the members and governors as engaging with their Foundation Trust partly through their influence over nominations and partly as a 'public' rendered tangible and accessible and with whom directors may speak.

Foundation Trusts' boards of directors are modelled on the conventional 'unitary board' model drawn from the 'Anglo' style of corporate governance. Boards are populated by a mix of executive and non-executive directors, with an independent non-executive chair, a series of governance committees (nomination, audit and remuneration). They have full powers to set strategic priorities for the Trust. Non-executive directors, who are full board members but are normally expected to have a disciplinary role 'representing' stakeholders, must normally be drawn from either the public or patients constituencies from which the membership is drawn National Health Service Act, Schedule 7 para 16 (4) (A). The board of governors appoint or remove the non-executive directors, the non-executive directors appoint or remove the Chief Executive director (with a vote of approval from the board of governors) and it is for a committee made up of the non-executive directors, the CEO and the chair to appoint or remove other executive directors National Health Service Act, Schedule 7 para 17 (1–5).

Similarly with regard to remuneration and allowances, the board of governors decide the remuneration of non-executive directors and the non-executives in turn decide the remuneration of executive directors National Health Service Act, Schedule 7 para 18 (1–2). It is the board of governor's duty to "hold the non-executive directors individually and collectively to account for the performance of the board of directors" and to "represent the interests of the members of the corporation as a whole and the interests of the public" (Health and Social Care Act, 2012, pt. 4 para 151 (4)), though formal action is restricted to governors' powers of appointment.

Executive and non-executive directors share a duty to promote "the success of the corporation so as to maximise the benefits for the members of the corporation as a whole and for the public" (Health and Social Care Act, 2012, pt. 4 para 152 (1))). This echoes company directors' duties as contained in section 172 of the Companies Act 2006, at least when it comes to promoting the success of the corporation. In the Companies Act, success is to be promoted 'for the benefit of the members,' although directors ought, among other considerations, to have regard to "the impact of the company's operations on the community and the environment" (Companies Act, 2006, sec. 172).

Monitor, the regulator for healthcare, has published a Code of Governance for Foundation Trusts that mirrors the UK Corporate Governance Code (Financial Reporting Council, 2012) in setting out the principles to which Trusts ought to adhere.' Foundation Trust adherence to the code is mandated on a 'comply or explain' basis, so Foundation Trusts can choose either to comply with specific principles or to publish an explanation regarding their choice not to comply (Monitor, 2010). This is in keeping with what is considered to be 'best practice' for corporate governance in the commercial sector, and is the foundation of the UK's delegated self-regulation for listed companies. As a system it is designed to promote autonomy and to keep firm practices free of procedures that boards deem to be unsuitable. In practice, some scepticism has been raised about the effects that it has in promoting directorial power at the members' expense (for some perspectives, see I. MacNeil & Li, 2006; Moore, 2009; Arcot, Bruno, & Faure-Grimaud, 2010; Keay, 2013).

The principles upon which Foundation Trusts are governed focus on the idea that the success for the corporation can be defined in terms of the pursuit of success 'for the benefit of its members' (Companies Act, 2006, sec. 172 (1)) and additionally, in the case of Foundation Trusts, for the public at large. What this conception of success might mean for the corporation's strategic direction is, as I said above, in very large part a matter of discretion for the corporation's directors (so long as they can reasonably be described as acting in 'good faith' (Companies Act, 2006, sec. 172 (1))). Unless a power is reserved for members in legislation or in the corporate constitution, directorial primacy prevails: it is up to directors to judge how that success might best be pursued (on director primacy and the corporate form, see Bainbridge, 2006, 2008).

As such, while the formal framework around Foundation Trusts holds itself out as emphasising local 'democracy,' as a corporation it is not simply an articulation of members' will. A consultative role and a (limited) franchise in terms of governance may lead to the Trusts soliciting members' views, but there is no sense in which members can claim any more than this with regard to these companies: they are *self-owning entities guided by a largely sovereign board.*

This is a significant aspect of the argument: the mutual model as a formal device,[6] has been successfully used as a vehicle for particular kinds of association and movement at particular times. It seems to work quite well in those circumstances. That said, its existence in law *reflects* those successes: it did not produce them. Codification involved a verification and formalisation of associations that existed anyway. Mutualism's existence ought not persuade us that mutualism and organisational democracy can be produced through legislatively mandated procedures.

Board-driven organisations are likely to largely remain just that, whatever powers of input are distributed to others. And while members' and governors' voting rights may have a disciplinary effect, experience from the corporate governance field suggests that members' capacities to challenge board autonomy are limited, especially when – as seems to be the case with Foundation Trusts – memberships are largely passive in their oversight activities (on this see for instance Dixon, Storey, & Alvarez Rosete, 2010).

Consider for instance Foundation Trusts' provision of services to private patients. This is very likely to be one area where tensions around directorial power versus membership will might come to the fore in the wake of the 2012 Act. Up until the 2012 Health and Social Care Act, Foundation Trusts were restricted in the amount of income they were permitted to earn from services to private – as in, non-NHS – patients. In essence they could not grow their 'Private Patient Income' above 2003 levels (National Health Service Act, 2006, sec. 44, see also Regina (Unison) v Monitor, 2009). Under the 2012 Act, however, Foundation Trusts are to be regulated – at least in theory – "in the same way as any other providers, whether from the private or voluntary sector" (Department of Health, 2010, p. 36) – and as such may act as 'liberated' social enterprises, tailoring "governance arrangements to their local needs" (Department of Health, 2010, p. 36). In this light, restrictions on Private Patient Income have been removed (Health and Social Care Act, 2012, sec. 165), although Trusts must earn more than half their income from the provision of NHS services (Health and Social Care Act, 2012, sec. 164 (1)).

How NHS income ought to be balanced with non-NHS clinical and non-clinical income is a matter for directors to decide, although it might go to the heart of the corporate purpose. As I said above, it is difficult, as is often the case in corporate governance, to see how such 'business judgement' decisions might be challenged by boards, governors or members. Nonetheless, it is likely that private patient income will be a source of some tension, as financial returns for the organisation – and perhaps its financial sustainability or even its capacity to general remuneration for directors – are balanced against benefits for 'ordinary' members.

[6] Largely situated in the Industrial and Provident Societies Acts, 1965-2002, though many community companies are incorporated in any case under the Companies Act, 2006.

Foundation Trusts as Autonomous Entities.

The 2012 Act seeks to codify independence of action (from government) on the part of Foundation Trust boards. This is underpinned by a specific duty imposed upon the Secretary of State for Health to 'promote autonomy' within the NHS. Namely:

> (1) In exercising functions in relation to the health service, the Secretary of State must have regard to the desirability of securing, so far as consistent with the interests of the health service –
>
> 1. that any other person exercising functions in relation to the health service or providing services for its purposes is free to exercise those functions or provide those services in the manner that it considers most appropriate, and
> 2. that unnecessary burdens are not imposed on any such person (Health and Social Care Act, 2012, sec. 5).

This autonomy is motivated in large part by the perception that Foundation Trusts will use that independence, and the financial powers it brings, to maintain internal controls over the organisation with a view to maximising efficiency, to seek advantages in the provision of healthcare services to consumers (Clinical Commissioning Groups largely), and to 'shop around' for the most (cost-)effective services from different sub-providers: indeed the expectation would be that executive remuneration packages contain incentives towards such ends. In addition, of course, the redefined relationship between the Secretary for Health and the NHS passes responsibility for the provision of healthcare – formally at least – onto the Foundation Trusts themselves (for the implications of such a switch, see Christensen & Lægreid, 2007, 2006; on this element in NHS reform, see Davies, 2013).

Internally, in keeping with mainstream corporate governance theory, governance towards efficiency and service might be maintained through incentives systems. On the one hand, oversight by non-executive directors, governors and members will, policy-makers hope, discipline executives to attend to the success of the corporation for the benefit of the members and the public at large. Externally, competition for patients and consumers through their GPs or through other forms of entry to healthcare (or through related business opportunities) will be the driver for efficiency and equality. After all, as Andrew Lansley, the Health Secretary who drove the reform had it, "competition between organisations facilitates the adoption of new treatments and technologies, and allows innovative individuals within those organisations to flourish. It is a critical element of healthcare system reform."[7] How

[7]Lansley, 2012; for debates on the merits of competition for patients in the (pre 2013) NHS, see Beckford, 2011; Cooper, Gibbons, Jones, & McGuire, 2011a; Gibbons, 2012; Bloom, Propper, Seiler, & Van Reenen, 2011; Cooper, Gibbons, Jones, & McGuire, 2010, 2012; Cooper, 2010; Pollock, Macfarlane, & Greener, 2012; Pollock, Majeed, et al., 2011; Bloom, Cooper, et al., 2011; Pollock, Macfarlane, et al., 2011; Pollock, Price, & Roderick,

the formal structures of Foundation Trusts are supposed to allow innovative individuals to flourish is left to our imagination, but we can presume that 'innovative' here does not mean innovative in terms of clinical care in and of itself, but in terms of measures to which the corporate form is amenable: effectiveness, efficiency, and profitability etc. 'Innovation' is that which attracts business or reduces costs. Foundation Trusts, as such, are designed to balance both the most convenient features of market forms and the most desirable features of mutual forms.

Nonetheless, government has not allowed Foundation Trust autonomy wholesale. The 2012 Act has embedded a number of restrictions on corporate conduct into the system. Primary among them of course, is the regulation of the quality of care through the Care Quality Commission (Department of Health, 2013), although it is up to Monitor, the healthcare regulator, to enter into enforcement actions against Trusts that breach standards. Layered on top of that are three other regulatory interventions: a pricing system for NHS services, a licensing system for NHS-approved providers, and the statutsory extension and integration of competition law into NHS procurement practices. As Anne Davies has it above, this all amounts to the 'juridification' of market integration in the NHS (For a longer account of these see Davies, 2013, p. 165ff; see also Economic Insight, 2012). This means that a marketisation imperative driven from managerial intervention has switched to one driven from the legal foundations of the NHS itself: this represents a switch, to put in Romzek and Dubnick's terms, from market-making practices drawing on bureaucratic accountability perculating through the system to expanded and reinforced practices imposed through a new framework of legal accountability (Romzek & Dubnick, 1987, p. 230).

Nonetheless, concern has already emerged about the effects of local autonomy both on standards of care and of the character of corporate governance that Foundation Trusts has produced. A scandal arose around the mid-Staffordshire NHS Trust – an entity that was busily seeking Foundation Trust status – was found to not only be carrying a relatively high death rate related to emergency admissions and on some of its wards (Commission for Healthcare Audit and Inspection (The Healthcare Commission), 2009, p. 22), but was found to be governed by a board predominantly focused on attaining Foundation Trust status. This focus drove massive cuts in staff numbers (and in morale). A board-level drive to achieve a surplus with a view towards attaining Foundation Trust status led to an 8% cut in turnover, an 18% reduction in the number of beds, a reduction in the number of nurses when the hospital was already understaffed and a board that was focused primarily on marketing & public relations (Commission for Healthcare Audit and Inspection (The Healthcare Commission),

2012; Cooper, Gibbons, Jones, & McGuire, 2011b; See also Pollock, Shaoul, & Vickers, 2002.

2009, pp. 9–10).[8] When alerts were issued, they were blamed on the unreliability of measures themselves. The possibility of failings in care was not considered.

Andy Burnham, who had been Secretary for Health at the time, subsequently expressed his displeasure to Parliament, saying that "I can remember the shock I felt on reading the first Francis report's finding [into the Trust] that, on receiving [Foundation Trust] status, one of the first things that the Mid Staffs board did was to resolve to hold more meetings in private. That was an audacious breach of the spirit of the legislation passed by this House" (Hansard, 2013, para. 520–1). In a sense, however, mid-Staffordshire Trust, *as a corporate entity*, was working well within the specifications of its design: directors exploited their decision-making primacy to attend to their interest in undisrupted decision-making and went on an efficiency drive to attend to the clearest imperative the corporation faced: getting into surplus.

What they did not attend to was the clinical work of their hospitals: something to which corporatisation does not directly speak. What was missing, in fact, was an *assemblage of practices* that might have oriented the board's attention elsewhere. These practices were never going to emerge from legal form – though the autonomy built into that form, combined with the board-level imperative to pursue directorial ambitions, facilitated misfeasance – they would have to emerge elsewhere: in the everyday administration of healthcare.

Limitations in the Mainstream Theory of the Firm.

It is perhaps not surprising that the primary interpretation of the firm[9] in UK policy-making circles is drawn from economic and financial theory (for a discussion of why particular theories "have legs," see Snider, 2000). The current interpretation emerged from finance literature beginning in the 1970s,[10] most notably Michael Jensen and William Meckling's 'Theory of the Firm' (1976). Built on contemporary economists' formulations of property rights,[11] Jensen and Meckling posit the firm as a 'convenient fiction' that describes, not an actual thing, but more a series of market transactions, articulated in contract, from which production might emerge (Jensen & Meckling, 1976, p. 310). "It makes little or no sense," Jensen and Meckling argue,

[8] Similar findings came from a number of related reports and documents (see The Mid Staffordshire NHS Foundation Trust Inquiry, 2010a, 2010b; Thomé, 2009; The Mid Staffordshire NHS Foundation Trust Public Inquiry, 2013).

[9] We use the term 'firm' here as an economic association distinct from the corporation as legal form.

[10] Although it also drew from Ronald Coase's classic work on the emergence of administrative hierarchies in market systems (Coase, 1937).

[11] Property, that is, as the emergent interplay of ownership, information, distribution and exchange (see for instance Demsetz, 1967; Alchian & Demsetz, 1972; Furubotn & Pejovich, 1972; Anderson & Hill, 1975).

> to try to distinguish those things which are 'inside' the firm (or any other organisation) from those things that are 'outside' of it. There is in a very real sense only a multitude of complex relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labour, material and capital inputs and the consumers of output (Jensen & Meckling, 1976, p. 311).

The firm comes within neoclassical economics here, redescribed as a network of discrete, voluntary and self-contained contracts between private parties – capital, labour, managerial enterprise etc – and the interplay of and transaction costs attached to which can be modeled and analysed. Importantly, it is also held to be *efficient*: tested in markets, organisational forms and procedures are, by this light, the most amenable to the pursuit of efficiency, managerial responsiveness to investing 'principals (or, by extension, community members) and the like.

Accountability emerges in this space in other words because inappropriate spaces will lose under the evolutionary pressures of markets (for products, for executive labour, for investment etc). The firm is an administrative entity that is verified by – indeed is indistinguishable from – market exchange and, seemingly, has evolved as an optimal assemblage of balanced powers, responsiveness, innovation, transparency and disclosure. It is little surprise, given this, that the firm has become the model for market-reforms in public administration.

Company Law.

Company law, within this worldview, simply outlines a default high-level contracting framework which, absent codification through law, would be put in place in an efficient market anyway (see Easterbrook & Fischel, 1991, p. 15). We should note here that 'contracts' denote firm arrangements that are discrete, self-contained, legible and transparent. In fact, this conception of contract is unfamiliar to contract law scholars (see for instance Grantham, 1998) and the idea of contract as discrete and self-contained or of contracts being complete has been subject to substantial scepticism (see I. R. MacNeil, 1978, 2000, 2001).

Just as importantly for our purposes, we might accept that arrangements within firms can emerge in such a way as to promote social spaces that come to be described as ' accountability.' That is, they can promote conduct that is conducive to the more powerful parties to those arrangements. That said, company law must be seen as quite a separate – and perhaps even marginal – element in the emergence of accountability on these terms. This is important in general because it puts a stop to the idea of company law as facilitating capitalist innovation, or efficiency, or responsiveness to principals. Law does not facilitate capitalism: it *mirrors* capitalism.

Company law is best seen as emerging parallel to but not directly from emergent firm accountability arrangements. Whereas the productive processes that make up firms are open-ended, often market-oriented and fluid, companies map out distributions of powers between various stakeholders – workers, executives and members – in the struggle to maintain control over the uses to which company assets are put. What's more, nexus of contracts theorists' situating of companies in markets obscures the degree to which company law formed, not as an emergent property of markets but as Paul Johnson noted regarding the construction of Victorian market society, "in accordance with the design of key actors, and thus reflected both their interests and their political power" (Johnson, 2010, p. 24).

Law has, in large part, played a role of facilitating, formalising and codifying firms and other associations, in part as experiments with particular organisational structures and market associations exposed vulnerabilities in industrial capitalism (see Alborn, 1998, p. 127ff; for one discussion of the implications of this, see O'Kelly & Wheeler, 2012) and as part of a statist ('regulatory capitalist' perhaps) project to standardise corporate capitalism towards fiscal and regulatory legibility (Braithwaite, 2008; Scott, 1998).

Regarding the vulnerabilities of industrial capitalism, as partnership structures became ever-more complicated in the search for the investment levels required by complex industry, creditors found it increasingly difficult to pursue partners for the recovery of debts. They – and others – pressured Parliament to innovate. This pressure, combined with legislators' frustration at the sheer volume of petitions from proposers for private bills of incorporation led to Parliament liberalising the corporate form so that the joint and several liability underpinning partnership structures was replaced by the corporate person – a legal structure that could have the assets of proposers and investors transferred to it and from there could contract for and be pursued for debt on its own account (see Johnson, 2010, p. 116ff). Likewise, when the expansion of the corporate form exposed investors and creditors to unscrupulous, incompetent or fraudulent corporate proposers, and when cascades of corporate collapses led to crises in communities of capitalists around the country, Parliament innovated again by imposing mandatory audits on companies (Companies Act, 1900).

That is not to say that law has been passive in shaping the evolution of capitalism: the emergence of a vibrant secondary market for shares can in large part be put down to the courts interpreting the Companies Acts in such a way that shareholder 'voice' was restricted to areas reserved for them in articles of association (see Automatic Self-Cleansing Filter Syndicate Co. Ltd v. Cuninghame, 1906), thus making 'exit' a desirable option as shareholders diversified portfolios in order to minimise the risks of managerial arbitrage (tax structures also played a role here undoubtedly).

What it does mean is that law as it has pertained to commercial and other associations has always played the role of follower: at no point has form simply led to function: function has always pointed form's way. The massive expansion of associations in industrial and then late capitalism, for instance, saw capitalists and others (trade unionists for example, or other social entrepreneurs) associate as they saw fit, not just being subject to law, but making use of law where it served them well, exploring other avenues of association where those avenue promised more convenient opportunities, and negotiating the meaning, scope and extent of law with each other and with legislative, enforcement and regulatory authorities.

As Suchman and Edelman have it, law "is actually a welter of conflicting principles, imperfect analogies, and ambiguous generalities. Thus, lawyers, judges, enforcers, and target populations negotiate the meaning of law in each application, seeking workable consensus rather than logical certainty" (Suchman & Edelman, 1996, p. 932). Given this we should see law's authority, not as an originator of successful, innovative and socially or economically enriching associational cultures, but as a general framework for the allocation of power over assets through which – *when convenient in particular situations* – innovation, success and enrichment might be organised.

Discussion.

Government reform of the NHS seeks to bring the democratic energy of the mutualisation movements and the innovation, efficiency and responsibilisation dynamics of business to bear upon healthcare. But reformers seek to inject these energies and dynamics into the NHS through the concoction of corporate forms. This misunderstands the role of law in the construction of economic and other social associations: legal form has long been subordinate to social function. Questions arise as a result, as to whether social functions can flow so successfully from the manufacturing of a legal form: can reform be successfully effected by imposing such forms on existing systems of work, association and collaboration? Legal forms are not disruptive in this sense.

This point also stands with regard to the mutual movement. Members' voting rights may be more extensive in mutual societies, but they still have no ownership claims over the company and their calls over strategy are restricted by the articles. It is a body corporate in a manner similar to that codified in the Companies Acts (Industrial and Provident Societies Act, 1965, sec. 3).

The 'mutualisation' and 'accountabilisation' aims of the NHS reforms as manifested in the 2006 and 2012 Health Service Acts have the misconceptions of the nexus of contracts theorists at their core. In the first place, the idea of the corporation as a 'fictional' expression of members' interests, and thus (within its own terms) democratic in purpose, is based on a misapprehension of company law's role. Even the mutual style of incorporation sees the company as autonomous and self-owning. And where the corporate purpose is directed in law towards the members' interests, it is a matter for the board to decide how those interests ought best to be pursued. This is crucial for NHS reform: the construction of autonomous bodies corporate has – sometimes to the chagrin of policy makers – led to extensions in board power, not in democratic service. The corporation is a real thing, it exists beyond the members, and given the location of the directing mind in the board, it works if anything under a principle of 'directorial primacy' (on which see Bainbridge, 2008, 2006).

Second, and importantly for questions of performance, corporate governance is very limited in its application to the associative functions that go into the making of conduct within organisations. While corporate governance innovations (Financial Reporting Council, 2012) have aimed themselves at creating board-level checks on director primacy, organisational power still resides with the executives. Secondly, following from that, NHS reforms rely on the idea of the company and its contracts as something that is measurable, legible and subject to regulation. Evidence from corporate governance ought to give us pause.

Given events at mid-Staffordshire, while the directorial primacy of the traditional corporate form seems to be emerging in the NHS, the kinds of mutualist and innovative corporate practices that reformers seemed to envisage simply have not appeared. Studies on local empowerment through Foundation Trusts have suggested that Foundation Trusts have not been wholly successful in engaging widely within local communities or with internal stakeholders (Allen, Townsend, et al., 2012; Baggott, 2005). There is a general sense, in addition, that while strong 'vertical accountability' to Monitor exists, specifically with regard to financial control, 'horizontal' oversight and interventions, including with regard to clinical standards is weak (Dixon et al., 2010). And while Trusts become more 'business like' in their processes (Allen, Keen, et al., 2012), executives may be risk averse in an uncertain environment with corporate strategies shaped largely on defensive grounds (Exworthy, Frosini, & Jones, 2011; Mannion, Goddard, & Bate, 2007; see also for an older perspective Hoque, Davis, & Humphreys, 2004), and there is a lack of clarity over links between 'performance' and the governance structures underpinned by the 2003, 2006 and 2012 Acts (Anand, Exworthy, Frosini, & Jones, 2012; Veronesi & Keasey, 2011; Currie, Humphreys, Ucbasaran, & McManus, 2008). When set against corporatist measures, the news is not hopeful.

It is not even certain, as confirmed in the broader corporate governance literature, that corporatisation even successfully constructs 'accountable units' that are legible to regulatory and auditing regimes (for discussions of legibility see Scott, 1998) or simulates apparently commercial spaces where financial control as a core imperative can be imagined as market behaviour in and of itself. Foundation Trusts reflect instead both an idealisation of corporate forms as being in themselves efficient and that they reflect a hyper-modern drive to create legible organisations that can be subject to various kinds of regulatory oversight and in doing so can reconfigure healthcare systems in a form that 'accountocrats' and 'econocrats' (as Christopher Hood described them in Hood, 1995) can manage.

In fact, while ministers and other reformers might be in thrall to the myth that efficiency emerges from the corporate form – given its apparently 'market' roots – or that private forms of membership and public forms of democracy run in parallel, the evidence suggests that the corporate form is convenient for particular insiders alone: either executives pursuing their sectional interests or coalitions of executives and others, again in pursuit of relatively narrow interests. Those who are not party to such coalitions are, so to speak, their victims. Any benefits are incidental. Hence the patterns of use 'in the wild' so to speak.

What's more, the corporate form is not the source of efficiency gains, or innovation, or responsiveness. These things come from elsewhere, in very specific circumstances, on very specific terms. Accountability, in other words, is not made in these ways: it emerges in as a kind of social space manufactured by assemblages of fluid and often experimental ground-level practices (on which, for instance, see Kaufman, 2006). In the NHS, clinical care or responsiveness to patterns of local need and the like are likely to emerge from directly 'regulatory conversations' (Black, 2002) as terms of governance – and the meaning of duties in law – are negotiated between various power brokers (Monitor, ministers, social entrepreneurs, local politicians etc).

Conclusion.

I am sceptical about the role that law can play in public administration reform, at least when it comes to the construction of various iterations of 'accountability.' Legislative reformers (in the NPM mould at least) seem convinced that they can manufacture administration in distant functions with the tools that they have: primarily with law. State power to effect itself on relatively messy social functions is the core premise of high modernism (as Scott, 1998 has it), and indeed state power seemed to be somewhat successful when social functions were brought directly under bureaucratic control – to an extent at least. This may reflect the power of bureaucratic and hierarchical control to bring itself to bear on conduct – at least towards the complicated purposes to which bureaucratic and hierarchical control have been put.

The current era involves, however, an experiment in 'government at a distance' (Miller & Rose, 1990; Rose & Miller, 1992; for a discussion see Dean, 2010, p. 198) where reformers have set themselves with the task of finding organisational forms that can orient institutions and their workers towards desirable ends, can hold them to account, to produce desirable effects and all at rather more than arm's length. The quest for accountability has focused on the notion that accountability can be manufactured in law through the production of particular procedural and organisational forms. This leads reformers to forms that seem to have flourished in the private realm: mutual and commercial companies.

The NPM diagnosis to which bureaucracy was put – that it was not only inefficient but was *inimical to liberty* (a lesson they drew from Hayek, 1944, 1960; see Gray, 1998 for an account) – was not extended to 'private' hierarchical forms: they were, or so it seemed, emergent products of market forces and were therefore the embodiment of liberty, efficiency and the like. Their attractions included their seeming responsiveness to members, the clarity delivered by contractual control and the ferocity that would meet any directorial deviation from the optimum balance between innovation, investment, leadership and democracy.

This vision of the company is an illusion however. It is in itself a vehicle for *reinforcing* various kinds of private power, a codification of capitalists' capitalism. Market forces can indeed produce efficiency, innovation and the like, and social associations can indeed be democratic, responsive and discursive. But these phenomena come not from procedure but from *conversation*: they emerge where particular people – managers, community-activists, clinicians – develop standpoints that are conducive to democracy, innovation etc. Law sits to the side, *doing other things*.

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