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LOBBYING AGAINST DEMOCRACY

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ABSTRACT

This essay seeks to excavate the anti-democratic propensities of corporate lobbying. It begins by considering the nature of lobbying and then attempts to comprehend the relationship between corporate lobbying and democracy in terms of Crouch's theory of post-democracy. The political culture of post-democracy is blatantly corporatist and promotes the anti-democratic proclivities of the corporate lobby by providing ready opportunities for non-transparent lobbying. Cohen-Eliya & Hammer classify non-transparent lobbying as an index of the failure of the democratic process. The essay applies the typology developed by them to Germany as a case study of anti-democratic corporate lobbying in action. It concludes by considering regulation and criminalisation as two possible remedies for the anti-democratic transgressions of non-transparent corporate lobbying. The former is explored by way of an analysis of the regulatory regimes of Germany and the USA; the latter by considering non-transparent corporate lobbying as a homologue of the crime of corruption.

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1 INTRODUCTION

Historically, the USA has been the lobby capital of the world. However, lobbying in Europe has mushroomed in recent years. Today, the corporations which dominate the private sectors and commercial landscapes of European countries rely routinely upon lobbyists to present and advance their interests politically. Indeed, the centres of competence where political decision-making takes place are flushed with corporate lobbyists. Berlin alone has round 5 000 lobbyists, which translates into about eight lobbyists per parliamentarian.[1] Brussels, the unofficial capital of the European Union (EU), hosts between 10 000 and 25 000 lobbyists.[2]

The analytical focus of this essay is on legislative corporate lobbying. It is concerned to understand how corporate lobbyists influence the law-making process and what the consequences of such influence are for society. To this end, it interrogates the practices of corporate lobbyists in Germany. It considers also efforts to regulate corporate lobbying, both in the USA and in Germany, and explores the idea of comprehending corporate lobbying as a homologue of criminal corruption in certain instances. In brief, the essay is offered as a contribution to the critique of corporate lobbying, using Germany and (to some extent) the USA as its vectors of critique.

2 THE NATURE OF LOBBYING

Conventionally, lobbying refers to the exercise of influence by a self-interested person or entity on decision-making processes through the provision of information.[3] In a word, lobbyists seek to influence politicians with information. Politicians need data in order to contribute meaningfully to policy discussions and to facilitate their decisions. They often do not have the capacity to collect the required information themselves. It is this information deficit which lobbyists purport to remedy, by providing the

1 See Leif T & Speth R (2 March 2006) "Die fünfte Gewalt" *Zeit online*, available at http://www.zeit.de/online/2006/10/lobbyismus (visited 8 June 2017); Maas S & Otto T (9 Sept 2015) "Lobbyismus in Brüssel und Berlin:Leise Geschäfte an lauten Orten in Deutschlandfunk", available at http://www.deutschlandfunk.de/lobbyismus-in-bruessel-und-berlin-leise-geschaefte-an.724.de.html?dram:article_id=330630 (visited 8 June 2017); Bülow M (2010) "Die Lobby-Republiek" *Institut Solidarische Moderne, Schriftenreihe Denkanstöße* 1-29 at 18.

2 See Leif & Speth (2 March 2006); LobbyControl "Lobbyismus in der EU", available at https://www.lobbycontrol.de/schwerpunkt/lobbyismus-in-der-eu/ (visited 8 June 2017).

3 See Wehrmann I (2007) "Lobbying in Deustchland – Begriffe und Trends" in Kleinfeld R, Zimmer A & Willems U (eds) *Lobbying: Strukturen, Akteure, Strategien* Wiesbaden: VS Verlag für Sozialwissenschaften at 39; Begović B (2005) "Corruption, Lobbying and State Capture" *CLDS Working Paper #0106* at 5.

politicians with the facts and figures they need to make knowledgeable legislative choices. In this regard, the "lobbyist is like a merchant of information".[4]

Of course, it is accepted that corporate lobbyists are not motivated primarily by altruism or charity. They have a determinate *quid pro quo* in mind when they assist politicians with information, namely, that the viewpoint of their corporate clients becomes embedded in the laws or policies at stake. As Teachout puts it, "the social function of lobbying is to take money and turn it into political power" and effective lobbying entails the harnessing of state power "to serve the social goals of those who can afford lobbyists".[5] The primary aim of corporate lobby groups is to deploy their superior data resources to achieve the economic targets of their business bosses by improving the legal conditions of their doing business.

In sum, then, conventional wisdom has a bifurcated view of lobbying. On the one hand, lobbying is conceived as essentially a "communication process" based upon the flow of information from lobbyists to politicians.[6] On the other hand, lobbying is aimed at ensuring that the politicians use the information they receive to make decisions in favour of the interest group represented by the lobbyists.

The problem with the conventional view is that it comprehends lobbying essentially as a technical exercise in which professionals with expertise and access to important data assist politicians to make informed decisions. In other words, despite the fact that these decisions invariably redound to the economic benefit of the corporation employing the lobbyist, the activity of lobbying is presented as a scientific enterprise, in keeping with the general scientific mien of western civilisation. This approach conceals the dark side of lobbying, of secret consultations and hidden deals, which exists in tandem with its public aspect. The creation of a professional and scientific self-image by corporate lobbyists is no warrantee that the underworld of lobbying has collapsed or even receded.[7] An aim of this essay is to render visible this shrouded dimension which is omitted from the conventional view of lobbying.

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4 Giuliani JD as cited in Georgen P (2006) *Lobbying in Brussels: A Practical Guide to the European Union for Cities, Regions, Networks and Enterprises* Brussels: D & P Services at 14. See also Parenti M (1980) *Democracy for the Few* New York: St Martins' Press at 214.

5 Teachout Z (2014) *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* Cambridge: Harvard University Press at 144.

6 Parenti (1980) at 214.

7 Parenti (1980) at 214.

3 LOBBYING, DEMOCRACY AND POST-DEMOCRACY

The advocates of lobbying consistently suggest a positive link between it and democracy. The argument is simple: lobbying both expresses and promotes democracy by making available to politicians the data they need to contribute in an informed manner to the important policy debates. In other words, notwithstanding its perceived repugnance, lobbying is both a desirable and necessary ingredient of the democratic culture.

Samuelson's defence of lobbying as "democracy in action" is representative and merits extended quotation:

> Lobbyists have a bad rap, which is why politicians routinely vilify them. Denouncing them is an uncontested rhetorical lay-up. People want to blame their discontents on a conspiracy of sleazy influence merchants. Periodic scandals confirm the stereotypes: the Jack Abramoffs who wine and dine legislators, or the congressmen like Duke Cunningham who took bribes from government contractors and steered federal funds to them. But mainly the anti-lobbying bias is popular mythology.

He continues:

> We are a collection of special interests, and one person's special interest is another's job or moral crusade. If people can't organise to influence government—to muzzle or shape its powers—then democracy is dead. The 'will of the people' is rarely observable, because people disagree and have inconsistent desires. Of course, the 'public good' should always triumph, but what represents the public good is usually debatable. The idea that the making of these choices should occur in a vacuum—delegated to an all-knowing political elite—is profoundly undemocratic. Lobbyists sharpen debate by providing an outlet for more constituencies and giving government more information.[8]

For Samuelson, then, lobbying is the democratic way of excavating the "will of the people" and ensuring that the political elite makes decisions which foster the "public good".

Cohen-Eliya & Hammer agree with Samuelson that, even though lobbying has "a bad reputation", it is an essential aspect of democracy:

8 Samuelson R (12 December2008) "Lobbying is Democracy in Action" *Newsweek* at 1, available at http://europe.newsweek.com/samuelson-lobbying-democracy-action-82909?rm=eu (visited 7 June 2017).

> Despite its negative reputation, lobbying is an important vehicle for ensuring citizen participation in the democratic process and the exercise of constitutional rights, allowing for a vibrant and participatory democracy.[9]

They subscribe to the pluralistic theory of democracy,[10] which they describe as follows:

> The point of departure of the *pluralistic* theory is that citizens have different, and often conflicting, interests. Democracy, according to this approach, is an arena in which interest groups struggle to attain the utmost realisation of their interests. A proper democratic process exists when the struggle among interest groups is conducted fairly. The product of such a process is arrangements that constitute a compromise reflecting the intergroup power relations, ie, how many citizens have a certain preference and to what degree of intensity.[11]

From this perspective, "lobbying is a desirable phenomenon",[12] a means of promoting fair competition amongst citizen groups over the allocation of resources and of providing "equality of opportunity to influence the democratic process".[13] Cohen-Eliya & Hammer understand that the theory and practice of pluralistic democracy may diverge significantly, according to the extant balance of power. Still, they defend it as the embodiment of equality and fairness.[14] However, they require that lobbying be transparent, and they decry non-transparent lobbying as a failure of pluralist democracy. We shall return to this issue later.

The pluralist theory seems to be the one most favoured by commentators who discern a direct connection between lobbying and democracy. Even though he does not identify expressly with any theory of democracy, it would appear from the excerpts cited above that Samuelson, too, comprehends democracy in pluralistic terms. Parvin, similarly, considers lobbying to be "symbolic of a healthy pluralist democracy".[15] To be sure, whether lobbying is considered to help or hinder democracy is dependent upon

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9 Cohen-Eliya M & Hammer Y (2011) "Nontransparent Lobbying as a Democratic Failure" 2 *William and Mary Policy Review* 265-287 at 266.

10 They distinguish pluralistic democracy from competitive elitism and deliberative democracy.

11 Cohen-Eliya & Hammer (2011) at 273. Original emphasis.

12 Cohen-Eliya & Hammer (2011) at 273.

13 Cohen-Eliya & Hammer (2011) at 275.

14 Cohen-Eliya & Hammer (2011) at 275.

15 Parvin P (2007) *Friend or Foe? Lobbying in British Democracy* London: Hansard Society at 11. See also Porcella L (2013) "Bridging the Gap: Lobbying and Democracy in the European Union" at 8-11, available at http://tesi.eprints.luiss.it/10600/2/porcella-luca-sintesi-2013.pdf (visited 7 June 2017).

the form of democracy.[16] However, this question well may have been rendered moot by the evolution of democracy itself. There is a significant school of thought which adjudges that democracy, at least in the advanced capitalist nations, has transcended its conventional configurations and transmogrified into a form identified as post-democracy.

Crouch is the acknowledged progenitor of the concept of post-democracy. He constructs the evolution of modern democracy in parabolic terms, with the graph initially rising, then peaking and finally declining. Post-democracy is an attribute of the declining arm of the parabola. The trajectory of modern democracy goes somewhat as follows. The world-historic political transition from pre-democracy to democracy coincided, more or less, with the world-historic socio-economic transition from feudalism to capitalism.[17] This process reached its apogee in the 1950s:

> In most of Western Europe and North America, we had our democratic moment around the midpoint of the twentieth century … In those industrial societies which did not become communist, a certain social compromise was reached between capitalist business interests and working people. In exchange for the survival of the capitalist system and the general quietening of protest against the inequalities it produced, business interests learned to accept certain limitations on their capacity to use their power. And democratic political capacity at the level of the nation state was able to guarantee those limitations, as firms were largely subordinate to the authority of national states.[18]

The "democratic moment" thus was a product of class conflict, with the working people being powerful enough to secure from their rulers those welfare concessions and political rights which constituted the high-water mark of modern democracy. The "democratic moment" was marked by constant contention between the mass of the people, political parties and government. In other words, it was a period of mass politics, of close connection between people and government, if only in the sense that the latter knew that its existence required the *imprimatur* of the former.

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16 Competitive elitism rejects lobbying, pluralistic democracy embraces it, while deliberative democracy ties its legitimacy to the particular objective it seeks to achieve. See Cohen-Eliya & Hammer (2011) at 273-274.

17 See Swift R (2002) *The No-Nonsense Guide to Democracy* Oxford: New Internationalist Publications at 37-43; Nash K (2000) *Contemporary Political Sociology: Globalisation, Politics and Power* Oxford: Blackwell Publishers at 216-218.

18 Crouch C (2004) *Post-Democracy* Cambridge: Polity Press at 7-8.

After the "democratic moment", the trajectory of modern democracy was decidedly downhill, into the post-democratic epoch. The fundamental difference between democracy and post-democracy seems to lie in the replacement of the democratic constitution and its accoutrements by *simulacra*. The essential physiognomy and conventional *indicia* of democracy persist.[19] Elections are held regularly, they are contested by an array of political parties, and parliament is constituted as representative of the electorate. However, the continuation of democratic forms belies a significant abandonment of democratic content, as the sectional interests of the business elite take centre stage and side-line the general interests of the mass of people. As Crouch explains:

> Under this model, while elections certainly exist and can change governments, public electoral debate is a tightly controlled spectacle, managed by rival teams of professionals expert in the techniques of persuasion, and considering a small range of issues selected by those teams. The mass of citizens plays a passive, quiescent, even apathetic part, responding only to the signals given to them. Behind this spectacle of the electoral game, politics is really shaped in private by interaction between elected governments and elites that overwhelmingly represent business interests.[20]

Korvela agrees with Crouch:

> Postdemocratic states will retain the outlook of a democracy while in practice they have transformed into a sort of managed democracy. The legitimacy of rule is theoretically based on the sovereignty of the people expressed in free elections, but in practice both the democratic input and output of the political system can be merely nominal.[21]

He concludes that the process of post-democratisation means that "democracy has been hollowed out and only its crust remains".[22]

In sum, then, the shift from democracy to post-democracy is simultaneously a movement from substance to form, as the institutional pillars of representative or pluralist democracy are denuded of their historic content to become instruments of mass distraction, concealing the rule of the minority behind the mirage of popular

19 Crouch (2004) at 22.
20 Crouch (2004) at 4.
21 Korvela P-E (2013) "Postdemocracy and the End of History" 1(1) *Economic and Political Studies* 136-155 at 137.
22 Korvela (2013) at 138.

sovereignty. As Farrell puts it: "We have become squatters in the ruins of the great democratic societies of the past."[23] In this context, the downward arm of the parabola of democracy entrains also a significant shift in policy- and decision-making, a shift which may be classified usefully as one from government to governance. Conventional representative democracy presumes that "elected officials make policies which public officials then implement" and that "officials are accountable to politicians and the politicians to the voters".[24] In terms of post-democratic governance, by contrast, both the formulation and implementation of public policy routinely are surrendered to private sector actors who are understood to possess the resources and expertise which politicians and state agencies do not. In the conditions of post-democracy, it is presumed that only such non-governmental actors have the capacity to inject body into the epithet "good" which invariably precedes the notion of governance. Central government gives way to networks of governance, and democracy becomes a "top-down policy" which is "produced by government as part of an administrative process".[25]

The post-democratic pursuit of good governance is expressed in a material amendment to the structure of the governing elite. Traditionally, the political management of the ruling party in a representative democracy comprises an inner circle of core leaders and advisers. This political core then radiates out in concentric circles, from members of parliament, through local councillors and party organisers, to party loyalists and voters.[26] The post-democratic leadership core departs from the traditional concentric model and assumes the form of an ellipse instead. The new elliptical model of political management is distinguished by the addition of lobbyists to the usual party coterie of leaders and advisers. The new ingredient brings to the leadership elite expertise in data production and manipulation to facilitate trend analysis, vote capture, policy formulation and the like. However, the lobbyists invariably are corporate hired guns, unlikely to be genuine supporters of the party line, whose prime if undeclared ambition is to mould the party line towards the creation of a political milieu favourable to the requirements of big business. In the contemporary world, the big corporations are champions of the exaggerated neo-liberal commitment

23 Farrell H (2013) "There is No Alternative" *Aeon Magazine* at 3, available at https://aeon.co/essays/the-left-is-now-too-weak-for-democracy-to-survive (visited 8 June 2017).
24 Korvela (2013) at 143.
25 Korvela (2013) at 146.
26 See Crouch (2004) at 70-71.

to free markets, privatisation and deregulation, and their lobbyists dutifully seek to incorporate these notions into the ideational platform of the new party political leadership.[27] In a word, the post-democratic elliptical model, unlike the democratic concentric model, is geared towards ensuring that big business has a really big say in the political direction of central government.

If the fundamentals of the theory of post-democracy are correct, then corporate lobbying is no longer about the protection and promotion of democracy, if ever it was. Rather, it is about importing a corporate imprint into the heartland of political life. Whereas lobbyists used to be seen as extraneous to government, they evidently have become integral to the construction of the ideal of good governance which seems to be the hallmark of post-democracy. However, the enhanced role of lobbyists in post-democratic decision-making entails a significant departure from the democratic tradition, in that unelected agents of corporate interests are afforded the opportunity to influence and even formulate government policy. From this perspective, lobbying has nothing to do with expressing democracy and everything to do with suppressing it. Post-democracy thus emerges as a lobbying *Shangri-la* of sorts, in which there are few, if any, obstacles to corporations exerting persuasive, sometimes even decisive, influence upon governmental policy.[28]

This intimate, nigh incestuous, relationship between government and the business lobby has to be a matter of concern, especially for those who embrace lobbying as a positive expression of democracy. It is the kind of relationship which can descend easily into corruption, as lobbyists are free to deploy their resources to bribe and otherwise nefariously influence politicians at will. Such transgressions by both lobbyists and politicians fall within the ambit of anti-corruption law and, if exposed, presumably will be dealt with in terms of the criminal law of corruption. However, outright corruption likely will be episodic. Few lobbyists and politicians would be arrogant or avaricious enough to risk criminality by acts of brazen corruption. A much more attractive option for both is the opportunities for non-transparent lobbying which the post-democratic political culture provides.

As indicated earlier, Cohen-Eliya & Hammer consider non-transparent lobbying to signify failures of democracy. They identify three such failures: firstly, the ability of the corporate lobby to "jump the queue" and use its superior economic power to

27 See Crouch (2004) at 72-74.
28 See Crouch (2004) at 4.

foreground its interests in the formation of government policy; secondly, the revolving door phenomenon which sees politicians, lawmakers and administrators co-operate with corporate lobbyists in anticipation of securing lucrative positions as lobbyists themselves when they leave office; thirdly, the practice of niche lobbying, which constitutes the bulk of corporate rent-seeking lobbying and which occurs in hermetic locations free of the limitations of both competition and public scrutiny.[29] These lobbying malpractices which violate the democratic tradition so blatantly also fit easily into the structure of post-democracy. All three are consistent with the prominence afforded corporate interests in the post-democratic political heartland. In combination, they constitute a slice of post-democracy in action, a "post-democratic moment", which provides a real sense of the ways in which corporate lobbyists operate beyond the public pale, to influence the inner workings of government and central policy-making.

It hardly can be gainsaid that non-transparent corporate lobbying, which occurs surreptitiously, away from the public eye, represents a significant failure of democracy in any of its forms. It is the kind of lobbying which invariably sacrifices the needs of the bulk of the citizenry (the so-called 99%) at the altar of the narrow interests of the corporate sector (the so-called 1%). Needless to say, lobbying usages which rely upon concealment to pursue corporate ambitions at the expense of the collective welfare ought not to be tolerated. If post-democracy is democracy debauched, then non-transparent lobbying is a degenerate product of that debauchery. It has no place in a democracy. To be sure, the post-democratic constitution well may facilitate or even encourage non-transparent lobbying. However, it would be irrational to accept such lobbying as legitimate, even if, arguably, it may be taken as an attribute of post-democracy. Certainly, the fact that democracy has become debased does not constitute a serious argument for the defence of a form of lobbying which is fundamentally anti-democratic. It is submitted that non-transparent lobbying is completely unjustifiable and has to be opposed and exposed at every turn for the assault upon democracy that it is.

4 ANTI-DEMOCRATIC LOBBYING IN ACTION

In this section we attempt to demonstrate the reality of non-transparent corporate lobbying as a democratic failure in the German context. We analyse various episodes of lobbying in terms of the typology developed by Cohen-Eliya & Hammer.

29 See Cohen-Eliya & Hammer (2011) at 276-277.

4.1 Jumping the queue

Corporate lobbyists routinely enjoy priority access to politicians. Their vast financial resources endow them with great informational leverage, obviating the need for them to stand patiently in line, as mere mortals must, in order reach the politicians whom they seek to influence. The extent to which some politicians depend on information supplied by lobbyists has been brought to light by *LobbyPlag*. This digital platform has revealed that members of the European Parliament (MEPs) have adopted numerous amendments to the European General Data Protection Regulation[30] *verbatim* from written proposals by corporate lobbyists. Big companies such as Amazon, eBay and Facebook, as well as advocacy groups such as the Dutch digital rights foundation Bits of Freedom, the Brussels-based European Digital Rights (EDRi) and the American Chamber of Commerce, sent so-called "voting recommendations" to MEPs, hoping that these would be incorporated into the law under consideration.[31] It is most revealing that these "voting recommendations" sometimes were labelled unthinkingly, if not presumptuously, as "voting instructions",[32] an occurrence indicative of the power which corporations and their lobbyists wield in the law-making process.

LobbyPlag provides the opportunity to compare, word for word, which suggestions MEPs adopted from the lobbyists as their own for inclusion in the European General Data Protection Regulation. Even the most cursory comparison shows that the lobbyists were extremely successful in their efforts. The *LobbyPlag* postings provide both a fascinating and an instructive peek into the real world of corporate lobbying which promotes the causes of "well-organised interest groups, at the expense of the dispersed majority".[33] They render visible the profoundly anti-democratic impact which corporate lobbyists who are allowed to jump the queue can have upon the law-making process. The General Data Protection Regulation is a European and not a specifically German regulation. Significantly, however, *LobbyPlag* is a German website. And given the leading position which Germany occupies in the EU,

30 The General Data Protection Regulation aims to unify data protection within the EU. It was adopted on 27 April 2016 and will come into force properly on 25 May 2018.

31 *LobbyPlag* lists 44 lobby organisations (41 named and 3 unknown) which submitted proposals on the European Data Protection Regulation. Other big names include BITKOM, British Telecommunications, European Banking Federation, First Data, Intel, Microsoft, Nokia and Yahoo.

32 *TAZ Online* (11 February 2013) "Kopierfabrik Brüssel", available at http://www.taz.de/!5073487/ (visited 8 June 2017).

33 Cohen-Eliya & Hammer (2011) at 276.

the lobbying around the Regulation may be taken as fairly representative of the German situation.

An instructive German example of lobbyists jumping the queue concerns the important issue of carbon capture and storage (CCS) technology. This is a technology which is designed to reduce carbon dioxide emissions and thereby to protect the environment. For example, carbon dioxide which results from energy generation in fossil power plants can be deposited and grouted into the earth even before it enters the atmosphere. In 2009, the German Parliament (*Bundestag*) had to deal with a complex draft law on CCS technology. Unsurprisingly, the German parliamentarians lacked expertise regarding the technicalities of environmental protection and pollution control. However, this situation presented fertile ground for corporate lobbyists to argue for a business bias to be built into the law.

In Germany, draft laws are formulated by the responsible ministries and lobbyists seek to stamp a corporate imprint on the draft law at ministerial level, even before it goes before the *Bundestag.*[34] In this case, the energy lobby produced a draft law on CCS technology which was entered into the ministerial deliberations. The energy lobby also agitated for a rapid adoption of the law, as the EU had promised subventions for corporations which commenced with the CCS programme before 2010. Of course, many parliamentarians did not grasp completely the intricacies of the draft law placed before them. Gradually, however, the lobbyists convinced more and more parliamentarians that a speedy implementation of the law was necessary. A domino effect was generated, as some parliamentarians who had been won over began to lobby their colleagues.[35]

In the end, however, the draft law was withdrawn under pressure of lobbying from another quarter. The agrarian lobby realised that pipelines needed for the CCS technology would be built across farmland and that the carbon repository could affect farming operations negatively. Agriculture constitutes a major sector of the German economy, and the agrarian lobby had sufficient clout to thwart the adoption of the CCS law.[36]

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34 Bülow (2010) at 8.

35 Bülow (2010) at 11.

36 Bülow (2010) at 16. A law on CCS technology eventually was adopted on 24 August 2012 as the *Gesetz zur Demonstration und Anwendung von Technologien zur Abscheidung, zum Transport und zur dauerhaften Speicherung von Kohlendioxid* (Act on the Demonstration and Use of the Technology for the Capture, Transport and Permanent Storage of CO_2).

Marco Bülow, an SPD parliamentarian, was involved in the debate on the CCS law in the *Bundestag*. He took the opportunity to confront the issue of lobbyists trying to influence parliamentarians and intrude business interests into the legislative process. He counted that during the two weeks of decisive legislative debate, lobbyists tried to contact him more than 400 times, via e-mail, telephone and letters, and there were many requests for personal meetings with him.[37] Also, he was offered numerous "voting suggestions", that is, perfectly elaborated legislative proposals formulated by lobbyists on behalf of their corporate clients.

Evidently, corporate lobbyists consider parliamentarians easy targets when they have to consider complex statutes with a significant technical dimension. The debate on the CCS law showed how expert lobbyists jump the queue to put data-based rationality to work in their efforts to convince parliamentarians to embrace legislative provisions with the singular aim of protecting and promoting business interests. What is more, the lobbying process may take on a momentum of its own, as persuaded politicians persuade their fellows, triggering a pro-business avalanche which precludes all critical engagement with the draft law. Needless to say, in this lobbying jamboree the interests of the plebeian populace are conspicuous by their absence.

4.2 The revolving door

The notion of the revolving door encapsulates the practice of politicians moving to the private sector as lobbyists, consultants, advisers and the like.[38] Such movement usually occurs at the end of the politician's term of office, when he seamlessly takes up a lucrative corporate position and makes available to his new employers the knowledge, expertise and influence which he acquired while in public office. Corporations are prepared to pay handsomely to have well-connected former politicians in their corner. However, outside the corporate context, the revolving door phenomenon is notorious for the aura of unsavouriness which it brings to the relationship between government and business.

In Germany, the most prominent example of the revolving door in action is the case of former Chancellor, Gerhard Schröder, who held the office from October 1998 to November 2005. As Chancellor, Schröder had supported vigorously the Baltic Sea Gas Pipeline project, to supply Russian natural gas to Germany via the Baltic Sea. The

37 Bülow (2010) at 7.

38 The process operates in reverse also. However, the business-to-government revolving door falls outside the scope of this essay.

pipeline is owned by Nord Stream AG, in which Gazprom, the Russian state-owned gas company, holds a 51% stake.[39] In September 2005 the agreement governing the pipeline project was concluded and signed in the presence of Schröder and Vladimir Putin, the Russian president.[40] And less than a month after his withdrawal from politics, Schröder was inducted as chairman of the supervisory body of the Nord Stream AG consortium responsible for constructing the pipeline.[41] It is a position which earns him €250 000 a year.[42] Schröder retains an office in the *Bundestag*. The *Bundestag* was perturbed sufficiently by the former Chancellor's business dealings to subject the ethics of his behaviour to formal debate.[43]

Moreover, in March 2006 it became public that, after he had lost the 2005 elections to Angela Merkel but before the end of his term, Schröder planned to provide a state guarantee for a loan of €1 billion that Gazprom had obtained from *Die Deutsche Bank* to finance the Baltic Sea pipeline. Essentially, the guarantee would have meant that should Gazprom fail to settle its debt to *Die Deutsche Bank*, the German government would have to do so. Schröder steadfastly denied any knowledge of the supposed guarantee.[44] This chapter of the Schröder shenanigans came to an end, more or less, in April 2006 when Gazprom declined to take up the loan from *Die Deutsche Bank*, thereby rendering the question of the guarantee moot.[45]

Gerhard Schröder evidently is an unapologetic votary of the revolving door, and was so convinced of its value to his future that he intruded a foot into it even before he lost the chancellorship. It is not hard to imagine the dogged influence which Mr Schröder, as Chancellor, would have exerted to secure approval for the Baltic Sea Gas Pipeline project, nor the enormous wealth which he would have accrued since. Indeed,

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39 Russia owns 50% plus one share of Gazprom.

40 Klein H & Höntzsch T (15 November 2007) "Fliegender Wechsel - die Drehtür kreist. Zwei Jahre danach - Was macht die Ex-Regierung Schröder II heute? " *LobbyControll*, available at http://www.lobbycontrol.de/download/drehtuer-studie.pdf (visited 8 June 2017).

41 Schwabe A (12 December 2005) "Neuer Job: Schröder verübelt seinen Ruf" *Spiegel Online*, available at http://www.spiegel.de/politik/deutschland/neuer-job-schroeder-verrubelt-seinen-ruf-a-389956.html (visited 8 June 2017).

42 Von Bornhöft P *et al* (10 April 2006) "Der Gasprom-Kanzler" *Spiegel Online*, available at http://www.spiegel.de/spiegel/print/d-46581509.html (visited 8 June 2017).

43 *Deutsche Welle* (15 December2005) "Bundestag Debates Ex-Chancellor Schröder's Ethics", available at http://www.dw.com/en/bundestag-debates-ex-chancellor-schr%C3%B6ders-ethics/a-1820818 (visited 8 June 2017).

44 Von Bornhöft *et al* (10 April 2006).

45 *Bundestag Drucksachen* 16/1366, available at http://dip21.bundestag.de/dip21/btd/16/013/1601366.pdf (visited 8 June 2017).

it is as hard to find a serious defence of Schröder's behaviour in this matter as it is to deny the personal enrichment with which it favoured him.[46]

The case of Eckart von Klaeden, although not as infamous Schröder's, also is exemplary of the turpitude of the revolving door, especially as regards its commingling of the political and the economic. Von Klaeden was a CDU member of the *Bundestag* from 1994 until the elections in September 2013. In 2009, he was appointed as Minister of State to the Chancellor. Politically, therefore, he held two important positions: he was elected directly to the *Bundestag* and he had direct access to Chancellor Merkel. Von Klaeden's ministerial portfolio included responsibility for relations between the political and economic sectors of Germany. In May 2013 he announced that he would not be participating in that year's elections, as he would be leaving politics to become chief lobbyist for Daimler AG, manufacturer of all Mercedes Benz automobiles. He left the *Bundestag* in October 2013 and was appointed Head of Global External Affairs and Public Policy at Daimler AG on 1 November 2013. He resigned his membership of the CDU, under public pressure, only some two weeks later.

Needless to say, von Klaeden negotiated his shift from the public to the private sector while he was charged by the Chancellery with regulating communications between the two sectors. For example, in 2012, von Klaeden met three times with Daimler AG and five times with the European Aeronautic Defence and Space Company (EADS), in which Daimler AG held a 30% stake.[47] In other words, he engaged Daimler AG and EADS about his private future while occupying a political position which was supposed to have foreclosed such personal engagement for him. Daimler AG sold its shares in EADS in April 2013 to the state-owned *Kreditanstalt für Wiederaufbau* (Development Loan Corporation). Daimler AG denies that von Klaeden was involved in this deal with the Federal Government.[48] Be that as it may, it goes without saying that Daimler AG is paying von Klaeden handsomely for his services; but it goes without saying also that his new employers value the former Minister of State to the Chancellor much more for his political connections and economic intelligence than for any knowledge which he may have of the design and construction of luxury motor vehicles.

46 Klein & Höntzsch (15 November 2007).

47 *Bundestag Drucksachen* 17/14550, available at http://dip21.bundestag.de/dip21/btd/17/145/1714550.pdf (visited 8 June 2017).

48 *FAZ Online* (17 November 2013) "Half Ex-Staatsminister von Klaeden Daimler in Sachen EADS?", available at http://www.faz.net/aktuell/wirtschaft/unternehmen/anteilsverkauf-half-ex-staatsminister-von-klaeden-daimler-in-sachen-eads-12668296.html (visited 8 June 2017).

A particularly delicate aspect of the von Klaeden affair concerned a European Regulation which sought to introduce an upper limit for automobile carbon dioxide emissions for cars. Such a limit would have affected primarily manufacturers of big and expensive cars. Many of the cars produced and sold by Daimler AG would have fallen foul of the proposed reductions in carbon dioxide emissions. In June 2013, the German government was instrumental in blocking the European Regulation. Von Klaeden was implicated in this episode also, as will emerge in more detail later.

In November 2013, shortly after von Klaeden joined Daimler AG, the Berlin prosecution office launched an investigation against him in relation to a charge of *Vorteilsannahme* or acceptance of benefits by a public official. The investigation was historic: for the first time a top German politician became the subject of a criminal enquiry arising directly out of his entanglement in the machinations of the revolving door. Joerg Howe, a spokesman for Daimler AG, announced that:

> We're looking forward to the prosecutor's investigation with great equanimity and have absolutely no doubts about the integrity of Eckart von Klaeden.[49]

Daimler AG's confidence in von Klaeden was not misplaced. The investigation fizzled out somewhat tamely, with the prosecution office admitting in February 2015 that:

> There were insufficient grounds for taking the matter further; the investigation has been dropped.[50]

It appears that von Klaeden was just too audacious in his dealings not to invite some form of investigation. Regrettably, the collapse of the investigation suggests that von Klaeden's misfortunes were no more than a bump in the road for politicians turned lobbyists and signifies that the revolving door likely will remain impervious to all who do not seek access to its largesse.

The cases of Gerhard Schröder, former Chancellor, and Eckard von Klaeden, former State Minister to the Chancellor, constitute vivid examples not only of the moral repugnance of revolving door practices, but also of the anti-democratic impulses embedded in such practices. No democratic theory, even if it supports lobbying, has

49 *Automotive News Europe* (3 November 2014) "Berlin prosecutors investigate Daimler lobbyist", available at http://europe.autonews.com/article/20131103/ANE/131109931/berlin-prosecutors-investigate-daimler-lobbyist (visited 8 June 2017).

50 *Reuters* (10 February 2015) "German prosecutors drop probe of Daimler, Merkel aide", available at http://www.reuters.com/article/daimler-prosecutor-zetsche-idUSL5N0VK1RO20150210 (visited 8 June 2017).

condoned the revolving door phenomenon as it operates currently. Indeed, it is a phenomenon which accords tidily with the spirit of post-democracy, paying much more heed to the interests of big business than to the well-being of ordinary citizens. The point is that current revolving door practices are politically undesirable in a socio-economic landscape dominated by corporations. If they are to be allowed to continue, at the very least there ought to be a cooling-off period of several years before former politicians are permitted to take up positions as corporate lobbyists.

4.3 Niche lobbying

Corporate lobbyists do the bulk of their persuasive work in niches. These are specialist areas which encompass the business of their clients but which are far removed from public involvement or oversight. Niche lobbying takes place in the interstices of the political system, where corporate representatives enjoy more or less a free hand to recruit important politicians to their cause and to make their mark upon the legislative process. It is the kind of lobbying which brings business and government together in interactional recesses, protecting the secrets and deviations of both. For this very reason, it likely is the most effective form of lobbying for corporations.

As intimated above in the discussion of the von Klaeden affair, in 2013 the German government, at the behest of the German automobile lobby it appears, obstructed the adoption of a European Regulation seeking to reduce carbon dioxide (CO_2) emissions from cars. Such reduction is one of the main goals of European climate policy. Already in 2007, the EU had adopted a European Energy Strategy, the framework of which established that by 2020 the EU wants to achieve a reduction of 20% in greenhouse gas emissions (using 1990 as base year). In that same year, the European Commission[51] proposed the formulation and adoption of a *Regulation of the European Parliament and of the Council setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO_2 emissions from light-duty vehicles*.[52] Regulations are legislative instruments which bind all EU members completely and directly. The Commission opted for a Regulation because earlier "voluntary commitments taken by the [automobile] industry" had failed.[53] It considered that a Regulation which did not require domestication was the

51 The Commission is the executive of EU and the only EU institution with power to propose new legislation.

52 COM (2007) 856 final.

53 Para 3 of the Explanatory Memorandum to COM (2007) 856 final.

most appropriate route to the implementation of a common approach across the EU.[54] The Commission's Proposal materialised as EC Regulation 443/2009, which established 95g/km as the 2020 target for CO_2 emissions.

EC Regulation 443/2009 had a stepped implementation agenda: by 2015, all new cars had to comply with a CO_2 emissions target of 130 g/km; by 2020, the target of 95 g/km had to be reached. Pursuit of the 2015 target could be immediate, whereas pursuit of the 2020 target was tied to agreement being reached upon enforcement modalities. Such agreement was reached in June 2013, in the form of a *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 443/2009 to define the modalities for reaching the 2020 target to reduce CO_2 emissions from new passenger cars*.[55] This Proposal found a first reading agreement in the European Parliament, and approval by the Council of the EU was virtually a foregone conclusion. It was at this juncture, when a deal regarding the modalities for achieving the 95g/km emission target apparently had won general approval, that Germany demurred. In an unprecedented move, it sought to prevent the Proposal being accepted by the Council of the EU and to scupper the agreement. The Chancellor herself led the German *volte face*, lobbying other member states to support the move.

The reason for the German recalcitrance is not hard to understand. It was, rather transparently, about protecting the interests of the German manufacturers of luxury vehicles such as Daimler, Mercedes Benz, BMW, Porsche and Audi. These vehicles emit larger amounts of CO_2 than basic models, and their manufacturers hardly were prepared to stand by and watch the passage of a Proposal which entailed serious financial and operational consequences for them. Thus, on 8 May 2013, Matthias Wissmann, president of the German Automobile Association or *Verband der Automobilindustrie* (VDA), wrote a letter to the Chancellor in which he asked the German government to advocate for less strict EU provisions concerning CO_2 emissions. Angela Merkel and Matthias Wissmann know each other as former colleagues in the CDU and in the German government.[56] Wissmann's letter focused upon the supposed damaging impact on German carmakers of the EU's emissions

54 Para 3 of the Explanatory Memorandum to COM (2007) 856 final.

55 COM (2012) 393 final.

56 Wissmann was a CDU member of the *Bundestag* from 1976 to 2007, when he resigned to become president of the VDA.

plan.[57] It began with the familiar salutation "Dear Angela" and contained a veiled threat:

> We cannot allow our powerful and strong premium sector, accounting for almost 60 percent of car manufacturing jobs in Germany, to be regulated to death by arbitrary limits.[58]

Wissmann argued that the production of hybrid and electric vehicles by automobile manufacturers ought to count as a ''credit" to be offset against the higher emissions of the rest of their fleets.[59]

Two weeks after receiving Wissmann's letter, Chancellor Merkel began to discuss the emissions question publicly again, in terms which basically mirrored the position of the VDA.[60] Till then it had been accepted generally that the years of negotiation, which had begun in 2007, had produced a settled plan which merely awaited formal adoption. However, Angela Merkel brazenly set about persuading other governments to put the EU emissions plan on ice.[61] And she succeeded, at least in the short term, by convincing the Netherlands, the UK, the Czech Republic, Portugal, Slovakia, Austria and Hungary to endorse the German arguments for postponing acceptance of the emissions plan.[62]

> The plan had been expected to be rubber stamped by national leaders at the quarterly European council meeting on Thursday [27 June 2013], but was

57 In addition to the 2020 target of 95 g/km, the EU also aimed for an average target of 68 to 78 g/km by 2025.

58 *The Local* (21 May 2013) "Car boss asks Merkel to rethink CO2 pledge", available at http://www.thelocal.de/20130521/49829 (visited 8 June 2017). See also *FAZ Online* (21 May 2013) "Autoindustrie bittet Kanzlerin um Hilfe",available at http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/eu-fordert-dreiliterauto-autoindustrie-bittet-kanzlerin-um-hilfe-12189219.html (visited 8 June 2017).

59 *Spiegel Online* (21 May 2013) "Streit über CO2-Grenzwerte: Autolobby schreibt Bettelbrief an Merkel", available at http://www.spiegel.de/auto/aktuell/co2-grenzwerte-autolobbyist-wissmann-schreibt-bittbrief-an-merkel-a-900916.html (visited 8 June 2017).

60 *Spiegel Online* (27 June 2014) "Car Clash: Germany blocks CO2 reduction deal", available at http://www.spiegel.de/international/europe/germany-delays-eu-decision-on-lower-co2-emissions-for-cars-a-908176.html (visited 8 June 2017).

61 *Monitor Nr 650* (8 August 2013) "Auf Eis gelegt: Wie die Kanzlerin den Klimaschutz ausbremst", available at http://www.wdr.de/tv/applications/daserste/monitor/pdf/2013/0808/klima.pdf (visited 8 June 2017).

62 Keating D (7 March 2013) "Emissions impossible?" *Politico*, available at http://www.politico.eu/article/emissions-impossible-2/ (visited 8 June 2017).

> dropped from the agenda after Merkel telephoned other leaders to lobby them.[63]

Merkel defended blocking the Proposal as being in the interests of the German economy, thereby equating the general interests of the nation with the sectional interests of the car industry.[64]

The German machinations reportedly evoked accusations of scandal from certain EU diplomats.[65] Franziska Achterberg of Greenpeace decried the German behaviour as anti-democratic:

> Chancellor Merkel has shown that she is not afraid to hijack democratic processes and bully other governments to pamper a few high-end carmakers.[66]

Matthias Groote of the SPD agreed:

> Merkel's unilateral attempt to try and stop the car CO_2 deal is undemocratic and unwelcome.[67]

There is no reason to disagree with this sentiment. The German Chancellor indeed was prepared to derail the democratic EU legislative process to advance the interests of the German luxury automobile sector.

Needless to say, it would have been beyond the pale for the Germans to reject the CO_2 emission target of 95g/km by 2020 out of hand. Instead, they wanted it phased in, with 80% implementation by 2020 and 100% by 2024.[68] One contemporary commentator pointed out perceptively that:

63 *The Guardian* (28 June 2013) "Angela Merkel 'blocks' EU plan on limiting emissions from new cars", available at http://www.theguardian.com/environment/2013/jun/28/angela-merkel-eu-car-emissions (visited 8 June 2017).

64 *Spiegel Online* (28 June 2013) "CO_2-Grenzwert: Merkel rechtfertigt Blockade mit Industrie-Interesse", available at http://www.spiegel.de/politik/deutschland/merkel-rechtfertigt-co2-blockade-mit-industrie-interessen-a-908421.html (visited 8 June 2017).

65 *Spiegel Online* (27 June 2014).

66 Keating (7 March 2013).

67 *The Guardian* (28 June 2013).

68 *BBC News* (15 October 2013) "Germany delays EU limit on CO_2 emissions from cars", available at http://www.bbc.com/news/world-europe-24532284 (visited 8 June 2017).

> This would allow Germany's luxury car manufacturers, who already receive more relaxed standards than makers of lighter cars, to sell even more gas-guzzlers for another decade.[69]

However, in this instance Germany was unable to drum up sufficient support in the EU Parliament to prevail. In November 2013, after months of German obstructionism, a new CO_2 emissions compromise agreement finally saw the light of day. It provided for the CO_2 emissions target of 95g/km to be implemented in two stages, with 95% compliance by 2020 and 100% by 2021.[70] Of course, this agreement is a dilution of the original, "equating to a 3g/km weakening of the target"[71] and giving the automobile manufacturers a year more to enforce the target fully.[72] Rebecca Harms, co-president of the Greens in the EU Parliament, denounced the compromise as "a shameful sop to German car manufacturers" which will "slow the development of new technologies to deliver more efficient and less polluting cars".[73] Be that as it may, in March 2014 the compromise became directly applicable in all member states as EU Regulation 333/2014.[74]

This episode of political double-dealing, informed always by the business interests of the German automobile industry, was crowned by three political donations which the family Quandt made to the CDU. Donations to political parties are not banned in Germany, unless they recognisably are made in anticipation of an advantage to be granted, and any donations which exceed €50 000 must be disclosed. It so happens that the family Quandt is a major shareholder in the BMW Group, owning a

69 *Transport and Environment* (30 September 2013) "Germany pushes to delay agreed CO_2 limit for cars by four years", available at http://www.transportenvironment.org/press/germany-pushes-delay-agreed-co2-limit-cars-four-years (visited 8 June 2017).

70 See *Euractiv* (27 November 2013) "EU agrees new deadline on car emissions limits", available at https://www.euractiv.com/section/transport/news/eu-agrees-new-deadline-on-car-emissions-limits/ (visited 8 June 2017); *European Commission* (8 May 2015) "Reducing CO_2 emissions from passenger cars", available at http://ec.europa.eu/clima/policies/transport/vehicles/cars/index_en.htm (visited 8 June 2017).

71 *Euractiv* (25 February 2014) "EU parliament backs tougher car emissions limits", available at http://www.euractiv.com/section/transport/news/eu-parliament-backs-tougher-car-emissions-limits/ (visited 8 June 2017).

72 *Zeit Online* (29 November 2013) "Neuwagen ab 2020: EU-Staaten einig über Klimaauflagen", available at http://www.zeit.de/news/2013-11/29/eu-neuwagen-ab-2020-eu-staaten-einig-ueber-klimaauflagen-29172205 (visited 8 June 2017).

73 Cited in *Euractiv* (25 February 2014).

74 Regulation (EU) No 333/2014 of the European Parliament and of the Council of 11 March 2014 amending Regulation (EC) No 443/2009 to define the modalities for reaching the 2020 target to reduce CO_2 emissions from new passenger cars.

stake of approximately 47%. Matriarch, Johanna Quandt, her son, Stefan Quandt, and her daughter, Susanne Klatten, each donated €230 000 to the CDU in October 2013. The Wall Street Journal noted that:

> Taken together, those donations represented the largest gift to a single party in Germany in years, according to the list of political donations disclosed by Germany's parliament.[75]

The family Quandt's combined donation of €690 000 was made just before aggressive German lobbying derailed EU efforts to resolve the CO_2 emissions question. The publication of the donation prompted Klaus Ernst, of the Left Party, to vilify it as "the most blatant case of purchased policymaking in a long time". He added: "BMW has Merkel in the bag. No one's done it that openly so far".[76] These sentiments ring true. The timing and context of the donations are suggestive, at best, of a quite unwholesome relationship between those involved in the political and business ends of the CO_2 emissions imbroglio in Germany.

The automobile industry is a classic example of a business niche which is extremely powerful and wealthy. Germany's rather shameful role in the negotiations surrounding the CO_2 emissions question is a graphic expression of the anti-democratic character of niche lobbying. In this case, the automobile lobby had direct and unopposed access to the Chancellor of Germany in a matter which concerns the health and well-being of all Germans. The interests of the citizenry were no doubt a significant consideration in the negotiations to limit CO_2 emissions from motor vehicles to 95g/km in the EU. However, those interests were side-lined unceremoniously when the automobile lobby convinced Chancellor Merkel to break ranks and agitate for a re-negotiation of the proposed Regulation. In the event, the particular interests of the German automobile industry fuelled German obstructionism at the expense of the people's right to a healthy environment. And, in the process, democracy suffered a body blow.

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75 *Wall Street Journal* (15 October 2013) "Timing of BMW Donation to Merkel's Party Draws Fire", available at http://www.wsj.com/articles/SB10001424052702304330904579137651526605472 (visited 8 June 2017). See also *Spiegel Online* (15 October 2013)"Parteienfinanzierung: CDU erhält Riesenspende von BMW-Großaktionären", available at http://www.spiegel.de/politik/deutschland/union-erhaelt-riesenspende-von-bmw-eignern-klatten-und-quandt-a-927871.html (visited 8 June 2017).

76 *Spiegel Online* (15 October 2013) "Merkel's Patrons: Donation from BMW Owners Raises Eyebrows", available at http://www.spiegel.de/international/europe/cdu-gets-donation-from-bmw-owners-during-co2-talks-a-927954.html (visited 8 June 2017).

4.4 Summation

As noted earlier, jumping the queue, the revolving door and niche lobbying all may be subsumed under the rubric of non-transparent lobbying. This section has attempted to demonstrate how these forms of lobbying operate in practice to subvert the very democratic process which lobbying is purported to express and promote. If, as its proponents submit, lobbying is a form of democratic engagement, then non-transparent lobbying has to be a form of anti-democratic degradation. Indeed, it is a form of lobbying which habituates the outer limits of legality, and routinely crosses into the penumbra of illegality. The examples discussed above illustrate that non-transparent lobbying really is an expression of corporate power in pursuit of profit. It is a form of lobbying which operates, for the most part, beyond the reach of lobbying law.

5 WHAT IS TO BE DONE?

The conventional response to the excesses of lobbyists is a demand for more rigorous or extensive regulation. This demand presumes that the problem lies not with the practice of lobbying *per se*, but with transgressions by certain of its practitioners. The hope is that lobbying will live up to its billing as a democratic stalwart provided that it is controlled properly and opportunities for nefarious adventurism are minimised.

The call for tighter regulation invariably pivots on the *desideratum* that all lobbyists be registered formally. The lobbying register is considered by its advocates as key to warrantying that lobbying remains within the bounds of legal and ethical propriety, and that lobbyists do not stray from their declared function of providing information which enables politicians to make informed decisions for the overall welfare of society. Essentially, the registered lobbyist is meant to be the reputable lobbyist, and the act of registration is simultaneously a declaration of honour, a commitment to a virtuous and transparent lobbying practice.

5.1 Regulation of lobbying in Germany

Germany is one of only a handful of European countries that has introduced regulations for lobbying.[77] Its regulatory regime, too, turns upon the idea of a lobbying register. The provisions governing lobbying are contained in Annex 2 to the Rules of

77 Others are Hungary, Lithuania, France, Slovenia and Poland and the UK. See Van Hulten M & Bentinck M (2011) *Parliamentary Ethics: A Question of Trust* Brussels: European Parliament at 21.

Procedure of the *Bundestag*.[78] Put briefly, registration is a prerequisite for lobbying at both the parliamentary and federal levels. In other words:

> all groups and organisations wishing to express or defend their interests before the *Bundestag* or the Federal Government must be entered in a register.[79]

The registration process in Germany requires disclosure of details pertaining to such matters as the identity, location and business address, composition and size, and sphere of interest of the lobby group seeking official recognition.[80] The President of the *Bundestag* is tasked with the responsibility of constructing the lobbying register,[81] and of arranging for its annual publication in the Federal Gazette (*Bundesanzeiger*).[82]

The Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien* (GGO)) allow lobbyists to participate in hearings on draft bills.[83] After a draft bill has been crafted by a ministry, it is referred to the *Bundestag* for consideration. In this regard, the Rules of Procedure of the German Parliament (*Geschäftsordnung des Deutschen Bundestages* (GOBT)) provide for public hearings to be held on draft bills:

> For the purpose of obtaining information on a subject under debate, a committee may hold public hearings of experts, representatives of interest groups and other persons who can furnish information.[84]

78 Rule 1 of Annex 2 describes the register as "a public list in which all associations of trade and industry representing interests *vis-à-vis* the *Bundestag* or the Federal Government shall be entered". See also Malone M (2004) "Regulation of Lobbyists in Developed Countries: Current Rules and Practices" *Institute of Public Administration, National University of Ireland* at 13.

79 Malone (2004) at 13. See also Chari R, Hogan J & Murphy G (2007) "Regulating Lobbyists: A Comparative Analysis of the United States, Canada, Germany and the European Union" 78(3) *The Political Quarterly* 422-438 at 422.

80 Rule 2 of Annex 2 lists the required information as follows: "name and seat of the association; composition of the board of management and the board of directors; sphere of interest of the association; number of members; names of the associations' representatives; and address of its office at the seat of the *Bundestag* and of the Federal Government". See also Van Hulten & Bentinck (2011) at 52; Malone (2004) at 13.

81 Rule 1 of Annex 2 to the Rules of Procedure of the *Bundestag*.

82 Rule 5 of Annex 2 to the Rules of Procedure of the *Bundestag*.

83 See §47 of the GGO. It allows, *inter alia*, for "central and umbrella associations and of the expert community at federal level" to participate in hearings on ministerial drafts of bills.

84 §70 of the GOBT.

Lobbyists take full advantage of such public hearings to advance the interests of their clients. Indeed, lobbyists play a crucial role in constructing comprehension for parliamentarians, thereby excluding counter-arguments and alternative perspectives.[85]

Only those lobbyists who are registered formally qualify for a *Hausausweis* (a pass that allows them to enter the *Bundestag* complex) to participate in hearings.[86] As Malone observes:

> In principle, lobbyists may not be heard by parliamentary committees or be issued with a pass admitting them to parliamentary buildings until they are entered on the register.[87]

In Germany, then, unregistered lobbyists do not have the right and should not have the opportunity to influence the law-making process. Indeed, formally they are denied even physical admission to the buildings in which the law-making process occurs. Not only is registration the crux of the German regulatory system, but also, it would seem, the existential key to the legal construction of the lobbyist *qua* lobbyist. *Prima facie*, the lobbyist who is unable to gain access to the site of his trade is emasculated well and truly.

However, the German lobbying regulations have much more bark than bite. To begin with, the lobbying register is constructed exclusively of associations (*Verbände*).[88] Chari & Murphy explain:

> There is a long tradition of interest group involvement in the policy process in Germany. This involvement tends to be based around representation on a collective basis whereby lobbying has largely been pursued by interest associations whose contacts developed primarily with government.[89]

However, a historical register of *Verbände* hardly begins to encompass the contemporary lobbying industry in Germany. On the one hand, *Verbände* are losing both members and influence.[90] On the other hand, lobbying has become increasingly

85 See Leif & Speth (2 March 2006); Wehrmann (2007) at 43.

86 Rule 3 of Annex 2 to the Rules of Procedure of the *Bundestag*. See also Zerfaβ A, Bentele G & Von Oehsen H (2009) "Lobbying in Berlin: Akteure, Strukturen und Herausforderungen eines wachsenden Berufsfeldes" in Sell A & Krylov A (eds) *Interaktion zwischen Wirtschaft, Politik und Gesellschaft* Frankfurt am Main: Verlag Peter Lang at 32.

87 Malone (2004) at 13. See also Chari, Hogan & Murphy (2007) at 423.

88 See Ronit K & Schneider V (1998) "The Strange Case of Regulating Lobbying in Germany" 51(4) *Parliamentary Affairs* 559-567 at 559.

89 Chari & Murphy (2006) at 55.

90 Speth R (2010) "Das Bezugssystem Politik - Lobby – Öffentlichkeit" 19 *APuZ* 9-15 at 9.

professionalised, as a new generation of lobbyists, comprised of public affairs agencies, lobbying consultancies and the like, has blossomed. Certainly, the register "does not cover companies and law firms which often are the most active and well-financed lobbying actors".[91] The point is that the current lobbying register is far too restricted to have any serious regulatory impact upon the thousands of private lobbyists who are known to operate in Berlin alone.[92] As Ulrich Muller of *LobbyControl* declares, the current register of *Verbände* is "from the 1970s and hopelessly outdated".[93]

Furthermore, Rule 4 of Annex 2 to the Rules of Procedure of the *Bundestag* contains an escape clause which provides that formal registration does not confer on the lobbyist any right to a *Hausausweis* or to a hearing in either the *Bundestag* or the ministries. What is more, the *Bundestag* has the power to call for informational input from or grant hearings to unregistered persons during the law-making process.

> Registration does not entitle a group to special treatment, nor to be consulted at parliamentary hearings. The *Bundestag* may unilaterally declare an entry pass invalid, and the *Bundestag* and its committees may invite associations or experts who do not appear on the register to their meetings where they consider it necessary.[94]

The German registration system thus is confounded by a curious contradiction, which can disadvantage the compliant while advantaging the non-compliant.

> On the one hand, groups who register have no entitlement to be heard, while on the other, groups who have not registered simply have to be invited by the *Bundestag* in order to get a hearing.[95]

The German regulatory regime, then, offers little by way of secure incentive to those lobbyists who register, while doing nothing to discourage those who do not.

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91 Berg J & Fagan C (2012) "Lobbying in the European Union: Levelling the Playing Field" *Transparency International Regional Policy Paper #3* at 2.

92 See Kinkartz S (25 June 2013) "Lobbyists wield too much power in Berlin" *Deutsche Welle*, available at http://www.dw.com/en/lobbyists-wield-too-much-power-in-berlin/a-16907908 (visited 8 June 2017).

93 Cited in Kinkartz (25 June 2013).

94 Lehmann W & Bosche L (2003) "Lobbying in the European Union: Current Rules and Practices" *European Parliament* at 47. See also Malone (2004) at 13.

95 Chari R & Murphy G (2006) "Examining and Assessing the Regulation of Lobbyists in Canada, the USA, the EU institutions and Germany: A Report for the Department of the Environment, Heritage and Local Government" at 55, available at http://www.environ.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Administration/FileDownLoad,14572,en.pdf (visited 8 June 2017).

The lobbying register has been taxed also for being deficient in respect of its informational requirements. The concern is that the prescribed registration information is too general and does not promote transparency.[96] Ninua observes that it:

> does not include any financial information, information on who is participating in lobbying on behalf of an association, or on what issues the organisation lobbies.[97]

The point is that the disclosure requirements contained in Rule 2 of Annex 2 to the Rules of Procedure of the *Bundestag* are insufficient for regulatory purposes, especially as regards the funding of the registrants. There is "no requirement to provide any financial information".[98] Critics consider that the registration information ought to be more detailed in order to provide proper insight into the activities, finances and connections of lobbyists.[99] It well may be that non-transparent registration requirements impede proper regulation and encourage non-transparent forms of lobbying.

Arguably, the problems besetting the regulation of lobbying in Germany may be ascribed to the fact that the lobbying register is entirely voluntary.[100] Lobbyists may elect to register or not, but "registration confers no special status or privileges".[101] It hardly is surprising, therefore, that lobbyists have demonstrated no especial proclivity to register. The possibility, even the probability, of obtaining access to the legislative chambers and law-making process has not been sufficient incentive to encourage registration. As there are no guaranteed perks accompanying registration, so there are no threats of sanctions accompanying non-registration. "The public register lacks any legal force",[102] rendering it effete as an instrument of regulation. What is more, it is accepted that "not being on the register is no real barrier to being in contact with

96 Zerfaß, Bentele & von Oehsen (2009) at 32.

97 *Transparency International* (2012) "Best Practices in Regulation of Lobbying Activities" at 4, available at http://www.transparency.org/files/content/corruptionqas/Best_practices_in_regulating_lobbying_activities.pdf (visited 8 June 2017).

98 Chari & Murphy (2006) at 8.

99 See Sebaldt M (2007) "Strukturen des Lobbying: Deutschland und die USA im Vergleich" in Kleinfeld R, Zimmer A & Willems U (eds) *Lobbying: Strukturen, Akteure, Strategien* Wiesbaden: VS Verlag für Sozialwissenschaften at 109.

100 See Berg & Fagan (2012) at 2; *Transparency International* (2012) at 4; Kinkartz (25 June 2013).

101 Malone (2004) at 13.

102 Malone (2004) at 13.

parliamentary committees or members of the *Bundestag*".[103] All in all, then, an election by a lobbyist not to register entails no negative consequences of any significance. Indeed, given the ease with which an unregistered lobbyist may obtain the supposed benefits of registration, non-registration may be more attractive in practice.

Of course, the current constitution of the register, limited as it is to *Verbände*, itself stands as an impediment to any sort of comprehensive regulation through registration. It is this historical curiosity which no doubt informs *LobbyControl's* proposition that Germany lacks a lobbying register proper.[104] A lobbying register that is both voluntary and severely straitened probably does not deserve the appellation. It is at best a *faux* register "lacking the strength to effectively capture all lobbying activity".[105] Unsurprisingly, therefore, *LobbyControl* and its kindred organisations have been united in their advocacy for a mandatory register of all lobbyists in Germany (and Europe).[106] The accoutrements of such a mandatory register would include a wide definition of lobbyists to encompass all the practitioners operating outside the *Verbände* and rigorous disclosure requirements, especially in respect of finance, clients and lobby issues.[107] The hope, no doubt, is that thorough regulation of the lobbying industry will keep it on the straight and narrow, and prevent the excesses which routinely have scandalised lobbying in Germany.

5.2 Regulation of lobbying in the USA

The prospects of German success are appreciated best in relation to the situation in the USA which, as in most matters pertaining to lobbying, is the exemplar here. Its attempts to regulate lobbying are encapsulated in the Lobbying Disclosure Act of 1995 (LDA). The LDA seeks, *inter alia*, to control:

> the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government.[108]

Section 4(a)(1) of the LDA requires lobbyists to register with the Secretary of the Senate and the Clerk of the House of Representatives within 45 days of commencing business. Such registration must disclose relatively exhaustive information about the

103 Chari, Murphy & Hogan (2007) at 423. See also Malone (2004) at 13.
104 See Kinkartz (25 June 2013).
105 *Transparency International* (2012) at 4.
106 See Kinkartz (25 June 2013), Berg & Fagan (2012) at 3; *Transparency International* (2012) at 1.
107 See Berg & Fagan (2012) at 3; *Transparency International* (2012) at 4-5.
108 Section 2(1) of the LDA.

lobbyists themselves, their clients and the business activities of both.[109] Lobby firms must register each client individually. However, a client need not be registered if the lobbyist's income from that client does not, and is not expected to, exceed $3 000 per quarter. A lobby firm is exempted from registering itself if its expenses on lobbying activities does not, and is not expected to, exceed $12 500 per quarter.[110] Otherwise, registration and its attendant disclosures are mandatory.

Furthermore, all registered lobbyists are required to file quarterly reports on their activities with the Secretary of the Senate and the Clerk of the House of Representatives. Such reports must be filed within 20 days of the end of each quarter.[111] Section 7 of the LDA provides sanctions for non-compliance with the registration requirements: for intentional non-compliance, section 7(a) prescribes a maximum civil fine of $200 000; for intentional and corrupt non-compliance, section 7(b) specifies a maximum term of imprisonment of five years or a fine under Title 18 of the United States Code[112] or both.

The USA is indisputably in the van of lobbying regulation. Certainly, the regulatory system created by the LDA is both ambitious and comprehensive. Were its provisions to be observed diligently and implemented fully, lobbying indeed would become an instrument of democracy. However, the US regulations have not succeeded in creating a level political playing field for lobbying. In other words, the LDA has not reduced markedly the power of many "insider" interests or increased the effectiveness of "outsider" interests.[113] Business continues to enjoy better contact opportunities with politicians than, for instance, NGOs and corporate interests continue to exert a decisive influence upon policy- and law-making processes. There thus is serious enforcement deficit as regards the regulatory purport of the LDA.

What is more, lobbyists in the USA increasingly have embraced the so-called shadow lobby complex in order to evade the regulatory reach of the LDA. Shadow lobbying is a form of underground lobbying conducted by unregistered lobbyists who operate beyond the ambit of the official regulatory system. Unsurprisingly, the rise of

109 Registration details are specified in section 4(b)(1)-(6) of the LDA.
110 See section 4 of the LDA Guidance (2008).
111 Section 5(a) of the LDA. See section 5(b)(1)-(6) of the LDA for the information to be included in the reports.
112 The maximum fines range from $10 000 for an infraction, through $200 000 for a Class A misdemeanor not resulting in death, to $500 000 for a felony.
113 Malone (2004) at 22; Sebaldt (2007) at 108.

the shadow lobby complex has coincided with the contraction of the LDA's lobbying registration system.[114] As Fang puts it:

> On paper, the lobbying industry is quickly disappearing. In January [2014], records indicated that for a third straight year, overall spending on lobbying decreased. Lobbyists themselves continue to deregister. In 2013, the number of registered lobbyists dipped to 12 281, the lowest number on file since 2002. But experts say lobbying isn't dying; instead, it's simply going underground.[115]

According to figures quoted by Fang, there in fact are approximately 100 000 working lobbyists, a number far in excess those on the official registration database. Also, whereas official figures put the annual amount spent on lobbying at $3,2 billion in 2013, the actual figure surpasses $9 billion.[116] It ought to be noted, however, that descriptors such as shadow and underground lobbying do not imply that the bulk of lobbying now takes place surreptitiously, in the nooks and crannies of the corridors of power. On the contrary, the new *corps* of "nonlobbying lobbyists" in the USA operates openly and with impunity, earning millions of dollars annually.[117] The shadow lobby complex thus is not about hiding from the regulatory regime of the LDA; it is about rendering that regime impotent and hence irrelevant.

The problem of enforcement deficit which plagues the LDA is acknowledged by the US Attorney's Office for Washington, DC which "has never prosecuted anyone for failing to register or for deregistering while continuing to lobby".[118] The same applies to the US Justice Department which reportedly lacks the resources and political will to confront transgressions of the shadow lobby complex.[119] The point is that the country with the most advanced lobbying regulatory regime in the world patently is unable to regulate the activities of the vast majority of its lobbyists. The lobbying register which is meant to be the centrepiece of the regulatory regime has failed rather miserably as an instrument of identification and control, with most lobbyists working freely and lucratively outside the registration system. All in all, lobbyists in the USA appear to be

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114 Deregistration is possible in terms of section 4(d) of the LDA: "A registrant who after registration — (1) is no longer employed or retained by a client to conduct lobbying activities, and (2) does not anticipate any additional lobbying activities for such client, may so notify the Secretary of the Senate and the Clerk of the House of Representatives and terminate its registration."

115 Fang L (2014) "The Shadow Lobbying Complex" *The Investigative Fund* 1-12 at 3, available at http://www.theinvestigativefund.org/dialogs/print/?id=1929 (visited 8 June 2017).

116 Fang (2014) at 3.

117 Fang (2014) at 3-4.

118 Fang (2014) at 5.

119 See Fang (2014) at 5.

as ungovernable as they are untouchable, and the ideal of the registered, law-abiding lobbyist has yielded to the reality of the unregistered lobbyist who is untroubled by the strictures of the LDA. In this regard, enforcement deficit amounts to democratic deficit.

The failure of the US regulatory regime does not bode well for Germany. Even if Germany were to introduce mandatory registration for all lobbyists, the chances of bringing the lobbying industry under control are not favourable, if the shenanigans of lobbyists in the USA to circumvent regulation are anything to go by. As Chari, Murphy & Hogan admonish:

> even in highly regulated systems, if there is a 'will' there is always a 'way' of undermining the regulations.[120]

Certainly, there is no evidence to suggest that a rigorous German regulatory regime will succeed where the US efforts have foundered so conspicuously. To be sure, mandatory registration and detailed disclosure may bring some semblance of restraint to non-transparent lobbying in Germany. However, it must be acknowledged also that:

> lobbying legislation is no panacea: if lobbyists and politicians desire to pursue corrupt activities, no piece of legislation will prevent them from so doing.[121]

The question thus remains: how to deal with lobbyists who flout regulations in the pursuit of corporate agendas and at the expense of democratic transparency? The possibility of criminalisation is considered below.

5.3 Lobbying and corruption as criminal homologues

Despite the common-sense temptation to denounce lobbying as a variant of corruption, it must be conceded at the outset that such an equation would not withstand even cursory analytical scrutiny. Certain lobbyists will cross the line and seek to achieve their objectives by way of corrupt dealings. In such cases, lobbying indeed does become a form of corruption and may be treated as such.

Of course, most lobbying does not transmute into corruption so patently. Still, there does appear to be some sort of relationship between lobbying and corruption, given that the former is located often on threshold of the latter. Non-transparent lobbying, in particular, if not a form of corruption *per se*, seems to be entrenched within the penumbra of corruption. Certainly, all the instances of non-transparent

120 Chari, Murphy & Hogan (2007) at 433.
121 Chari, Murphy & Hogan (2007) at 433.

lobbying discussed above reek of corruption. And it would be wilful blindness not to comprehend as unequivocally wrong the conduct of Gerhard Schröder in the Baltic Sea Gas Pipe affair, of Eckart von Klaeden in becoming the chief lobbyist for Daimler AG, and of Angela Merkel in the CO_2 emissions controversy. The aim of this section is to consider non-transparent lobbying as a homologue of corruption. Specifically, it is concerned to explore the proposition that the underworld of corporate lobbying is so affined to corruption that the activities which it encompasses ought to be designated criminal also.

There is a generalised social consensus that corruption is immoral,[122] and the notion that corruption violates our precepts of justice and fairness has gained global traction. The international anti-corruption concord embraces the premise that corruption is wrong whenever, however and wherever it occurs, and the idea that it is a moral abhorrence is a constituent aspect of contemporary anti-corruption discourse. And, needless to say, its perceived immorality fuelled its universal condemnation as a crime. Lobbying in its non-transparent forms occupies the same moral low ground as corruption. Jumping the queue, scurrying into the revolving door and capturing lobby niches all deserve the same moral opprobrium as we routinely heap on corruption. If nothing else, the behaviour of the Gerhard Schröders, the Eckart von Klaedens and the Angela Merkels suggests that non-transparent lobbying and corruption may be taken as ethical equivalents. Thus, there seems to be no good reason why the former should not be criminalised with the same resolve that the latter has been.

There is also widespread agreement that corruption is anti-democratic. The western world embraces democracy as its basic political culture, and we object to corruption because it undermines democracy and its constitutional appurtenances, such as the rule of law, good governance and human rights.[123] Put briefly, corruption is a crime because it is anathema to the democratic frame of mind. Lobbying often is presented by its proponents as a democratic benediction of sorts, helping to provide the choices needed to make democracy work. However, the argument from democracy is rendered effete in the post-democratic context, in which lobbyists representing corporate interests constitute an integral ingredient of the ruling circle. Post-

122 Ocheje PD (2011) "When Law Fails: A Theory of Self-Enforcing Anti-Corruption Legislation in Africa" 4 *The Law and Development Review* 238-280 at 262; Cleveland M *et al* (2009) "Trends in the International Fight against Bribery and Corruption" 90 *Journal of Business Ethics* 199–244 at 201.

123 See Cleveland *et al* (2009) at 201.

democratic theory posits a descent into a stripped down democracy, which has been encouraged in no small part by the supposedly democratic activities of lobbyists. From this perspective, lobbying, especially in its non-transparent aspect, is decidedly anti-democratic. Like corruption, it too ought to be abhorrent to the democratic frame of mind. Again, if we do not hesitate to criminalise corruption, why should we not condemn non-transparent lobbying as criminal also?

In anti-corruption discourse, it is an article of faith that corruption is a socio-economic scourge. It is accepted that corruption hinders trade and investment, distorts markets and undermines economic growth.[124] In corrupt conditions, social wealth becomes fair game for private predators, and money intended for welfare services becomes a source of personal enrichment for rent-seekers. Corruption thus increases socio-economic inequality and poverty, as it spirits away public resources into private pockets. In a word, corruption is an impediment to development. Nobody has argued yet that the socio-economic consequences of lobbying approach those of corruption. Certainly, it would be problematic to sustain an argument that lobbying *per se* inhibits development. However, it should not be assumed, therefore, that the socio-economic consequences of lobbying are negligible.

The transition to post-democracy entrains an incestuous relationship between government and corporations. The latter enjoy unprecedented access to the institutions of political power and have a major say in the formulation of social and economic policy. The problem, of course, is that corporate interests are fundamentally sectional, whereas social and economic policy is supposed to express the general interest. This paradox generates a post-democratic *simulacrum*, which sees the sectional being re-presented as the general while the general is being sacrificed at the altar of the sectional. The upshot is a skewed form of development, one which foregrounds the economic health of the corporation at the expense of the socio-economic well-being of the citizenry. The point is that in post-democratic conditions any coincidence between the interests of business and society is entirely contingent, and more often than not the interests of business will prevail. It is in this context that non-transparent lobbying may be reproached as an impediment to development, if development is concerned with enhancing the socio-economic welfare of the populace as a whole. Again, the intersection between corruption and non-transparent lobbying

124 Hess D (2009) "Corruption in the value chain: private-to-private and private-to-public corruption" in Transparency International *Global Corruption Report: Corruption and the Private Sector* Cambridge: Cambridge University Press at 20.

is hard to ignore. And if the developmental debilitations of corruption played a significant role in its criminalisation, then the socio-economic deviations of non-transparent lobbying ought to recommend its criminalisation too.

Non-transparent lobbying is a homologue of corruption. The first approximates the second substantially and sufficiently enough to sustain the proposition that the criminalisation of the second justifies the criminalisation of the first. The idea that corruption is a crime is a settled tenet of the ethical constitution of contemporary society. Lobbying has not suffered the same fate as corruption yet. However, it is a central tenet of this essay that non-transparent lobbying in all its forms ought to be fated thus. Whereas the economic constitution of our globalised world precludes the outright criminalisation of all lobbying, our moral imperatives require that lobbying in its non-transparent aspect be censured in criminal terms.

5.4 An historical excursus

Despite its reputation as the historical home of lobbying, during the nineteenth century the USA was opposed quite stridently to its premises and practices. Many state legislatures criminalised lobbying and the courts routinely struck down lobbying contracts as contrary to public policy.[125] Legislators and judges were imbued with a strong moral objection to lobbying, considering it "the gateway to bribery".[126] The lobbyist was castigated as a corruptor of civic virtue and a subverter of the moral fabric of society. In *Marshall v Baltimore and Ohio Railroad Company*, Justice Grier declared that:

> Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.[127]

125 See Teachout (2014) at 144-169.
126 Teachout (2014) at 166.
127 *Marshall v Baltimore and Ohio Railroad Company* 57 US 314 (1853) para 117.

He continued uncompromisingly:

> Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors ... The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact *corps* of venal solicitors, vending their secret influences, will infest the capital of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome—'*omne Romae venale'*.[128]

Justice Grier's condemnation of lobbying as the source corruption infesting the body politic was not exceptional for the times. It appears that lobbyists generally were denounced as *persona non grata* and their goings on as unethical and unscrupulous.

Needless to say, the deceits and frauds practised by lobbyists fuelled the opposition from legislatures and courts. However, this opposition did not stop at non-transparent or "underhanded lobbying".[129] Lobbying itself, in any form, was repudiated as the vector of corruption. In *Trist v Child*, the lobby contract was completely transparent, without a hint of secrecy or slyness. Yet the court had no hesitation declaring it a violation of public policy. According to Justice Swayne:

> The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.[130]

The case concerned an old man who had contracted a lawyer to lobby for payment of a debt owed him by Congress. Justice Swayne saw in this contract between individuals the harbinger of a world of corrupt corporate lobbying:

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128 *Marshall v Baltimore and Ohio Railroad Company* 57 US 314 (1853) para 119-120.
129 Teachout (2014) at 155.
130 *Trist v Child* 88 US 441 (1874) para 27.

> If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.[131]

The USA then was not a lobby-friendly environment by any means. Indeed, it was patently hostile to lobbying and its perceived perils. Lawmakers and judges, animated by the ideals of republicanism and the precepts of anti-corporatism, readily linked lobbying *per se* to general moral decay and would have no truck with it, in whatever form. In that environment, it was not unusual for lobbying to be outlawed altogether.[132]

The contemporary world is much more hospitable to lobbying and currently lobbyists go about their business with full confidence in the legality of their contractual arrangements. Regrettably, as feared by our forebears, anti-democratic underhandedness has become inscribed in the constitution of lobbying. At least, however, the argument for outlawing non-transparent lobbying today can claim an unimpeachable provenance in the birthplace of lobbying itself.

6 CONCLUSION

Proponents of lobbying continue to defend its democratic pretensions. This essay has attempted to excavate the anti-democratic impulse of lobbying, especially in its non-transparent version. The fall of democracy and the rise of post-democracy, in combination, have exploded every democratic claim of lobbying. The post-democratic turn entailed not only the emasculation of democracy but also the colonisation of the public by the private. This has encouraged the normalisation of non-transparent lobbying, as powerful corporations install themselves in the political heartland, beyond public scrutiny.

The problem with lobbying, then, is not the flagrantly corrupt shenanigans of Casino Jack and his ilk. Rather, it is the impunity with which corporate lobbyists, with easy access to the political elite, can rubbish the ideal of democratic transparency inscribed in lobbying regulations and prevail upon policymakers in brazenly anti-

131 *Trist v Child* 88 US 441 (1874) para 28.

132 For example, in 1877 the US state of Georgia declared lobbying a crime punishable by a maximum of five years' imprisonment. California, too, damned lobbying as a felony. See Teachout (2014) at 146-148 & 166.

democratic settings. Post-democracy and non-transparent lobbying are natural bedfellows, forming a compact which more and tighter regulation of lobbying is unlikely to sunder. The point is that post-democratic conditions do not foster a regulatory solution to the problem of non-transparent lobbying, as the vast shadow lobby complex in the US attests. Indeed, post-democratic conditions operate to subvert such a solution.

In the result, criminalisation well may be the only way to defend society against the anti-democratic ravages of non-transparent lobbying. Indeed, there is no good reason why this form of lobbying, given the magnitude of the harm it perpetrates upon body politic, ought not to be considered criminal, as an offence against the public good. And if corruption and non-transparent lobbying are homologous as regards their moral decadence, their assault upon democracy and their shackling of development, then the outlawing of corruption ought to prefigure the outlawing of non-transparent lobbying.