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Edited by Hannah Quirk, Toby Seddon and Graham Smith

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## 1

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## Regulation and criminal justice: exploring the connections and disconnections

GRAHAM SMITH, TOBY SEDDON AND HANNAH QUIRK

This book explores the relationship between regulation and criminal justice. It comprises a selection of papers presented to an international seminar series hosted by the School of Law, University of Manchester, UK, between November 2007 and February 2009.<sup>1</sup> The majority of seminar participants were criminologists and interdisciplinary scholars involved in research across a range of criminal justice fields, invited to engage in a ‘long conversation’ with several regulation scholars and practitioners. One of the strengths of interdisciplinary discourse is the cross-fertilization of ideas between specialisms that facilitates comparative study and knowledge transfer. Socio-legal research and analysis, in explanatory and normative forms, has played a crucial part in the recent development of regulation (Morgan and Yeung 2007) and criminal justice (Sanders *et al.* 2010) as distinct areas of scholarship. But, as we will see, the two areas do share some common heritage, and so it is not surprising that connections have been established – most persuasively in the fields of policing (Ayling *et al.* 2009; Johnston and Shearing 2003) and restorative justice as an alternative to penal orthodoxy (Braithwaite 2002).

Grabosky (see Chapter 4, this book) describes regulation as a ‘mansion with many rooms’, an image that captures its scope, multifaceted character and conceptual diversity. Contemporary regulation discourse is rooted in public sector innovation dating back some three decades, which led to the transformation of governance in, and between, democratic polities regionally and globally (Levi-Faur 2005; Majone 1996). Keeping abreast

<sup>1</sup> Entitled ‘Regulation and Criminal Justice: Developing a New Framework for Research and Policy Development’, the Economic and Social Research Council-funded series was organized by the three co-editors, Kevin Brown and Andrew Sanders, to whom, with Phil Edwards (2008), we are grateful for their contributions to this chapter. In addition to the chapters in this collection, seminar papers have been published in regulation and criminology journals (Crawford 2009; Smith 2009; Tombs and Whyte 2009).

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of the rapidly developing policy terrain scholars have theorized on the opening up of regulatory spaces (Hancher and Moran 1989; Scott 2001), (new) regulatory and post-regulatory states (Moran 2002; Parker and Braithwaite 2003; Scott 2004; Sunstein 1993) and regulatory capitalism (Braithwaite 2008; Levi-Faur 2005). Research has sought to understand and inform practice in analyses of governing from a distance (Osborne and Gaebler 1992), responsive regulation (Ayres and Braithwaite 1992), risk regulation regimes (Hood *et al.* 2001), decentred or polycentric regulation (Black 2002), problem-solving (Sparrow 2002) and regulation of regulation, or meta-regulation (Grabosky 1995).

Among this wealth of scholarly enterprise many definitions have been crafted. For Braithwaite, 'steering the flow of events' (2008: 1) suffices in an endeavour to portray regulation's vast reach and the growth of 'regulatory capitalism'. Moran adopts a similarly straightforward approach, 'to govern in the sense of balancing a system' (2002: 5) like the regulator in a steam engine. Developing a law-and-economics approach, Ogus (see Chapter 2, this book), limits its meaning to public governance, which is characterized by state intervention in markets to override individual preferences and private governance in order to address what are perceived to be undesirable outcomes. Black also adopts a purposive approach but, in contrast to Ogus, she conceives regulation to be decentred and not restricted to state activity. Thus, 'regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly defined outcome or outcomes' (Black 2002: 26; see also Shearing and Froestad's treatment of polycentric governance, Chapter 5, this book). In her examination of techniques available to regulators to secure compliance with Australian competition law, Yeung draws on Ogus and Black to conceptualize regulation as 'the sustained and focussed attempt by the state to alter behaviour thought to be of value to the community' (2004: 5). Clarifying her standpoint Yeung accepts the important part that non-state actors play in regulation, but declares there is no space for them in her definition because she is investigating the role of public regulators. Her reason for restricting the type of behaviour that is subject to regulation, as that which is thought to be of value to the community, is because if it were not, it would be subject to punishment and censure by criminal sanction.

Criminal justice research is also a relative newcomer to the academy.<sup>2</sup> Devoted to study of the criminal process it does not boast the same

<sup>2</sup> Until recently it was customary to refer separately to the administration of justice, criminal law or criminal procedure, as typified by the title of Sir Leon Radzinowicz's five-volume

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intersectoral credentials as regulation, which partly explains the poverty of criminal justice theory.<sup>3</sup> In their attempts to contextualize criminal law and explain innovation in the criminal justice system scholars have tended to rely on normative models (Ashworth and Redmayne 2005; Packer 1968; Sanders, Chapter 3, this book). There are signs that the reluctance to define criminal justice is changing, arguably as a result of the emergence of regulation as an alternative control system which challenges conventional criminal justice practice and ideas. The development of regulation as a governing force is sharpening its relief with substantive and procedural criminal law and focusing the minds of criminal justice scholars to think more about what criminal justice is (Zedner 2004), what it is not, and how it is different to regulation. Thus, in their examination of recent criminal justice reform in England and Wales, Ashworth and Zedner present a liberal conception of criminal justice ‘that emphasises both the purpose of the criminal law in providing for censure and punishment and the need to respect the autonomy and dignity of individuals in the criminal process’ (2008: 22). Analysing the UK government’s reliance on regulatory tools in its antisocial behaviour agenda, Crawford (2009)<sup>4</sup> stops short of offering a definition of criminal justice. In arguing that regulation language has intruded upon criminal justice practice, however, he outlines core elements of criminal justice. These include ‘command-and-control-style rule’, ‘[u]niform standards and universal principles’ and ‘re-ordering and accounting for past conduct’ (Crawford 2009: 813–14). Sanders (Chapter 3, this book, and see more below) goes one step further and, although qualifying his definition by restricting its reach to the purpose at hand, broadly conceives of criminal justice as ‘legal state coercion that is determinable in the criminal courts’.

The aim of the Manchester seminars was to examine the nexus between regulation and criminal justice with a view to developing a new framework for research and policy development. We wanted, above all, to explore how regulatory scholarship from other fields might inform our understanding of contemporary criminal justice developments. There appeared to us to be some new policy directions in the field for which

*History of English Criminal Law and Its Administration* (1948–86). Sanders and Young wrote the first textbook on criminal justice in England and Wales, in 1994, now in its fourth edition.

<sup>3</sup> The exception here is the end point of the criminal justice process, punishment, which has been the subject of extensive theorising, both normative and explanatory, for a very long time. See Garland (1990) and Duff and Garland (1994).

<sup>4</sup> A participant in the Manchester seminar series, Adam Crawford presented an earlier draft of this chapter to the first seminar.

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the application of more conventional criminal justice approaches was of only limited usefulness. We were interested in exploring the extent to which cross-cutting perspectives may help to advance knowledge and thinking about policy. It is apparent that the connections between these two social control systems extend beyond policing and restorative justice. For example, the criminal sanction is one of several regulatory interventions intended to modify behaviour; criminal justice operates as a regulatory regime that may influence behaviour whether or not a sanction is issued; and the organizations that make up the criminal justice system are subject to regulation. Moreover, the introduction in England and Wales of hybrid interventions, which combine civil orders and criminal penalties, most particularly the Anti-Social Behaviour Order (ASBO) and the Control Order for the purpose of regulating antisocial behaviour and terrorist risk, respectively, point to overlapping regulatory and criminal justice practices. On closer inspection, however, it is also evident that there is much in principle and practice to distinguish regulation and criminal justice, and disconnections were repeatedly articulated in seminar discussions. Connections or disconnections are made depending on how regulation and criminal justice are conceptualized, the nature of the issue problematized and whether analysis is explanatory or normative. In consequence, the relationship between regulation and criminal justice is characterized by blurred and uncertain boundaries. The distinction, for example, between conduct that is controlled by regulatory measures and that which is subject to the criminal law, often appears unclear or even arbitrary. Yet it is a distinction which is frequently accepted as the basis for much scholarship and policy-making.

In the first of the four seminars, we focused on the idea of criminal justice, attempting to specify its parameters and boundaries, as a prelude to looking at its relationship with regulation. In fact, discussions about concepts and definitions continued throughout the series and the chapters in Part I of this book, by Ogus (Chapter 2), Sanders (Chapter 3) and Grabosky (Chapter 4) are products of this debate.

Several important perspectives in regulatory, socio-legal and criminological scholarship can be understood as extended efforts to transcend the divide between regulation and criminal justice. Founded on the seminal contributions of Richard Posner, Gary Becker and others, the law-and-economics movement that emerged in the USA in the late 1950s is a major regulation perspective. Influential on both sides of the Atlantic and elsewhere it seeks to provide a framework which can be applied in diverse fields that sweep across the boundaries of regulation and criminal

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justice. The founding principle of law and economics is the Benthamite notion that ‘people are rational maximizers of their satisfactions’ (Posner 1983: 1) who weigh up costs and benefits before taking decisions about how to act. The central insight of the approach is that this is true not only when people engage in markets but more broadly in other areas and activities of life. As Becker puts it:

I have come to the position that the economic approach is a comprehensive one that is applicable to all human behavior, be it behavior involving money prices or imputed shadow prices, repeated or infrequent decisions, large or minor decisions, emotional or mechanical ends.

(1976: 8)

A key moment in this literature is Becker’s famous paper published in 1968, in which he applies an economic approach to the problem of crime and criminal justice. He defines ‘crime’ very broadly in this paper, including ‘not just felonies – like murder, robbery, and assault [...] but also tax evasion, the so-called white-collar crimes, and traffic and other violations’ (1968: 170). Becker’s economic model sets out the impact of enforcement actions and punishment on motivations to offend:

There is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities, the frequency of nuisance arrests, and his willingness to commit an illegal act.

(1968: 177)

This model provides a generic method for determining the most efficient and effective strategy for securing compliance with rules and standards concerning human behaviour – a model, in other words, for optimizing enforcement. Expressed in this way, it is an analytical perspective which can potentially cut across the boundaries of regulation and criminal justice.

Law-and-economics proponent Anthony Ogus examines the relationship between regulation and criminal justice, Chapter 2 of this book. Cost–benefit analysis rests at the heart of what he describes as a continuum between ‘mainstream criminal law offences’ and ‘regulatory offences’ and in the proposition that mainstream criminal offences – against the person, property, public order – are more appropriately regulated by criminal justice; and regulatory offences by compliance strategies and administrative or civil interventions. Excepting, of course, where the seriousness of the offence committed requires criminal sanction. In accordance with the economic theory of deterrence, as the object of enforcement is to modify behaviour,

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it follows that it should be practised optimally in a way that involves minimum cost and produces maximum benefit. Based on the assumption that regulatory offences are committed in furtherance of activity which is of value to the community, high administrative and error costs and welfare losses (reduced activity as a precaution against the risk of prosecution) associated with criminal proceedings, renders criminal justice deterrence ineffective relative to less costly regulatory enforcement. Standard criminal behaviour does not generate significant social value and, without the need to offset administrative and error costs against welfare losses, the same calculus does not apply when controlled by criminal justice.

Thus, for Ogus, a standard formula that calculates the utility of different methods of enforcement for different types of offence connects regulation and criminal justice. However, in making the connection, law-and-economics deterrence principles simultaneously disconnect regulation and criminal justice in the separating out of regulatory from criminal offences to justify the imposition of different enforcement interventions. For some, including Sanders and Whyte in their contributions to this book (Chapters 3 and 7, respectively) a consequence of this disconnection may be inequitable distribution of sanctions commensurate with the power, wealth and status of the offender.

Socio-legal criminal justice scholar, Andrew Sanders, offers an expansive definition of criminal justice, Chapter 3 of this book, which encompasses criminal and regulatory offences and enforcement techniques under the rubric of criminal justice, consistent with a toolkit approach. His objective is to develop a normative argument in support of the 'freedom model' he has collaboratively developed (Sanders and Young 2000; Sanders *et al.* 2010). For Sanders, regulation and criminal justice are connected by innovation in both fields and he sets out to establish some ground rules for how their respective goals and principles, some of which conflict, should be prioritized. Adopting a polemical style, he is critical of the failure of human rights, currently considered the dominant normative approach to criminal justice, to balance competing human rights adequately and maintains that their goal-setting capacity is limited. After Gearty (2006), his concern is that human rights cannot usurp democratic politics and serve as the basis for positive law. Addressing the apparent conflict between compliance and punishment approaches, cornerstones of regulation and criminal justice, respectively, he reminds us they are not goals, and concludes in favour of an integrated strategy to offending *per se*. Although he rejects Ogus's analysis restricting regulatory interventions to regulatory offences, Sanders accepts his argument on the

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cost-effectiveness of compliance, and extends it in his freedom perspective beyond the realms of regulation and criminal justice. With the assertion that 'criminal justice is a matter of social justice' he points out that effective resource allocation in criminal justice has positive consequences for other public services. Thus, state intervention, whether in regulation or criminal justice form, should only be exercised if the net effect is to enhance freedom. This may mean doing nothing if the activity contemplated, stop and search for example, is ineffective in the prevention or detection of crime and interferes with individuals' human rights; the resources required could be reallocated for more effective use elsewhere.

Sanders attaches major importance to regulation theory in his chapter, the ideas of eminent criminologist turned regulation scholar John Braithwaite in particular. To Braithwaite and colleagues in the Regulatory Institutions Network (RegNet) at the Australian National University the study of regulation has emerged at the cutting edge of paradigmatic change in the social sciences (Braithwaite 2000). For Braithwaite the organization of disciplines around categorical referents like 'crime' or 'markets' no longer makes sense. Instead, work organized around theoretical themes like regulation has much greater scope for delivering advances in knowledge, advances which may cut across categories (Braithwaite 2005). In broadly defining regulation as all attempts to steer the flow of events, crime becomes simply another regulatory problem and the apparent divide between regulation and criminal justice largely disappears. One of the 'big ideas' of the RegNet School – responsive regulation and the regulatory pyramid (Ayres and Braithwaite 1992; Braithwaite 2002; Grabosky, Chapter 4, this book) – illustrates this nicely. Developed and refined over the course of more than twenty-five years, it has been the focus of empirical research in diverse fields, from corporate crime to coal mine safety, tax evasion to youth offending. Empirical work in one field has shed light on research in others. It has been a site for genuine cross-boundary and cross-disciplinary conversations, facilitated through the deployment of the cross-cutting theme of regulation. And it is conversations of this kind which have proved more fruitful in terms of advancing knowledge and developing practice, rather than work located more conventionally within single disciplines.

In Chapter 4 Peter Grabosky, RegNet scholar in regulation and criminal justice, examines criminal justice as an instrument of regulation. His main point, in keeping with regulation orthodoxy, is that in comparison to the more informal tools preferred by regulators the *criminal process* is slow, costly, unpredictable, ineffective and only used as a last resort.

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Grabosky's principal contribution to research and policy is to locate and expand on the role of third parties in regulation and criminal justice. Dissatisfied with the capacity of Braithwaite's pyramidal heuristic to capture the complexity of multi-agency arrangements, he illustrates<sup>5</sup> the value of a three-dimensional Regulatory Tetrahedron; of which, more in a moment. Turning his attention to regulation as an instrument of criminal justice, Grabosky relies on a broader conceptualization of criminal justice. He conceives it more as *crime control*, which facilitates inclusion of crime prevention strategies designed to inhibit crime and forestall the need to engage the criminal process. Again, major importance is attached to third parties and Grabosky focuses his attention on their role in an examination of the application of regulatory principles to the crime control process. These include, *inter alia*, conscripting third parties to assist with law enforcement or regulation, a duty to maintain and disclose records (facilitating self-regulation), the availability of incentives to encourage compliance and contracting out of functions. Like Sanders, Grabosky is mindful of the importance of cross-sectoral resource management and organically connects regulation and criminal justice. Conscious of several normative problems, damage to transparency and accountability in particular, he stresses the greater potential of regulation for effective and efficient control in contrast to Sanders's emphasis on the expansion of criminal justice.

Sanders also refers to a new cross-cutting approach connecting regulation and criminal justice developed from within criminology: the 'social harm' or zemiology perspective (Hillyard *et al.* 2005).<sup>6</sup> This starts from the view that not only is the category of 'crime' a social construction with no ontological reality, it is also a term that encompasses an extremely wide range of behaviours and acts. Consequently, it is unlikely that a single type of intervention in the form of criminal justice will be appropriate or effective. Zemiologists argue further that many serious harms either lie outside the ambit of the criminal law or else tend to be

<sup>5</sup> Literally. In the first Manchester seminar he wowed participants with an impressive Powerpoint presentation which included moving three-dimensional images of the Regulatory Tetrahedron!

<sup>6</sup> Paddy Hillyard responded to Sanders's paper in the first Manchester seminar. Charles Loft, Local Authorities Co-ordinator of Regulatory Services Policy Officer, triggered a fascinating discussion by outlining a practitioner's concerns with cost-benefit analysis; namely, problems quantifying incommensurable variables and the probability of erratic or misleading outcomes. Discussion quickly moved onto the advantages of principles-based approaches and the relative merits of 'freedom' and 'harm' as alternative – positive and negative – indices of social control.

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handled outside of it. Examples include workplace injuries, corporate crime and police violence. In this view, the conventional criminal justice or crime control approach is a failure which allows many serious dangers and harms to continue relatively unchecked while focusing unduly on relatively minor or petty acts simply because they are defined by the crime label. To address this, they propose abandoning the concept of crime and replacing it with the idea of social harm – and in the process abandoning criminology for the new discipline of zemiology. ‘Social harm’ is defined broadly to cover a range of potential harms to individuals: physical; financial/economic; emotional/psychological; sexual; cultural. They argue that this perspective would open up the possibilities for much wider investigations of responsibility for producing harms and for much broader and more ambitious social policy solutions. There is an obvious affinity worth noting here between zemiology and law and economics: the term ‘harm’ shares many characteristics with the economic notion of ‘cost’. Indeed, Becker’s (1968: 198) seminal article even raises the speculative idea that the criminal law might become a branch of the law of torts with the public collectively suing for ‘public harms’. There is also a connection with the regulation perspective. The zemiologists seek to build a new theoretical approach around the concept of social harm which can cut across existing boundaries, in much the same way as Braithwaite attempts in using the concept of regulation. Like regulation scholars, the zemiologists are not confined by conventional views on the limits of criminal justice or regulation. Indeed, they explicitly aim to break down barriers between them.

Returning to the definitions presented at the beginning of this introductory chapter, they help differentiate the three comparative approaches developed by Ogus, Sanders and Grabosky. Ogus adheres to a type of criminal justice definition similar to that of Ashworth and Zedner (2008), alongside his public governance conception of regulation. Sanders’s criminal justice as state-coercion approach is consistent with Yeung’s definition of regulation. Grabosky’s conceptualization of regulation compares to Black’s and he relies on a narrow definition of criminal justice in keeping with Ashworth and Zedner when considering it as an instrument of regulation, broadening this out to crime control when examining regulation as an instrument of criminal justice.

Different metaphors also feature in the comparative approaches presented here. Ogus and Sanders rely on a one-dimensional spectrum to illustrate the relationship between regulation and criminal justice. Grabosky presents a version of Braithwaite’s two-dimensional pyramid

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and develops his own three-dimensional tetrahedron.<sup>7</sup> Each metaphor facilitates analysis, explanatory and normative, of the appropriate regulatory or criminal justice intervention used or required to achieve a desired outcome or censure and punish wrongdoing. Interventions are located dimensionally or spatially in each metaphor, and normative assumptions may also be represented by movement along, up and down, or inside each heuristic. Ogus uses type of offence and intervention, whether regulatory or criminal justice, to distinguish between regulation and criminal justice. Location on the spectrum is by cost–benefit analysis, using social welfare as a key determinant, and movement in either direction is resource driven. Sanders uses the notion of freedom and whether it is enhanced or eroded by interventions that pre-empt or remedy wrongdoing of any description; the desired goal is the pursuit of freedom which is located at one end of the spectrum. In Braithwaite’s regulatory pyramid, degree of compliance combined with severity of intervention determines vertical location and frequency of application is represented horizontally. Responsiveness is portrayed by movement up and down, which is achievable by the escalation and de-escalation of interventions. Grabosky’s tetrahedron, which fully incorporates Braithwaite’s pyramid on one face, additionally portrays the relationship between regulatee and regulator. One face represents the regulatee individually and collectively, in the form of professional body or association for example, and depicts self-regulation; state regulation is represented on the second face (Braithwaite’s pyramid); and the contribution of third parties on the third. The contribution of different parties, compliance and severity pinpoints interventions inside the tetrahedron, which provides the heuristic with the capacity to measure collaborative-ness in addition to responsiveness.

In light of this brief discussion of definitions and metaphors, what account do these scholars offer for the condition of the criminal justice estate? This is not of significance for Ogus, as he does not trespass on criminal justice territory.<sup>8</sup> Neither does it particularly exercise Braithwaite – as already mentioned his regulation landscape includes criminal justice

<sup>7</sup> Sanders also finds the toolkit image helpful. An advantage of this metaphor is its flexibility and the degree of discretion it affords the decision-maker; it suggests addressing a problem by choosing a remedy from an unordered range of interventions. The problem remains, however (as Sanders points out), how does the decision-maker prioritize conflicting goals and principles and choose the right tool for the job?

<sup>8</sup> In challenging the appropriateness of regulation and criminal justice referents and championing social harm as an alternative, zemiologists also maintain a critical distance from this question.