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What is 'regulatory crime'? - An examination of academic, judicial and legislative concepts

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Summary

Regulatory Crime is a term that is often used to denote a group of criminal offences that are seen as less than truly criminal. These offences share certain similarities, and 'regulatory crime' can refer to a particular offence within this group. However, it is a notoriously elusive and difficult concept. This paper seeks to begin a critical engagement with the differing concepts adopted by academic lawyers, judges and legislators in England and Wales in an attempt to shed light on the different concepts that are adopted. We examine the different but linked use of the regulatory crime concept by each of these groups, in an attempt to discern both the sometimes similar, and sometimes different, tendencies that constitute the regulatory crime concept used within these groups and the factors that influence particular conceptualisations. We see that different groups use the regulatory crime concept in different ways, and conclude that the question of a single regulatory crime concept does not have an easy answer, and perhaps is intractable.

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Introduction

What is a regulatory crime? The term is often used in legal discourse, but there is not a shared understanding of what it means. This can lead to a lack of clarity in such discussions. In general the term is used to denote a group of criminal offences that share certain similarities or to refer to a particular offence within that group. But which offences fall within that group? What are the similarities that they share?

'Regulatory crime' is often used in opposition to 'real crime,' and associated with the growth of the regulatory state and the increasing use of criminal offences in circumstances outside the traditional boundaries of criminal law (Ashworth, 2000). However the term "carries with it an ambiguity," and its meaning cannot easily be discerned (Cowan and Marsh, 2001). 'Regulatory crime' has an 'I know it when I see it' quality.

A regulatory crime is neither a natural thing, nor a legal thing. The definition is not provided by statute, or by the world around us, but instead exists in the writings of academic, judges and legislators. This article seeks to examine the use of the concept by the groups in the search for a coherent meaning of 'regulatory crime,' in order that conversations about such crimes can take place on the basis of a shared understanding.

Law is created, enforced and interpreted by human beings. It is a social entity. This is true whether we are concerned with the prohibition of murder or the terms of a contract for the sale of goods. It also applies to the division of the global 'law' concept into subsidiary areas, for practical or pedagogical reasons. The RC concept is created by society. It has been employed for a reason, and its customary use has come about in a societal context as a result of societal needs.

Assessing the features of particular terminologies and discourses and analysing the competition for supremacy between different, competing, discourses is a mainstay of the study of society (Bryman, 2004; Fairclough, 2003). The study of opposed regulatory crime concepts is therefore necessary when considering the role played by 'regulatory crime' in legal society. How is regulatory crime separated from other types of crime? Why?

Questions of concepts, usages and identities have, in general, been subject to very little socio-legal investigation within the UK legal community. Therefore, the vexed questions of how and why the 'regulatory crime' concept is used have not yet been comprehensively investigated. McGrath has considered aspects of definition in Ireland (McGrath, 2010), but within the UK the matter is substantially explored.

This may be because, despite the fact that "classification of diverse, but related, phenomena… is in some sense a basic intellectual tool" (Horder, 2005), it is, according to Smith and Hogan, "unfashionable" to consider the ambit of a particular area of law, and the

concepts within that area (Ormerod, 2005). Writers are often put off from undertaking this task in relation to criminal law in general, and regulatory crime in particular, no doubt influenced by the difficulty of the task. Glanville Williams, discussing, *inter alia*, the meaning of the term "regulatory offences" has lamented that "the difficulty with trying to establish a category of this kind is to say exactly what it means" (Williams, 1983). This piece aims to take preliminary steps toward addressing this literature gap, examining academic, judicial and legislative conceptions of RC through a critical lens.

This article first examines the concepts adopted by academics and judges, and second considers how regulatory crime has been defined by legislators. By examining the different but linked use of the regulatory crime concept by each of these groups this article attempts to discern the similarities and differences between the concepts adopted and the factors that influence particular conceptualisations. The article concludes by suggesting that it may not be possible to draw up a shared regulatory crime concept from this examination, but makes tentative steps to suggest characteristics that underpin what academics, judges and legislators see as regulatory crime.

The Academic and Judicial Conception

When discussing Regulatory Crimes many academics adopt an approach that takes core, purportedly indisputable, regulatory crimes, such as health and safety offences, and uses them as case studies. The resulting analysis may then be applied, by implication, to some or all Regulatory Crimes (whatever they may be). This approach does not need to engage with the debates regarding the limits of the regulatory crime concept, meaning that borderline questions of whether certain offences are within the concept or not are rarely considered. This part seeks to redress this omission by examining academic writing and teases out the factors that are used to conceptualise Regulatory Crimes.

The Importance of Criminal Character

Foremost amongst the characteristics within the academic conception of Regulatory Crime is the criminal character of the act referred to by the concept, whether or not the conduct is followed by prosecution and conviction. For academics, an act must possess criminal character before it can fall within the Regulatory Crimes concept.

This seems to be both obvious and nothing more than a tautology. However, labelling 'regulatory crime' as a different species of crime to common law and statute based 'real' crimes intimates, often tacitly, that offences falling within the regulatory category are not really crime, but are instead something different, akin, perhaps, to tort (see below). There are no formal differences between the two types of crime (*R v South Tyneside Justices ex p Mill Garages* The Times, 17th April 1995 (QBD)), but the perceived different character is often used to justify differences in the application of general principles of criminal law, such as the necessity for *mens rea*, to these 'public welfare offences' (Sayre, 1933).

The categorical difference is also used to make arguments that particular violations should not be dealt with by the criminal law, as they do not possess a 'criminal essence' (Loughlan, 2007). However, any attempted *sotto voce* downgrading of regulatory offences to non-criminal status is at odds with the clear indication of the criminality of 'regulatory crimes' provided by the use of the 'crime' signifier within the concept. This signals the criminal status of regulatory offences as a subset of a larger set of 'criminal' offences. Indeed, as noted by Simester, even "if regulatory offences are no more than 'quasi-criminal,' they retain by that very token something of the criminal character" (Simester, 2005).

Discovering whether particular conduct possesses criminal character can present problems, notwithstanding that this may appear to be a matter of common sense. When seeking to discover whether a particular act can properly be called criminal it is wise to take a descriptivist approach and ask is "is the act prohibited with penal consequences?" (*Proprietary Articles Trade Association v Attorney-General for Canada* [1931] AC 310, PC, 324). However, this raises the question of the nature of "penal consequences." For example, are civil sanctions imposed because of a breach of the criminal law penal sanctions?

An alternative suggested by Williams focuses on the procedural character of proceedings, and sees a crime as, descriptively, an "act capable of being followed by criminal proceedings, having one of the types of outcome (punishment, etc) known to follow these proceedings" (Williams, 1955). Judicial interest in the boundaries of the concept of crime has increased as Courts have been called to decide the question of criminal status as a prelude to the application of Article 6 of the ECHR, which imposes different procedural standards for criminal trials when compared to civil trials. This jurisprudence has tended to focus on the substance of a particular case rather than the domestic law classification as a criminal or non-criminal (Guinchard, 2005). This furthers the descriptivist approach identified above, and requires an examination of the true character of an offence to assess whether an offence is 'criminal.'

Ramsay's Characteristics

The examination by Iain Ramsay (2007) is the most detailed attempt to determine the characteristics of a 'regulatory offence.' Three factors characterise 'regulatory crimes.' Other crimes are less likely to possess these features:

1. … sanctions of strict criminal liability…
2. A specialised bureaucracy [not the Police and the CPS]… under a duty to enforce [regulatory criminal law ('RCL')]… involv[ing] the exercise of discretion by the agency in the implementation and enforcement of [RCL]
3. The courts… involved in day-to-day implementation of [RCL] are… the magistrates' courts (Ramsay, 2007).

Each of these tendencies can be contrasted to the characteristics ascribed to 'real' crimes, where *mens rea* is generally required, prosecution is undertaken by the Police and the CPS and there is a much greater likelihood that cases will be dealt with by a judge and jury in the Crown Court (Cartwright, 2001).

Strict Liability

Liability for many Regulatory Crimes is strict in relation to at least some elements of the *actus reus* (Richardson, 1987). However, some core regulatory offences do require proof of *mens rea* as a condition of conviction; an example is Consumer Protection from Unfair Trading Regulations 2008 regulation 8, which criminalises a trader who "knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence." Strict liability is therefore a tendency shared by many regulatory offences rather than a condition present in every regulatory crime.

Correlation between regulatory offences and strict liability does not demonstrating that regulatory crimes must be strict liability. Rather, courts are more willing to adjudge particular crimes to be crimes of strict liability because they are perceived to be regulatory crimes. Courts are "much more ready to hold… a 'regulatory offence' to impose strict liability" (Ormerod, 2005).

In *Sweet v Parsley* [1972] AC 824 Lord Reid expressly considered the offence under Section 5 of the Dangerous Drugs Act 1965 to be a "truly criminal matter." This finding was an important step in determining that the offence under Section 5 was not one of strict liability. In *Sweet*, classifying the offence as truly criminal was not straightforward or obvious. The offence could be plausibly seen as a regulatory offence relating to the management of property, a business activity which is freely entered into and which often attracts regulatory crimes. This may have changed the attitude of their Lordships to the imposition of strict liability.

Contrast *Sweet* with *Alphacell v Woodward* [1972] AC 824. Viscount Dilhorne made clear that the offence under Section 2 (1) of the Rivers (Prevention of Pollution) Act 1951 was "not criminal in any real sense," before deciding that *mens rea* did not need to be demonstrated. Lord Salmon stated that Section 2(1) was one of the "prototypes of offences which 'are not criminal in any real sense,'" using this observation to support the imposition of strict liability, particularly as "a comparatively nominal fine will no doubt be imposed" where the accused commits the offence without *mens rea*. Similarly, Lord Pearson examined the "kind" of offence created by Section 2(1) when deciding whether the prosecution were required to demonstrate a mental element or not. He concluded that, as the offence was "in the nature of a public nuisance" it did not. Strict liability applied.

B v DPP [2000] 2 AC 428 dealt with the mental element applicable to the Indecency with Children Act 1960 section 1(1). Their Lordships considered this to be a "serious offence" falling within the bounds of 'real crime.' This influenced the forceful restatement of the need for *mens rea* in criminal offences, and Section 1(1) in particular. *R v K* [2001] 3 All ER 897 dealt with the *mens rea* required for Sexual Offences Act 1956 section 14(1). Their Lordships decided that *mens rea* was necessary, no doubt influenced by the "seriousness of the offence of indecent assault." This language clearly places this offence within the realm of 'real crime.' Taken together these cases suggest that strict liability should be limited. In *K* Lord Steyn cast doubt on strict liability in all but the clearest textual cases, stating that the presumption of *mens rea* "can only be displaced by specific language." However, Lord Steyn's remarks have been implicitly read to apply only to real crimes, as they have not stopped the finding of strict liability regulatory offences.

In *Hart v Anglian Water* [2003] EWCA Crim 2243, [2004] 1 Cr. App. R. (S.) 62, the Court of Appeal made clear that Water Resources Act 1991 section 85(3) created an offence of strict liability observing "the necessity to preserve [rivers and watercourses] from pollution." In *R v Matudi* [2003] EWCA (Crim) 697 the Court of Appeal held that the Products of Animal Origin (Import and Export) Regulations 1996 regulation 21 created an offence of strict liability. This provision prohibited the importation of "any product of animal origin" without advance notice of arrival, which the court stated was of "considerable importance and social concern" and had "significant public health implications." This echoes the discussion of the dividing line between real and quasi–crime found in Lord Diplock's speech in *Sweet*, where offences aimed at ensuring public health were seen as 'regulatory' in character. In *Matudi*, the court, echoing the language of Lord Reid in *Sweet*, did not regard the offence as "one that is not criminal in any real sense… in contradistinction to a truly criminal act."

R v Muhammed [2002] EWCA Crim 1856, [2003] QB 1031 the Court of Appeal decided that the offence of 'materially contributing to the extent of insolvency by gambling' under Insolvency Act 1986 section 362(1) was one of strict liability. The Court expressed doubt as to whether the offence under Section 362 could be said to be "truly criminal," and appeared to favour the classification of the offence as a 'regulatory crime.'

Examining these cases, the factor which distinguishes between the *mens rea* and strict liability offences is the perception that the offences in the latter cases are 'regulatory crimes.' The court requiring *mens rea* for offences that fit within their preconceptions of a 'real crime,' but find strict liability where an offence appears to be 'regulatory' (Ormerod, 2005). Horder suggests that this is a result of courts attempts to ensure "negative liberty," or "freedom 'from' certain kinds of evil," including freedom from the stigma of conviction where the defendant is not at fault (Horder, 2002, Horder, 2005). Judicial comments in the cases examined suggest that conviction on a strict liability basis is only seen as wrong in 'real crime' cases. The courts do not perceive a need for *mens rea* in 'regulatory offences.'

The categorisation of a crime as 'real' or 'regulatory' influences the decisions of courts, in the absence of clear legislative language, as to whether strict liability is appropriate, rather than strict liability influencing the categorisation of a crime. In other words, the perception of a particular offence as regulatory is a cause, not an effect, of the imposition of strict liability for that crime. Therefore, whilst Ramsay's categorisation is a useful shortcut when considering whether a particular offence should be conceptualised as a RC, it does not reflect the results of the preliminary assessment of case law, which suggests that judges decided on offence classification prior to making the decision on the mental element required for a particular offence.

Specialised Agencies

Some Regulatory Agencies have an explicit power to prosecute particular crimes, and in some cases this may take the form of a positive duty to enforce particular legislation. However, it is not always the case that a regulatory body can or will prosecute only where it has an explicit duty to do so. In some case an agency may be implicitly granted a power to prosecute, because such a power is incidental to the other functions of the regulator (e.g. *R (Securiplan plc and others) v Security Industry Authority* [2008] EWHC 1762, [2009] 2 All E.R. 211). Ramsay's reference to a "duty" in his criteria would be more accurate if it referred to a "power." For a crime to be regulatory it need not be within the exclusive prosecutorial power of a regulatory agency. A right of private prosecution for offences, including regulatory crimes, is preserved under the Prosecution of Offences Act 1985. Further, the Crown Prosecution Service retains a broad power to prosecute crime, including regulatory offences.

Further, some regulatory agencies are able and willing to prosecute offences that are usually thought to be 'real crimes.' For example, Local Authorities are granted a broad power to prosecute by Local Government Act 1972 section 222, which allows them to "prosecute… any legal proceedings" if they "consider it expedient for the promotion or protection of the interests of the inhabitants of their area." This power clearly extends beyond the regulatory crimes that are normally seen as within a council's primary area of responsibility. For example, Local Authorities' quite frequently prosecute cases involving violations of the Theft Act 1968, the Fraud Act 2006 and the Forgery and Counterfeiting Act 1981.

In light of the above, this condition should be seen as an expression of two tendencies. First, that a crime that is prosecuted by a specialist agency is more likely than not to be a regulatory crime and second, that the prosecution of regulatory crimes will, in most cases, be performed by specialist agencies. Ramsay's criterion should not be read as definitively excluding from the RC concept any offence not prosecuted by a specialist agency, and neither should it be read as implying that all crimes prosecuted by specialist agencies are regulatory.

Ramsay's requirement that agencies involved with the enforcement of regulatory crime act with discretion should not be seen as adding to his criteria. Whilst different agencies may operate different prosecutorial strategies depending on the type of offence that they are entrusted with prosecuting (Baldwin and Black, 2008), it is a central role of the prosecutor of both real and regulatory crimes to make discretionary decisions as to whether to proceed with cases where all elements of the crime are present. This is true for prosecutors of both 'real' and 'regulatory' crime, and should not be seen as a unique feature or tendency that can be used to demarcate these concepts. Whilst agencies responsible for regulatory enforcement may be more likely to adopt compliance strategies, this does not mean that they solely enforce regulatory crimes.

Magistrates Courts

Almost all regulatory crimes are summary only offences, meaning they may be tried in the magistrates court only, or either-way offences, meaning either that they may be tried in the Magistrates or in Crown Courts at the option of the defendant or must be tried in the Crown Court if the magistrates believe the case is beyond their sentencing powers.

The small number of regulatory crimes heard in the Crown Court when compared to the Magistrates' can be illustrated through the comparison of Archbold, Blackstone's Criminal Practice and Stone's Justices Manual. These are the leading practical manuals for the Crown Court, in the case of Archbold and Blackstone's, and the Magistrates' Court, in the case of Stone's. Archbold contains very little discussion of substantive regulatory offences and investigatory powers of regulatory agencies when compared to the discussion of 'real offences' and the powers of the police, although it does contain a chapter on Commerce, Financial Markets and Insolvency, covering serious financial fraud. This illustrates the rarity with which the Crown Court has to deal with regulatory offences. Blackstones contains slightly more coverage of the substantive law of offences that could be considered to be regulatory, covering, like Archbold, offences concerning Company, Investment and Insolvency, but giving greater coverage to Offences Affecting Enjoyment of Premises, which can be considered to be part of the class of regulatory offences, and other offences, such as those contained in the Dangerous Dogs Act 1991, which under certain conceptions can be conceived as Regulatory Crimes, particularly if regulatory crime focuses on offences that concern 'special activities,' where the accused chooses to assume the risk of potential prosecution. However, the coverage of offences of this type still makes up a tiny proportion of the content of Blackstones, the great majority of which is devoted to coverage of substantive law and procedure relevant to 'real crimes.' Stone's, on the other hand, devotes a much greater proportion of its three volumes to these matters. This difference suggests that it is more important for professionals practicing in the Magistrates Courts to have full details regarding regulatory offences, whereas it is less important for those acting in the Crown Courts. This provides evidence in support of Ramsay's suggestion that the Magistrates' Court deals with these matters on a more regular basis than the Crown.

Personal experience in the field confirms that in practice most 'regulatory crimes' are heard in the Magistrates' Court, and therefore Ramsay is at least partially correct in his characterisation. One can consider the argument that Magistrates are responsible for the "day-to-day implementation" of Regulatory Crimes to be a statement that implicitly compares the chance of a particular Regulatory Crime case being heard in a Magistrates Court to the chance of that case being heard in the Crown Court. Whilst it is true that some cases concerning regulatory offences are heard in the Crown Court, particularly cases where severe consequences result, this does not detract from the usefulness of Ramsay's indication of this

tendency, which brief investigation suggests is consistent with the way that 'regulatory crime' is dealt with on the ground. The broad-brush descriptive power of Ramsay's 'Magistrates' Court' criterion provides an illustration of what is meant by 'regulatory crime,' even if it cannot, on its own, be used to assess whether a particularly statutory section may be properly referred to as creating a regulatory offence.

Stigma

Regulatory Crime is not perceived to give rise to stigma when compared to convictions for 'real' crime (Cartwright, 2001). As Lord Reid noted in *Sweet* "stigma … attaches to any person convicted of a *truly criminal offence*." This implies that stigma does not attach to offences that are not truly criminal. There is a suggestion, the strong argument, that a conviction for a Regulatory Crime imposes no mark of discredit on a defendant. However the weaker argument, that convictions for regulatory crimes are less stigmatic than convictions for real crimes, is more supportable. Both the strong and weak contentions regarding stigma will be examined.

Beginning with the strong argument, it seems odd that companies and individuals are prepared to pay law firms significant sums to defend them if the offences charged should give rise to no stigma on conviction. Of course, there may be financial considerations, as the sentencing courts often have the power to impose significant fines, but this would not explain the phenomenon of appeals against conviction for regulatory crimes which led to sentences of absolute or conditional discharge (e.g. *Scarborough Building Society v Humberside Trading Standards Department* [1997] C.C.L.R. 47; *Alphacell* "I should be surprised if the costs of pursuing this appeal to this House were incurred for the purpose of saving these appellants £44" (per Lord Salmon)). Of course there may be indirect penalties such as loss of shareholder value or loss of goodwill, but what are these losses if not a manifestation of the opprobrium of a class of the public at the conviction of a company or individual for a crime, regulatory or not. Further, even if no conviction results, the underlying behaviour, which could form a basis for a regulatory criminal prosecution, may be morally repugnant to the public, suggesting that the behaviour has a stigmatic effect. If one considers the stigma of conviction to be evidenced by the changes in behaviour shown by the public, or a particular sector of the public, following the *actus reus* of a Regulatory Crime then it appears clear that some regulatory crimes, or the conduct underlying them, carry stigma. For example, following the sinking of the *Herald of Free Enterprise*, an event that would today clearly form the basis of regulatory criminal liability under the Merchant Shipping Act 1995 section 58, the ferry operator Townsend Thoresen had to change its name, such was the damage to the company's goodwill caused by the conduct underlying these (regulatory) criminal acts.

Further, the assertion that conviction of a regulatory crime does not cause stigma is at odds with the enthusiasm for the use of publicity in regulation (Cartwright, 2012). The Macrory Report, which is solely concerned with Regulatory Crimes, notes that "a company's reputation and prestige is an important and valuable asset" and, therefore, "Publicity Orders… can really hold it to account for its regulatory failures" (Macrory, 2006). If the strong position above was empirically supported, publicity would in fact impose no penalty on those convicted of regulatory crime, as the lack of stigma would mean that individuals would not change their decisions when it came to dealing with the convicted individual or business. This would suggest that Macrory, and legislators in the US and Australia where publicity orders already exist,[1] have miscalculated the potential impact of publicity as a

[1] Australia: see, for example, the Fair Trading Act 1987 (New South Wales) Section 67. USA: see United States Sentencing Commission, Federal Sentencing Guidelines Manual 2007 Section 8D1.4.

punishment. This belies the significant thought about the area evident from the Report. Further, it would suggest that the subsisting perception amongst regulatory agencies that publicity adds something to a conviction, shown by the willingness of those agencies to trumpet successful enforcement action, is also incorrect.

Further, it seems clear that those subject to regulation fear publicity. Of course, there are some reasons to doubt that publicity will work as a punishment all the time (Fisse and Braithwaite, 1984; Howells, 2005), with the potential for the reaction of consumers to be disproportionate, by being either overly harsh or overly mild, to the wrong underlying the 'regulatory crime' conviction. However, this is just as apt to found an argument that 'regulatory crime' is stigmatic as an argument that it is not.

Evidence shows that the argument that Regulatory Crimes never gives rise to stigma cannot be supported. The best we can say is that some convictions attract stigma and others do not, but using this as a divide between 'real' and 'regulatory' crime is unworkable. It is possible to imagine circumstances where a conviction for the paradigmatic 'real' crime murder, perhaps on the basis of an assisted suicide, would not give rise to significant stigma in the view of a majority of the population. Such a crime would clearly not become a regulatory crime as a result. Perhaps the best we can say is that there are some crimes that generally attract less discredit than others, and these crimes are more likely to be 'regulatory' crimes than 'real' crimes. However, even these crimes may attract stigma depending on the circumstances surrounding the offence.

To generalise stigma, or lack of it, to the entire concept of Regulatory Crime is implausible. The weaker, more likely than not, statement should not exist within our concept, at least without further research into the effect of a conviction for a regulatory offence on a reasonable person, and whether they believe such a conviction is stigmatic. It is not the absence of stigma *per se* that separates 'real' and 'regulatory' crimes, but rather the effect of any stigma that does exist. Horder argues that stigma in regulatory crimes does not extend beyond the "specific context in which the offence arises," whereas this extension exists in cases involving real crimes (Horder, 2005). This is difficult to verify, and, interestingly, supports the proposition that regulatory crimes are stigmatic. The suggestion of the limited scope of stigma in regulatory offences may be countered by evidence of the difficulty of controlling publicity as a punishment for regulatory crimes, cited above, which suggests that, in at least some cases, stigma is not confined within the regulatory realm. Stigmatic effect remains a difficult criterion to fold into the concept of Regulatory Crimes.

The Relationship between Regulatory Crime and Private Law

It has been suggest that regulatory crime is more akin to civil law than it is to 'real' criminal law. Of course, "the line between criminal law and civil law is not, and never has been, impermeable" (Green, 1997). Indeed many crimes within the core of criminal law correspond to tortuous conduct. For example, when they commit crimes such as assault and theft perpetrators simultaneously commit the intentional torts of assault and conversion (Posner, 1998, Rogers, Winfield and Jolowicz, 2010). In recent years there has been a backlash against the overextension of criminal law, both by those who favour minimal criminalisation (Ashworth, 2000) and by law and economics scholars who argues that conduct falling with regulatory offences should be governed solely by the private law (Posner, 1998). In the opinion of these writers, unwarranted expansion of the criminal law has come about in the field of 'regulatory crime.'

Law and economics scholars have focused their conceptualisation of regulatory crimes on the relationship of the conduct to private law. Regulatory Crimes is seen by law and economics scholars as conduct that is suitable for treatment by the law of obligations, enforced by the injured party, rather than being dealt with by the criminal law, enforced by the state. There is a fundamental, economic, difference between public and private law enforcement. This divide can be seen as illegitimately straddled by regulatory crime. By examining the relationship between tort and 'regulatory crimes' it is possible to tease out tendencies used to by law and economics scholars to identify 'regulatory crimes.'

The general approach adopted by law and economics scholars is that criminal law should be used only "where the market fails" and where the state is in a better position to detect violations, the law aims to punish rather than price the violation, the violation caused serious harm and was committed with intent and "the private enforcement transaction costs are so high that public enforcement is needed" (Svatikova, 2008). Svatikova (2008) argues that strict liability, which is often associated with regulatory crimes, is beyond the legitimate bounds of 'crime' according to law and economics scholars. Coffee draws the boundaries more succinctly; "criminal law should generally not be used when society is unprepared to disregard the social utility of the defendant's behaviour" (Coffee, 1991). This means that criminal penalties must be used as a punishment and not seen as a price of doing business (Becker, 1968). The question arises whether this economic conception of the true domain of crime is descriptive of the current state of affairs, or whether it is merely normative, prescribing how things ought to be. It appears clear that the law and economics concept falls into the second of these categories, particularly given the procedural nature of 'crime,' discussed above.

Veljanovski, writing from a UK perspective, notes that "in practice the label criminal is applied to a diversity of acts which have different economic features, *some of which justify the label and others not*" (Veljanovski, 2007). Therefore, the label 'crime' appears to be used in practice when we seek to price non-compliance as well as when we seek to punish it. Coffee acknowledges that this is the case in the United States, noting that "both Congress and State Legislatures have shown no interest in slowing [the] trend" of expanding criminal law as a pricing mechanism (Coffee, 1991).

Given this, perhaps the price/punish distinction should not be seen as a line between crime and non-crime, but rather as a criterion to be utilised in the conception of 'regulatory crime.' This criterion could suggest that the use of criminal punishment as a pricing mechanism is more likely to apply to 'regulatory crimes' than 'real crimes.' This would conceive regulatory crimes as economically similar to torts, mechanisms for internalising external costs, and penalties seen as the price at which an individual would be allowed to engage in unlawful conduct. Such a conception would be unwelcome, antithetical to the formally uniform nature of criminal law, and would minimise the 'criminal' element of RC beyond the permissible. Further, some crimes that are regularly used as examples of regulatory crimes by academics, such as sections 2 and 3 of the Health and Safety at Work etc. Act ('HSWA'), have a punishment aim. Conversely fixed penalty notices for anti-social behaviour, in particular creating graffiti and fly-posting, and penalty notices for disorder, appear to have a classical pricing function, despite encompassing behaviour which could lead to conviction for 'real crimes,' such as criminal damage, theft or assault.

This *sotto voce* downgrades serious crimes of the type listed above by branding them anti-social behaviour, a trend similar to the one noted above when we examined the tendency to use the word 'regulatory' as a synonym for 'not-serious' or 'unreal.' Perhaps the shift from

punishment to pricing is in fact the agent responsible for the perceived lack of seriousness of both types of crime. That crimes traditionally seen as both 'real' and 'regulatory' are subject to what appear to be pricing mechanisms emphasises the fact that the supposed identifying tendency of regulatory crime to price violations of the law rather than punish them is, at best, merely a tendency.

Whilst law and economics scholars have tended to focus on the similarities between regulatory crimes and tort it is important to also examine the relationship between regulatory crime and that other major area of private law, contract (Collins, 1999). Many Regulatory Crimes may only occur when a specific relationship exists between the accused and the victim. In many cases the relationship co-exists with a contractual relationship between the two parties. For example, many of the regulatory norms that aim to protect the economic interests of consumers aim to ensure the propriety of the contractual relationship between buyer and seller, and fit with common law remedies for breach of contract or procedural norms relating to undue influence (Cartwright, 2001). Contractual remedies coexist with criminal sanctions. Indeed, the partial contractual background of 'regulatory crime' has been reflected by Richard Posner in his attempt to describe the extent of US Federal Criminal Law by way of a 5 part typology (Posner, 1998). Whilst this attempt does not explicitly refer to 'regulatory crime,' it is perhaps useful to examine one particular entry in his typology, which seems to reflect at least some of the notions of regulatory crime discussed in this piece. His third category of crime, consists of "voluntary, and therefore presumptively (but only presumptively…) value maximising, exchanges incidental to activities that the state has outlawed." This definition covers, for example, a number of the activities that are banned by Consumer Protection from Unfair Trading Regulation schedule 1. Posner states it is "difficult… to understand why… [this]… should be punished." This suggests that these contractual crimes are seen as not truly criminal, or, in the language used in this piece, as regulatory crimes. Of course, many contracts are not the concern of public enforcement and problems find only a private law remedy.

We clearly cannot say that when as contract is breached that a regulatory crime, or indeed any crime, is committed (Husak, 2005). We can, however, say two things; (1) when a crime is committed the *actus reus* of which would entitle the victim to a contractual remedy the offence is more likely to be a RC rather than a real crime; and (2) the proportion of concurrent criminal offences and breaches of contractual norms which are regulatory crimes is higher than the proportion of concurrent crimes and torts that are regulatory crime, as certain real crimes are also torts, but very few breaches of contractual norms also amount to real crimes.

Mala in Se and Mala Prohibita

Some academics have used Regulatory Crime as synonymous with *mala prohibita* (Sayre, 1933). Weaker approaches suggest a greater proportion of 'regulatory crimes' than 'real crimes' are *malum prohibita*. *Malum prohibita* are those crimes that are not wrong in themselves without the provisions criminalising them. They are contrasted with *mala in se*, which are usually longstanding crimes, found in either common law or statute, which are seen as morally wrongful, and would be seen as wrong even without the criminal law norm prohibiting them. The use of the *mala in se*/*mala prohibita* distinction to delimit the boundary between real and regulatory crime is fraught with problems.

The distinction may be criticised for using an antiquated definition of blameworthiness, focusing on both a quasi-religious concept of 'sin' and 'traditional' crimes which existed at an unspecified point in time, invariably in the past. This means that any concept based on

malum prohibita inevitably suffers from a lack of resonance. Further, socio-legal scholars have argued that this approach to the delimitation of the boundaries of Regulatory Crime pays insufficient attention to empirical findings that the category of crimes seen by the public as inherently wicked, or *mala in se*, is socially conditioned by observation of the types of conduct liable to be subjected to criminal prosecution (Ball and Friedman, 1965). The relationship between the publicly observed content of the criminal law and the public perception of offences that are *mala in se* is reciprocal, and ignored by those who seek to draw the distinction in this manner (Ball and Friedman, 1965). Further, "the line between *malum in se* and *malum prohibitum* has been crossed many times" (Coffee, 1991), meaning that it is hard to know where such a line should be drawn and what definition of blameworthiness should, or could, be used to construct a real crime/regulatory crime dichotomy.

This approach is fatally flawed, beset as it is by resonance problems. For example, Husak argues that money laundering is a paradigm *mala prohibita* offence (Husak, 2005). It seems clear that *mala prohibita* and Regulatory Crimes do not exactly correspond, as money laundering is unlikely to be seen as a regulatory offence. For example, applying Ramsay's criteria, despite being an either-way offence it is often dealt with in the Crown Court, it is generally prosecuted by the Crown Prosecution Service rather than a specialist agency and is likely to give rise to significant stigma and penalty.

Crimes of General and Special Prohibition

Smith and Hogan propose that the 'real'/'regulatory' dichotomy be draw by deciding whether a crime is one of general or special prohibition (Ormerod, 2005, Smith, 1999). Crimes of special prohibition are those that relate "only to those following a particular trade, profession or special activity." A crime falling within such a prohibition should, they submit, be seen as a "regulatory offence." Judicial support for this distinction can be found in the speech of Lord Diplock in *Sweet*, which talks of the difference between "penal provisions of general application" and those criminal prohibitions that relate to activities "in which citizens have a choice whether they participate or not" (see also *Hobbs v Winchester Corpn* [1910] 2 KB 471).

This distinction would appear at first glance to divide 'regulatory' and 'real' crimes along lines close to the common conception, with RC covering norms "regulating the sale of food,… the management of industrial premises… and the like," therefore satisfying the requirement of resonance. However, on closer examination offences commonly considered to be regulatory fall within the 'general prohibition' category, for example Section 3 of the HSWA, and commonly perceived 'real crimes,' for example Causing Death by Dangerous Driving, are specially prohibited,. Therefore, initial favourable impressions of the resonance of the concept are swiftly displaced upon deeper investigation. However, using the statement as a tendency, it can contribute to our understanding of the regulatory crime concept. Regulatory Crimes tend to be crimes of special prohibition.

Other characteristics

Other tendencies have been suggested as part of the Regulatory Crimes concept. It seems less likely that regulatory crimes will give rise to inchoate liability, which tends to apply to real crimes. It also appears that courts are generally more willing to allow the convictions of corporations for regulatory crimes on the basis of vicarious liability, rather than the higher standard of identification required for 'real crimes' (Sullivan, 1996). This echoes the more permissive approach to strict liability when courts deal with offences seen as 'regulatory

crimes.' These characteristics should be considered to be tendencies within the academic conception of regulatory crime.

The Legislative Conception - The Regulatory Enforcement and Sanctions Act 2008

The Regulatory Enforcement and Sanctions Act 2008 attempts to formalise the concept of regulatory crime using a pragmatic approach (Simester and Sullivan, 2005). The act applies to regulatory offences. Such offences are defined by reference to either the national agencies which have enforcement jurisdiction and/or the statute which criminalises the conduct. RES links the concept of regulatory crime to existing law rather than defining its essence freshly and independently.

The institutional approach taken by the Regulatory Enforcement and Sanctions Act 2008 mirrors the approach taken by the Macrory report (Macrory, 2006), which did not attempt to provide a definition of 'regulation' or 'regulatory crime,' but delimits its ambitions by "those regulators… mentioned in Annex C." Macrory was examining regulatory crimes, so Annex C provides an important indication of what the Report believed was within the concept. Annex C covers 56 national regulators, along with Local Authorities and Fire and Rescue Services. Interestingly, the list of regulators contained in Schedule 5 is smaller than that contained in Annex C, and in particular Local Authorities are not included. This suggests either that a narrower Regulatory Crime concept was adopted by the legislature, or that a Regulatory Crime concept that lay greater stress on the statutory basis of offences, rather than prosecutorial agencies, was adopted.

One reason for using definition by statute alongside definition by agency in the 2008 Act is that, despite appearing in Annex C to Macrory, some criminal offences that can be prosecuted by Local Authorities are not (purely) regulatory crimes,[2] and therefore are not within the scope of the Act. Macrory implicitly defined "Environmental Health, Planning, Building Control, Licensing and Trading Standards and related services" as within the 'regulatory crime' competence of Local Authorities, but left offences within the prosecution power of these bodies in the spheres of Education (e.g. Education Act 1996 Section 441(1)) and Housing (Protection from Eviction Act 1977 Section 1(2)) in the realms of 'real crime.'

The offences that were left outside the scope are those that can be committed mainly or exclusively by individuals, suggesting that Macrory was working with a business led conception of 'regulatory crime.' This is perhaps not surprising given that the precursor Hampton Review aimed to "identify ways in which the administrative burden of regulation on *businesses* [could] be reduced" (Hampton, 2005).

This legislative goal created a need to limit the scope of the 2008 Act by separating the offences which Local Authorities have power to prosecute into two categories, regulatory (meaning those which govern the behaviour of business) and non-regulatory (meaning those which govern the behaviour of non-businesses). Those statutes that were placed in the first, regulatory, category can be found in Schedule 6 of the Act. This provides an insight into the offences that the legislature consider as regulatory crimes, and those that they do not. Parliament, following Macrory, appears to endorse a concept that distinguishes 'regulatory' from 'real' crime on the basis of whether businesses or individuals are more likely to be exposed to liability.

[2] The scope of Local Government Act 1972 s222 means that local authorities are able to prosecute e.g. offences under the Fraud Act 2006 or the Forgery and Counterfeiting Act 1982.

However, business-focus cannot be the sole basis for conceptualisation. Macrory explicitly excluded from the scope of his report all crimes within the jurisdiction of Revenue and Customs and the Serious Fraud Office, some of which may be predominantly or exclusively committed by, or in the course of, businesses. This approach is followed in the 2008 Act. This leads to the, intuitively reasonable, inference that revenue offences and serious fraud exist within the realms of 'real' rather than 'regulatory' crime.

Both Macrory and Parliament must have relied on a further criterion of (lack of) seriousness, possibly finding roots in the *mala in se*/*mala prohibita* distinction, when considering scope. For example, Corporate Manslaughter, an offence that, by definition, can only be committed by a corporate entity, which will usually be a business,[3] is not included within the scope of the 2008 Act. The offence under Section 1 of the Corporate Manslaughter Act is clearly serious, both as regards the potential penal consequences, and the fault on the part of the officers and/or employees of the business. It is clearly not a regulatory crime within the conventional understanding, and therefore seriousness forms a basis for the RES classification.

The major strength of the implicit business-oriented non-serious offences concept adopted by the 2008 Act is that it creates certainty. Whilst a vague attempt to capture the essence of regulatory crime could have been used in a flexible and creative manner to ensure that many crimes were brought within the scope of the Act, this would have had the potential to be over-inclusive if a wide interpretation of the proposed statutory concept was adopted, or under-inclusive if a narrow reading was favoured. Given that Part 3 grants novel disposal powers directly to regulatory agencies, which have the primary responsibility for deciding on the scope of their powers, the certainty afforded by the approach in the Act is necessary. If the Act adopted a vague concept it is very possible that there would be significant litigation over the power to use the new sanctions. The approach adopted by the Act is much more user friendly, and is likely to encourage regulators to use the new disposal options, where a vague definitional attempt may mean risk adverse prosecutors are put off from acting.

The weakness of the approach taken by the 2008 Act is that it is unable to reflect changes to the law, such as the creation of new regulatory agencies or offences, without amendment. Given the proliferation of new offences and regulators, it seems likely that this will be necessary relatively often.

Conclusion

Ultimately this exploration has shown that one unifying concept of regulatory crime does not exist. The way that the concept is used varies according to the speaker and the context. This means that it is impossible to create a single RC concept and draw a bright line between the two types of crime; 'real' and 'regulatory.' To attempt such a bright line separation is to ignore the messy empirical reality, where there is broad agreement about the pigeonholing of central cases, but where more ambiguous offences provoke less conformity in approach. Therefore, visualising crimes on a continuum from 'real' to 'regulatory' better represents reality than viewing these two species as polar opposites. As shown above, 'regulatory' crimes sometimes have overtones of 'real' crimes and 'real' crimes possess features associated with 'regulatory' offences. Perhaps we should accept that defining a single Regulatory Crime concept is perhaps impossible. However, it is hoped that this piece has

[3] Corporate Manslaughter and Corporate Homicide Act 2007 Section 1(2).

provided an interesting contribution to the Regulatory Crime debate, and may be used as a basis for further study in this fascinating field.

Bibliography

Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 LQR 225
Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71 MLR 59
Harry V Ball and Lawrence M. Friedman, ‘The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View’ (1965) 17 Stanford Law Review 197
Gary S Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 Journal of Political Economy 169
Alan Bryman, *Social Research Methods* (2nd edn, OUP 2004)
Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press 2001)
— —,‘Publicity, punishment and protection: the role(s) of adverse publicity in consumer policy’ (2012) 32 Legal Studies 179
John C Coffee, ‘Does "Unlawful" mean "Criminal"?: Reflections on the Disappearing Tort Crime Distinction in American Law’ (1991) 71 Boston University Law Review 193
Hugh Collins, *Regulating Contracts* (OUP 1999)
Dave Cowan, Alex Marsh, ‘There's Regulatory Crime, and then there's Landlord Crime: from 'Rachmanites' to 'Partners'’ (2001) 64 MLR 831
Norman Fairclough, *Analyzing Discourse: Textual Analysis for Social Research* (Routledge 2003)
Brent Fisse, and John Braithwaite, *The Impact of Publicity on Corporate Offenders* (SUNY Press 1984)
Stuart P Green, ‘Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences’ (1970) 46 Emory Law Journal 1533
Audrey Guinchard, ‘Fixing the Boundaries of the Concept of Crime: The Challenge for Human Rights’ (2005) 54 ICLQ 719
Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury 2005)
Jeremy Horder, ‘The Classification of Crimes and the Special Part of the Criminal Law’ in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005)
— —,‘Strict Liability, Statutory Construction, and the Spirit of Liberty’ (2002) 118 LQR 458
— —, ‘Whose Values Should Determine When Liability is Strict?’ in Andrew Simester (ed), *Appraising Strict Liability* (OUP 2005)
Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 Journal of Law and Society 349
Douglas Husak, ‘Malum Prohibitum and Retributivism’ in Antony Duff and Stuart Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005)
Patricia Loughlan, ‘"You Wouldn't Steal a Car..." Intellectual Property and the Language of Theft’ (2007) 29 European Intellectual Property Review 401
Richard B Macrory, *Regulatory Justice: Making Sanctions Effective* (Better Regulation Executive 2006)

Joe McGrath, 'The traditional court of crime approach to the definition of a crime' in Shane Kilcommins and Ursula Kilkelly (eds), *Regulatory Crime in Ireland* (Lonsdale 2010)
David Ormerod, *Smith and Hogan Criminal Law* (11th edn, OUP 2005)
Richard Posner, *Economic Analysis of Law* (5th edn, Aspen 1998)
Iain Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (2nd edn, Hart 2007)
Genevra Richardson, 'Strict Liability for Regulatory Crime: The Empirical Research' [1987] Crim LR 295
Horton Rogers, Percy Henry Winfield and John Anthony Jolowicz, (2010) *Winfield and Jolowicz on tort* (18th edn, Sweet & Maxwell)
Francis Bowes Sayre, 'Public Welfare Offences' (1933) 33 Columbia Law Review 55
Andrew Simester, 'Preface' in Simester AP (ed), *Appraising Strict Liability* (OUP 2005)
Andrew Simester and Bob Sullivan, 'On the Nature and Rationale of Property Offences' in Duff RA and Green SP (eds), *Defining Crimes: Essay on the Special Part of the Criminal Law* (OUP 2005)
John Smith, *Smith and Hogan Criminal Law* (9th edn, Butterworths 1999)
Bob Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55 Cambridge LJ 515
Katarina Svatikova, *Economic Criteria for Criminalization: Why Do We Need the Criminal Law?* (March 2009). RILE Working Paper No. 2008/12. Available at SSRN: http://ssrn.com/abstract=1150689 or http://dx.doi.org/10.2139/ssrn.1150689
Cento Veljanovski, *Economic Principles of Law* (Cambridge University Press 2007)
Glanvil Williams, 'The Definition of Crime' (1955) 8 Current Legal Problems 107
——, *Textbook of Criminal Law* (2nd edn, Stevens 1983)