Combating Financial Crime: Regulatory Versus Crime Control Approaches

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The relative merits of regulatory and crime control strategies are a major feature of debates over the role of law in relation to financial crime, debates which have moral, political and ideological dimensions. Although these are often presented as alternative approaches, in practice regulation incorporates compliance and coercive strategies and there is a growing consensus that a balanced range of options which takes account of cost effectiveness and a moral dimension is necessary to ensure effective regulation. This paper will start by identifying the key arguments and assumptions involved in the 'regulatory debate' and their relevance to financial regulation. It will look at how these competing claims can be evaluated and will explore areas of potential consensus including the utility of an enforcement pyramid, the need to incorporate a variety of strategies directed at different kinds of activities and the significance of a moral dimension, before considering the potential application of a range of strategies combining both self and state regulation.

TO REGULATE OR CONTROL?

While the term 'regulation' can be applied to many areas of social and economic life, when applied to business regulation it refers to the 'use of the law to constrain and organise the activities of business and industry'. Financial regulation, directed at the control of fraud and at the regulation of standards in the market and in business and financial services, can be distinguished from social regulation, which incorporates areas such as health and safety at work, the safety and quality of food, environmental health, pollution and consumer protection.

The 'regulatory approach' is normally associated with the form of law and enforcement which developed in areas of social regulation during the 19th and early 20th centuries with criminal law being considered necessary to protect the public from dangers they could not protect themselves from, and criminal sanctions being justified instrumentally as a deterrent. Difficulties of proving intent led to the development of strict liability with regulatory offences being considered to be *mala prohibita* rather than *mala in se*, as not 'really' crime but as 'technical' offences. Out of this developed a discretionary enforcement style in which enforcers used criminal prosecution only as a last resort. A regulatory approach is therefore associated with a minimal use of criminal sanctions, although it is important to recognise that this emerged out of a long history of negotiation between business groups, regulators and governments.

The 'regulatory debate' hinges around the extent to which regulatory or criminal law can and should be used to control the activities of business and involves a range of theoretical and political positions which can be broadly summarised as conservative, liberal and radical. A conservative approach is associated with advocates of *laissez faire* and free market principles, to whom any form of regulation should be kept to a minimum as market forces provide sufficient protection. Liberal views, which incorporate a range of positions, accept that regulation is necessary, and should seek a balance between regulatory and criminal sanctions. To radical views, often associated with critical criminological or legal perspectives, law and regulation are inevitably limited by the pervasive influence of business interests and strong criminalisation is necessary.

The main arguments can be summarised by focusing on the different aims and strategies of each approach, their supporting arguments and underlying assumptions about the activities and businesses subject to regulation. Table 1 illustrates the broad parameters of the debate, although it should be recognised that such a presentation inevitably simplifies complex arguments and that, as will be seen later, there is considerable common ground and strategies can be seen as a continuum rather than as mutually exclusive.

Advocates of each approach place differing emphases on the aims of legislation. To regulatory approaches the main aim of law is to secure and maintain high standards of business and commerce, and enforcement should ensure an appropriate balance between the interests of industry and public protection. Crime control approaches emphasise
Table 1: Theoretical and political positions

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<td><strong>Aims:</strong></td>
<td>Securing and maintaining standards</td>
<td>Prosecuting and punishing offenders</td>
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<td>Securing compliance</td>
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<td>Protection + prevention</td>
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<td><strong>Strategies:</strong></td>
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<td><strong>Arguments:</strong></td>
<td>Persuasion and cooperation are:</td>
<td>Public justice and punishment</td>
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<td>Offences — complex, difficult to detect</td>
<td>Low prosecution rates undermining deterrence</td>
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<td>Evidential difficulties</td>
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<td>Cost/resource considerations</td>
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<td><strong>Assumptions:</strong></td>
<td>Not ‘really’ crime/technical issues</td>
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<td>Willing to comply</td>
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prosecution and punishment, not only for the instrumental purposes of deterring or incapacitating offenders but to secure justice and underline society’s disapproval. Regulation is therefore associated with compliance whereas crime control lays greater stress on justice and punishment.

This is related to different enforcement strategies. Regulatory enforcement is normally taken to involve cooperative compliance strategies including persuasion, advice and education, in which enforcers adopt the role of expert advisers. This contrasts with an assumed ‘policing’ style emphasising conflict, arrest and prosecution. Regulation incorporates self-regulation whereas crime control stresses the role of state regulation, and contrasts are made between ‘private’ and ‘public’ justice — regulation includes negotiating compensation and out-of-court settlements whereas criminal law deals with ‘punishment’ and ‘justice’ which is ‘seen to be done’.

In practice however regulators adopt a range of styles including ‘insistent’ and coercive strategies with the threat of prosecution to back these up.4 Crucial to regulatory enforcement is the power to implement administrative sanctions, including granting or withdrawing licences, providing certificates or qualifications, and imposing fines. These can threaten the survival of a business, and indeed some argue that regulators have too much power and can act as judge and jury. While deterrence is most often associated with crime control it is also therefore a major part of regulatory enforcement.

The main arguments supporting each model have been well rehearsed.5 Persuasive and cooperative strategies are said to promote good relationships based on mutual respect between regulators and businesses. They are also seen as more effective to deal with complex offences which involve the use or abuse of financial, legal or technological expertise and which make detection difficult and prosecution lengthy and costly. To critics however, regulatory strategies are weak and ineffective. Cooperative styles can lead to sympathy between regulators and the regulated and to the ‘capture’ of enforcers. The language of regulation, emphasising ‘compliance’ rather than ‘crime’, is also said to undermine the moral and symbolic role of the criminal law. Not prosecuting offenders challenges retributive justice, leading to a situation in which one group of offenders, often from a different social class, is treated more favourably.

These arguments are associated with different assumptions about the activities and businesses subject to regulation. Regulatory approaches underplay elements of moral stigma or blame, whereas advocates of criminalisation stress that these are
crimes — differences which reflect the moral ambivalence surrounding white-collar offences. While few dispute that ‘serious criminality’ should be prosecuted, defining what is ‘serious’ is problematic, and radical critics point to the socially constructed nature of crime itself and to the influence of business over which harmful and dishonest business activities are defined as ‘criminal’ and which are not. Different assumptions are also made about the population to be regulated. Cooperative approaches by and large assume that the majority of businesses are willing to comply and can be persuaded whereas to critical approaches businesses and corporations are rational, ‘amoral’ calculators whose pursuit of profit can only be dealt with by coercive strategies.

**Are these approaches mutually exclusive?**

To some writers, these contrasts are so great as to render the approaches mutually exclusive and they are often presented as opposing views. Clarke has recently argued that

‘in practice the two strategies . . . are so different as to be largely incompatible, albeit that regulatory agencies often have powers of criminal prosecution. For the allegation of criminality implies wilful wrongdoing and carries the stigma of conviction in a public court . . . regulatory action by contrast emphasises future, not past, conduct . . . the approach is less to sanction failings than to jointly agree remedies and to achieve understanding and commitment to acceptable conduct.’

As Clarke acknowledges however, regulation does incorporate criminal strategies, and to many the contrast between regulatory enforcement and policing is overdrawn. A crime control model can involve consideration of future conduct and remedies through rehabilitation, restorative justice and mediation. Deterrence, incapacitation and rehabilitation are all concerned with future conduct. To Simpson,7 deterrence, which she equates with a crime control strategy, and regulation are part of an overall enforcement strategy emphasising crime prevention and deterrence.

**FINANCIAL REGULATION AND CRIME CONTROL**

How do these arguments relate to financial regulation? This incorporates elements of both crime control and regulatory approaches which in turn reflect the arguments and assumptions outlined above. Many areas of financial regulation have seen a shift away from a reliance on self-regulation towards more enforced self and state regulation. This can be seen in the Financial Services Act of 1986, the creation of the Serious Fraud Office (SFO) in 1988, and the creation, in 2000, of the Financial Services Authority (FSA), which took over the responsibilities of many self-regulatory organisations (SROs). While these developments could be seen as paradoxical given the commitment of conservative governments to deregulatory and free market principles, they were seen as necessary to encourage new investors and to protect them from the risks of a more open market. Other agencies dealing with financial regulation include the Inland Revenue, the Department of Trade and Industry (DTI), the Office of Fair Trading (OFT) and Trading Standards Departments.

**Aims of regulation**

Legislation reflects the mixture of aims outlined above. While laws covering serious fraud emphasise crime control they also reflect a wider concern with standards. To Levi, they aim to ‘provide a regulatory framework within which commerce can function’,8 and the stated aims of the SFO are to ‘investigate and prosecute serious and complex fraud and so deter fraud and maintain confidence in the probity of business and financial services in the United Kingdom’.9 The main role of the Inland Revenue and Customs & Excise tends to be the maximisation of revenue and the main role of the Bank of England and other SROs has been described as ‘prudential or preventive’.10 Consumer protection legislation such as the Trade Descriptions Act aims to protect consumers and to balance their interests with those of industry.11 A regulatory model is also reflected in the stated objectives of the FSA, which centre around:

- market confidence: maintaining confidence in the financial system;
- public awareness: promoting public understanding of the financial system;
- consumer protection: securing the appropriate degree of protection for consumers; and
- reduction of financial crime: reducing the extent to which it is possible for a business carried on
by a regulated person to be used for a purpose connected with financial crime.  

Strategies of regulation

Agency strategies also reflect elements of regulation and crime control. The SFO and other police organisations involved in serious fraud stress detection and prosecution, whereas in general, most financial crime control is conducted by ‘forward looking compliance orientation’ with ‘arrest, prosecution and imprisonment viewed as subordinate methods’. The Inland Revenue prosecutes rarely and uses out-of-court settlements and administrative fines and many other areas of fraud are associated with a low rate of prosecution. Trading Standards departments use a range of strategies, although may be more likely to prosecute where there is evidence of intent and dishonesty, such as cases involving the ‘clocking’ of second-hand cars or the sale of counterfeit goods.

The FSA also adopts a regulatory approach. In A New Regulator for the New Millennium, published in January 2000, they state that they are required to observe ‘principles of good regulation’, which include ‘economy and efficiency in the use of our resources . . . and the need to be proportionate in our regulatory responses. Our approach is designed to ensure that we apply our limited resources to deliver the most effective regulatory action within these parameters’. In common with many other regulatory agencies they can use a wide range of sanctions including statutory powers to:

- withdraw a firm’s authorisation;
- discipline firms and people approved by the FSA, through public statements and financial penalties;
- impose penalties for market abuse;
- seek injunctions;
- prosecute various offences;
- require the return of money to compensate consumers.

Arguments about the respective merits of regulation and crime control

Following the Roskill report, discussions of regulatory and crime control strategies tend to stress the high level of expertise involved in fraud detection, the difficulties of obtaining sufficient evidence to prove criminal intent, the dangers of ‘risky’ prosecutions and the high cost of detection and trial. This makes regulatory sanctions attractive, particularly for agencies such as the Inland Revenue for whom administrative action achieves the goal of collecting revenue.

The contrasts between regulatory and criminal sanctions are in part reflected in the different perceived roles of the SFO and FSA, illustrated by Rosalind Wright in a discussion of the circumstances in which criminal proceedings are more appropriate. These include situations in which there are evidence of serious dishonesty, a high level of public concern for punishment and a need for urgent action; the nature of the offence requires strong criminal deterrence; and there is little cooperation. Regulatory action is more appropriate in situations in which the offence is seen as ‘technical’ or lies in a ‘grey area’; regulatory penalties seem sufficiently severe and are publicly known; regulators can take urgent action; there is no motive of personal gain; regulation is more likely to succeed; the main issue relates to the protection of markets rather than to serious dishonesty; and the defendant is likely to cooperate and public interest is satisfied by regulatory action. Wright also underlines the significance of criminal sanctions along with their moral and symbolic dimensions, arguing that ‘...the very public nature of many of our prosecutions and the press attention paid to them can provoke fundamental changes in attitudes and practices amongst businessmen and their advisers. The mere fact that a solicitor or accountant has been investigated or charged with a criminal offence ... can send shock waves through the profession ...’. 

The use of primarily regulatory strategies in some areas has attracted widespread criticism. Low rates of prosecution, along with ‘scandals’ such as the ‘mis-selling’ of pensions and endowment policies, can signify regulatory failure. To critics, self-regulation is too accommodating and, along with the use of administrative sanctions, means that cases receive less publicity, which in turn reduces the deterrent value of criminal sanctions. Enforcement is also generally seen as under-resourced, particularly where serious fraud is concerned. All of this undermines the moral and symbolic role of law and can, to critics, suggest class bias along with a tolerance of activities which, however contested their criminal status, essentially involve lying, cheating or stealing. As Levi argues, the ‘redrawing of boundaries of behavioural acceptability by public degradation ceremonies such as prosecution can have a substantial impact’.
Underlying assumptions: the ‘contested’ moral status of activities
The contested moral and criminal status of offences is also a feature of financial regulation. While many forms of fraud are unambiguously regarded as criminal, offences involving market regulation are often seen, as Wright’s comments indicate, as ‘technical’. These definitions can, however, be contested. What distinguishes for example the ‘mis-selling’ or the ‘misdescription’ of goods from fraud? What degree of deception should be criminalised? Are ‘regulatory’ offences devoid of moral content? While the activities of the salespersons persuading consumers to change pensions were regarded as ‘normal’ marketing practice at the time, to others they appear inherently deceptive, in that the ‘benefits’ of the new pensions or the commission to be paid to the sales person were not spelt out. To radical critics this provides an illustration of the law reflecting capitalist interests.

This moral ambiguity provides offenders with a justification for resisting regulation particularly where, as in the case of insider dealing, compliance officers may be sympathetic to such arguments. In court defendants can argue that offences are ‘merely technical’, that they were merely following normal business practice, and/or that the law inhibits the pursuit of business and commerce. As will be seen below, these attitudes may adversely affect regulatory efforts.

EVALUATING REGULATION AND CRIME CONTROL
How can these different claims be evaluated? There are few objective indicators to assess the success or otherwise of different strategies. Whereas for conventional crime, rates of recorded crime, victim surveys and clear-up rates provide some, albeit inadequate, information, much financial crime is neither discovered nor reported. Rosalind Wright comments that ‘we don’t know how much “fraud” is actually being committed’ and much remains unreported as it could indicate weaknesses in the internal systems of financial institutions. As so much regulatory enforcement is informal and infractions not ‘counted’, it is difficult to assess increases or decreases in rates of compliance, let alone the effects of different enforcement styles.

In any event, levels of prosecution and conviction are subject to different interpretations, and what level of prosecutions would indicate success or failure is far from clear. To those of a conservative persuasion, any given rate is likely to indicate over-zealous regulation, whereas to many liberals and radicals what are seen as low rates of prosecution indicate the weakness of regulation. The SFO was widely criticised following a series of high profile acquittals but has also been seen as too aggressive. Scandals such as those involving pensions or, in social regulation, high profile ‘accidents’ and ‘disasters’ are often taken to indicate regulatory ‘failure’, although their absence need not necessarily indicate success.

These problems are aggravated by a lack of research looking specifically at the effectiveness of financial regulation, as research has tended to focus more on the attitudes and styles of enforcers and has been based largely on social regulation, as public agencies may be more accessible than the more private world of the compliance officer or City regulator. Asking ‘who cares about what works in controlling white-collar crime?’, Levi argues that ‘from the amount of governmental, academic and, to a lesser extent, private-sector effort in most Western countries, one would have to conclude “no one very much”’. He further comments on the negligible research funding and absence of major research studies in economic crime and observes that there is little published information on the success of crime prevention strategies such as FSA advice about not falling for easy profits or checking against authorised financial services.

What do we know about effective regulation?
What can therefore be said about effective regulation? In some ways the question can be better answered by looking at the reverse question — what is associated with regulatory ‘failure’? Apart from the difficulties outlined above the large number of factors affecting regulation make it difficult to specify what strategies work best. Regulation may be affected by available resources, the moral status of the activities to be regulated, the traditions of different regulatory agencies or by the global, national and local political context in which it takes place and the different cultures of regulators and those subject to regulation. It can be subject to ‘fluctuations depending on political and media pressures’ and, argues Levi, what constitutes effective fraud prevention at the operational level is ‘obscure’. Nonetheless some, albeit very general, points can be drawn out of the literature.
Regulation is generally agreed to work better in situations in which:

- There is agreement between regulators and those regulated over the objectives of regulation.

One of the clearest messages is that all forms of regulation are more effective where the regulated are morally committed to compliance. Contentious legislation is likely to be resisted, a resistance legitimised by the morally ambivalent status of offences. This can lead to ‘unacceptable’ compliance, where the ‘letter but not the spirit of the law’ is complied with. In both social and financial regulation compliance may be resisted where it is seen to hamper production, sales or marketing and, if regulators share ambivalent views towards regulation, compliance may be seen as a set of hazards to be avoided.

- A mixture of strategies and sanctions is available and is used.

There is also general agreement that regulation works best with a range of informal and formal sanctions. Even those who most strongly support cooperative strategies agree that in most circumstances strong sanctions are needed as a back-up and must be used. Hutter, discussing railway safety, argues that self-regulation needs to be ‘enforced’. Most agree with Braithwaite that too much coercion can lead to ‘cultures of resistance’ and may also provoke a political backlash, which reduces the legitimacy of law. A balanced range of sanctions is therefore seen as essential.

- Regulators avoid capture.

Most also agree that the ‘capture’ of regulators should be avoided, which is more likely to happen where regulators are drawn from the industry to be regulated. It has been found less in areas of social regulation in Britain, where regulators are independent, but could be a greater danger in financial regulation, where self-regulation has been more prominent. A related issue is the extent to which an agency can achieve ‘ascendancy’ — the reverse of capture. A lack of ascendancy and the truculence of major companies were, argues Clarke, partly responsible for the difficulties faced by regulators in the pensions ‘mis-selling’ cases in which, despite regulatory action and attempts at ‘naming and shaming’, major household names persistently denied any misconduct.

- There is a single regulator with power over one industry.

Regulation may be more complex and inconsistent if more than one regulator is involved in a particular industry. The Federal Drugs Agency (FDA) has been cited as an example of an effective single industry regulator and this ‘accepted political wisdom’ affected the setting up of the FSA. Consolidating different agencies enables the employment of more staff with appropriate expertise and it has been suggested that there should be a National Police Authority with responsibility for fraud — incorporating the work of Fraud Squads and the SFO.

- Within corporations, objectives are clearly communicated and structures support compliance.

Regulation is particularly difficult with large companies in which the chain of command enables a diffusion of responsibility which involves ‘passing the buck’ and there may also be an imbalance of resources between regulators and businesses. Many organisational factors have been associated with non-compliance, including situations in which compliance officers, legal departments or safety officers are below sales or marketing personnel in the company hierarchy, which leads to profits being prioritised over standards. It is also important that rules and procedures are clearly communicated. Hutter found in relation to railway safety that, while many were strongly in favour of compliance and risk management strategies were in place, their effectiveness was limited by poor communication and complexity — rules were too elaborate to be understood by those at lower levels. Paying commission to sales personnel can also be a problem and was implicated in the pensions and mortgage mis-selling cases and more recently in the use of aggressive sales tactics to persuade customers to change supplier. Levi observes that malpractice in financial services often seems to grow out of dependence on individual commission payments rather than salaries, which ‘incentivises lying as well as selling’.

Does deterrence work?

A further issue is whether criminal sanctions are effective. The deterrent effect of criminal law is often assumed to be greater in financial, corporate and white-collar crime, as potential offenders are assumed to be rational, making decisions by calculating the
costs of compliance or offending against the costs of prosecution and sanction — thus their depiction as amoral calculators. But can these claims be validated? Theoretically, argues Simpson, such claims can be empirically tested although in practice studies have methodological flaws. After reviewing a very wide range of these studies she concludes that while there are some claims of success, the empirical evidence is 'equivocal'.

Simpson goes on to consider arguments from advocates of criminalisation that low rates of prosecution and a lack of severe sanctions means that deterrence has not been fully implemented — companies cannot be imprisoned and monetary penalties lack a 'sting'. Moreover assumptions of deterrability are based on views that corporate behaviour is 'rational'. On the other hand, she continues, corporations do not always behave rationally and, as seen above, compliance is more likely when it has a moral basis. Not all managers are 'amoral calculators' and not all non-compliance is based on economic reasoning — ignorance and disagreement with the law are also important — therefore she argues, 'corporate crime control based solely on deterrence is unlikely to work', and a dual emphasis on morality and rationality may be more appropriate.

How can the moral and symbolic role of criminal law be evaluated?

Arguments about 'justice' and 'just deserts' are particularly difficult to assess. Some assert that failure to prosecute larger numbers of offenders is a sign of class bias and is thereby unjust. There has however been little evidence of systematic class bias on the part of enforcers, although some have noted a tendency to target smaller, more marginal businesses such as street stalls or second-hand car dealers, who make easier targets for enforcement, have fewer resources to defend themselves and whose small size makes blame and culpability easier to establish. In court, 'respectable' offenders claim they have much to lose and that the 'process is punishment', but courts may quite justifiably take this into account in sentencing — although the outcome of this may be unfair to those who have less to lose. This can undermine the legitimacy of the criminal justice process — as Levi argues, 'to the extent that the public believes that white-collar criminals are treated leniently, then from a retributive-justice viewpoint the system does not work'.

Criminal sanctions are also justified on the grounds that they reflect moral disapproval of the activities concerned. They can therefore serve denunciatory purposes and also provide a means of changing attitudes towards activities. As Levi observes, the denunciatory principle of punishment is not achieved if there are few prosecutions, and early SFO prosecutions such as the Guinness and Blue Arrow cases along with the US insider dealing cases of Boesky and Milken did redraw the symbolic boundaries of law as well as persuading many financiers that the laws could have a very negative effect on them if they offended. Nonetheless, even if compliance does result from such cases it is difficult to tell if this is because attitudes have changed or because it appears more expedient and less risky to comply.

SOURCES OF CONSENSUS AND DISSENSUS

There is therefore a broad agreement that the control of business crime requires a combination of approaches incorporating instrumental and moral dimensions. This suggests the utility of Braithwaite's model of an enforcement pyramid. The diversity of offences and offenders involved in financial crime also needs to be considered and the significance of the moral dimension needs to be taken into account, although there remain issues around whether the regulated are amoral or moral calculators. Finally, while most agree that a regulatory 'mix' is desirable, how such a mix is to be balanced and achieved may be more debatable.

The enforcement pyramid and 'mixtures' of sanctions

The enforcement pyramid derives from Braithwaite's extensive research with collaborators on different forms of regulation. He states a clear preference for self-regulation, responsive regulation and cooperative approaches, as company investigators or 'private police' have more knowledge about internal procedures, can more easily monitor compliance and are best placed to take action. Self-regulation also requires companies to bear the cost of regulation. Nonetheless, this may not work in all cases and may need to be enforced with state regulators having powers to impose sanctions. Most businesses will comply, leaving a minority who require more coercive sanctions and a smaller minority whose activities are so serious and persistent that they 'deserve' strong punishment. Strategies and sanctions can therefore be
conceptualised as a pyramid at the base, to be used for more cases, self-regulation and persuasive strategies. Intermediate points of the pyramid range through enforced self-regulation, voluntary disciplinary measures and/or remedial investigations to be taken within firms, accountability agreements, imposed accountability orders, informal warnings and cautions, civil and monetary penalties, and, at the apex, severe sanctions including punitive fines and 'corporate capital punishment'. This latter might for example involve taking a company into state administration for a period of time — to avoid the adverse impact of closure on employees, investors and local communities.

These arguments have had considerable influence and have attracted broad agreement, although extreme conservatives would resist the imposition of tough sanctions and radicals dispute the strong emphasis on self-regulation and argue for a speedier escalation towards punitive strategies as self-regulation is seen as ineffective and the strong emphasis on self-regulation can all too readily become incorporated into arguments for deregulation. Determining the balance between self and external regulation, regulatory and criminal sanctions remains, therefore, a source of dissensus.

**Different offences, different approaches**

It is also important to avoid generalisations about financial crime or 'fraud', as these include a large number of different offences with different levels of complexity and visibility which make them more or less amenable to crime prevention and detection. Not all are as difficult to prosecute as serious corporate frauds, and some forms of employee fraud may be better prevented by routine security precautions. The moral status of offences can also affect attitudes to, and the effectiveness of, regulation.

There are also many different kinds of offenders including individual employees and managers, small businesses or large corporations. Some are more 'respectable' than others. Some are highly organised, while others are better characterised as 'slippery slope' offenders. Most sectors have their share of 'rogues' or 'cowboys', often seen as marginal — thus the popular depiction of 'rogue traders'. Offenders also have different motivations — some desire personal economic gain, others offend 'for the good of the company', some hope to resolve personal or financial problems and yet others are attracted to the 'thrill' of offending. Small businesses may be ignorant of the requirements of the law or find compliance difficult to afford.

This suggests that strategies may be more appropriate for some than for others. Some, particularly those with a vested interest in 'respectability', may be more deterred by the threat of public exposure, others by threats to profits. Small businesses may be more responsive to advice, education and 'rehabilitative' approaches, while larger businesses can more easily resist or side-step outside intervention. Those attracted to the 'thrill' of offending are less amenable to deterrence, and those who do not see their activities as crime are less likely to be persuaded — for such offenders strategies stressing the moral unacceptability of law might be more appropriate. Large corporations present even further problems as they may be able to impede the work of external regulators and influence regulatory agendas by exerting their influence over the law and rule-making process.

**The moral dimension: Moral or amoral calculators?**

These differences indicate that arguments about whether the regulated are moral or amoral calculators may be somewhat simplistic as it is clear that ethical standards vary, even within professions where ethical codes are in themselves a form of control. They may also vary depending on whether 'professionals' are employees or otherwise dependent on a particular company, or are in private practice — as illustrated in discussions of the role of accountants and auditors in the wake of the Enron collapse. As employees, they may face dilemmas in prioritising business or commercial interests over professional ethics in situations where they are expected to 'find ways around the law'. Firms may also vary in the extent to which ethical codes are developed and implemented and may have very different cultures of compliance.

Some approaches assume that businesses are ethical and 'shameable' and Simpson's research found high standards of ethics amongst intending business persons. Nonetheless, the moral standards of individual managers or executives can be subverted within the corporate environment — while managers may not be 'bad people', they can become 'amoral calculators'. This reveals a possible distinction between individuals and corporations. To radical critics, the latter are essentially amoral calculators as, at the end of the day, the balance
sheet determines decisions and ethical business statements are more likely to be generated by expediency than by moral commitment.51

Towards a range of sanctions?
These arguments suggest very strongly that effective regulation requires a wide range of strategies and sanctions which incorporates regulatory and crime control strategies and takes account of instrumental and moral dimensions. Some self-regulation is effective but needs to be backed up by a full range of sanctions which must be used. While it lies beyond the scope of this paper to fully discuss specific strategies they are likely to include enforcement strategies along with administrative penalties and criminal sanctions.

Any form of 'policing' in practice involves many different approaches. Certainty of detection is a major feature of deterrence and the law is undermined if detection and inspection rates are too low. A wide range of commentators, from radical critics to enforcers themselves, advocate stronger policing strategies involving increased amounts of inspection and prosecution along with more resources and specialist training for enforcers. Rosalind Wright for example has repeatedly argued for more resources for the policing of fraud,52 and there have, as seen above, been suggestions that a centralised authority should be created to deal with fraud, reflecting arguments that centralised agencies are more effective.

Administrative sanctions also have considerable potential as they threaten the survival of a business and, as they can be used speedily, protect the public more effectively than lengthy criminal prosecutions. Other strategies which seek to monitor and help businesses to comply are also effective means of prevention and financial sanctions can deter — particularly if calibrated against turnover.53 They do however involve 'private' rather than 'public' justice, which involves less publicity and can also be seen as unjust, as defendants may not have recourse to due process of law.

The lack of public stigma could be addressed by greater amounts of publicity and attempts to 'name and shame' offenders, suggesting a more proactive approach to publicity as is the case with publicity orders.54 Other suggestions might include the application of 'anti-social behaviour orders' to business crime. These, targeted at unruly youth and noisy neighbours, define anti-social behaviour as that which 'causes alarm or distress to one or more people not in the same household'. While their introduction was criticised for appearing to extend the net of criminalisation, they could be an example of a measure which might work better for business than for conventional crime. They could be applied for example to firms or sales personnel who use aggressive doorstep, telephone or Internet sales practices and it should be possible to identify 'anti-social' behaviour in the regulation of markets. The phrase itself is more indicative of moral disapproval than the less loaded 'remedial order'.55

Criminal sanctions, while often seen as more severe, can, as seen above, be criticised as lenient and lacking deterrence, which to some regulators justifies a non-prosecution policy. Monetary penalties have been described as 'derisory' and companies cannot be imprisoned. While a full discussion of sanctions lies outside the scope of this paper, there have been many suggestions that a wider range could and should be applied. These could include for example greater use in Britain of corporate probation or community service orders which, in addition to being deterrent, retributive or rehabilitative, also enhance a moral dimension by being more specifically associated with 'crime'.56

CONCLUSIONS
What can be concluded from this consideration of regulatory compared with crime control approaches?
It can be argued in the first place that presenting them as contrasting, even mutually exclusive strategies is an oversimplification. Regulation incorporates a wide range of strategies and works best if backed by the ultimate sanction of the criminal law. Presenting a crime control model rather crudely as inevitably involving prosecution and punishment fails to recognise that in practice controlling crime involves a range of approaches including mediation, crime prevention and restorative justice. Many of Braithwaite's arguments for example can equally well be applied to the control of so-called conventional crime. While there has been an increase in popular punitivism, which has generally excluded white-collar crime, this is in practice reserved for a minority of most dangerous serious or persistent offenders. There is therefore a need to move beyond a debate which has been characterised as 'barren'.57

While many commentators now accept that a balanced range of sanctions, more clearly targeted at different offences and offenders, is necessary, any
combination of strategies is likely to attract criticism from extreme advocates of either a conservative or a radical persuasion. This indicates that the control of financial, or any other kind of business crime must be seen in its political context and political will is necessary to develop and implement the kind of sanctions which can be justified not only on the basis of deterrence but also to underline the moral and symbolic role of regulation or control. Regulation may also be adversely affected where there is continuing cultural or subcultural tolerance of ‘offences’. A greater emphasis on the moral aspects of regulation is therefore also necessary and may be assisted by more publicity for regulatory activities and more public involvement in the regulatory process.

REFERENCES

(5) Clarke, ref. 3 above; Hutter, ref. 1 above; Simpson, ref. 3 above.
(6) Clarke, ref. 3 above, p. 3.
(7) Simpson, ref. 3 above.
(9) SFO website, www.sfo.gov.uk
(12) FSA website, www.fsa.gov.uk
(15) FSA, ref. 12 above.

(17) Levi, ref. 13 above, p. 75.

(20) Wright, ref. 16 above.
(22) Clarke, ref. 3 above.
(23) Levi, ref. 13 above.
(24) Hutter, ref. 1 above.
(26) Hutter, ref. 1 above.
(27) Clarke, ref. 3 above.
(28) Hutter, ref. 1 above.
(31) Clarke, ref. 3 above.
(32) Ibid.
(35) Energywatch Press Release 30/01/02 at www.energywatch.org.uk; OFT Press Release 14/02/01 at www.oft.gov.uk
(36) Levi, ref. 13 above, p. 73.
(37) Simpson, ref. 3 above.
(38) Croall, ref. 19 above.
(39) Levi, ref. 13 above, p. 75.
(40) Levi, ref. 13 above, p. 72.
(43) Levi, ref. 13 above.
(44) Levi, ref. 8 above.
(46) Hutter, ref. 1 above; Croall, ref. 45 above.
(49) Simpson, ref. 3 above.
(51) Pearce and Tomb, ref. 42 above.
(52) Wright, ref. 16 above.
(53) Croall and Ross, ref. 47 above.
New criminal confiscation powers come into force

New criminal confiscation powers under the Proceeds of Crime Act 2002 which apply to all acquisitive crimes came into force on 24th March, 2003. Key changes introduced by the Act in this area include:

- the freezing of suspects’ assets from the start of a criminal investigation, preventing them being hidden, moved or transferred beyond the reach of the law;
- the Crown Court acting as a ‘one stop shop’ for all criminal confiscation proceedings, making it easier and quicker to obtain a confiscation order;
- the Crown Court being required to decide at the start of confiscation proceedings whether the offender has a ‘criminal lifestyle’ (those with such a lifestyle can have all their assets confiscated going back six years);
- the requirement that confiscation orders must be paid immediately unless the offender can show exceptional circumstances;
- new and strengthened enforcement procedures to ensure that offenders pay up in full.

Under the Proceeds of Crime Act a confiscation order may be made following any conviction in the Crown or Magistrates’ Court. The confiscation procedures are mandatory, and the Crown Court must go through them when asked to do so by the Director of the Asset Recovery Agency or the prosecutor. The court also has the power to proceed in its own right.

The requirement for a ‘criminal lifestyle’ is met when the offender is convicted of an offence listed in Schedule 2 of the Proceeds of Crime Act. These include money laundering, along with a wide variety of other offences including trafficking in drugs, people or guns; money laundering; directing terrorism; counterfeiting, intellectual property theft; pimping and running a brothel; and blackmail or inchoate offences.

There is also a further category where the criminal lifestyle requirement is fulfilled where the offender has made at least £5,000 profit from crime and:

- has been convicted of at least four acquisitive offences at the same trial; or
- has committed an acquisitive offence over a period of at least six months; or
- has been convicted of at least two previous acquisitive offences on separate occasions within the last six years.

If an offender has a criminal lifestyle, the court must assume that all the offenders’ assets acquired over the previous six years have been derived from crime and are eligible for confiscation unless he can prove otherwise or this assumption would cause serious injustice. If an offender does not have a criminal lifestyle, only benefit from a particular offence or offences can be confiscated.