

**ENFORCEMENT OF REGULATION  
BY ADMINISTRATIVE OR PENAL  
SANCTIONS: AN ECONOMIC  
PERSPECTIVE**

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# OVERVIEW



- **Nature of regulatory law**
- **Economics of regulatory law**
- **Economic theory of deterrence and law enforcement**
  - **sanctions**
  - **procedural arrangements**
  - **institutional considerations**
- **Conclusions**

# NATURE OF REGULATION



- **Overriding of private preferences in relation to activities valued by the community**

- **Correction of market failure and private law failure to reach desired outcomes**

- **“social” regulation: inadequate information or externalities**

- **“economic” regulation: inadequate competition**

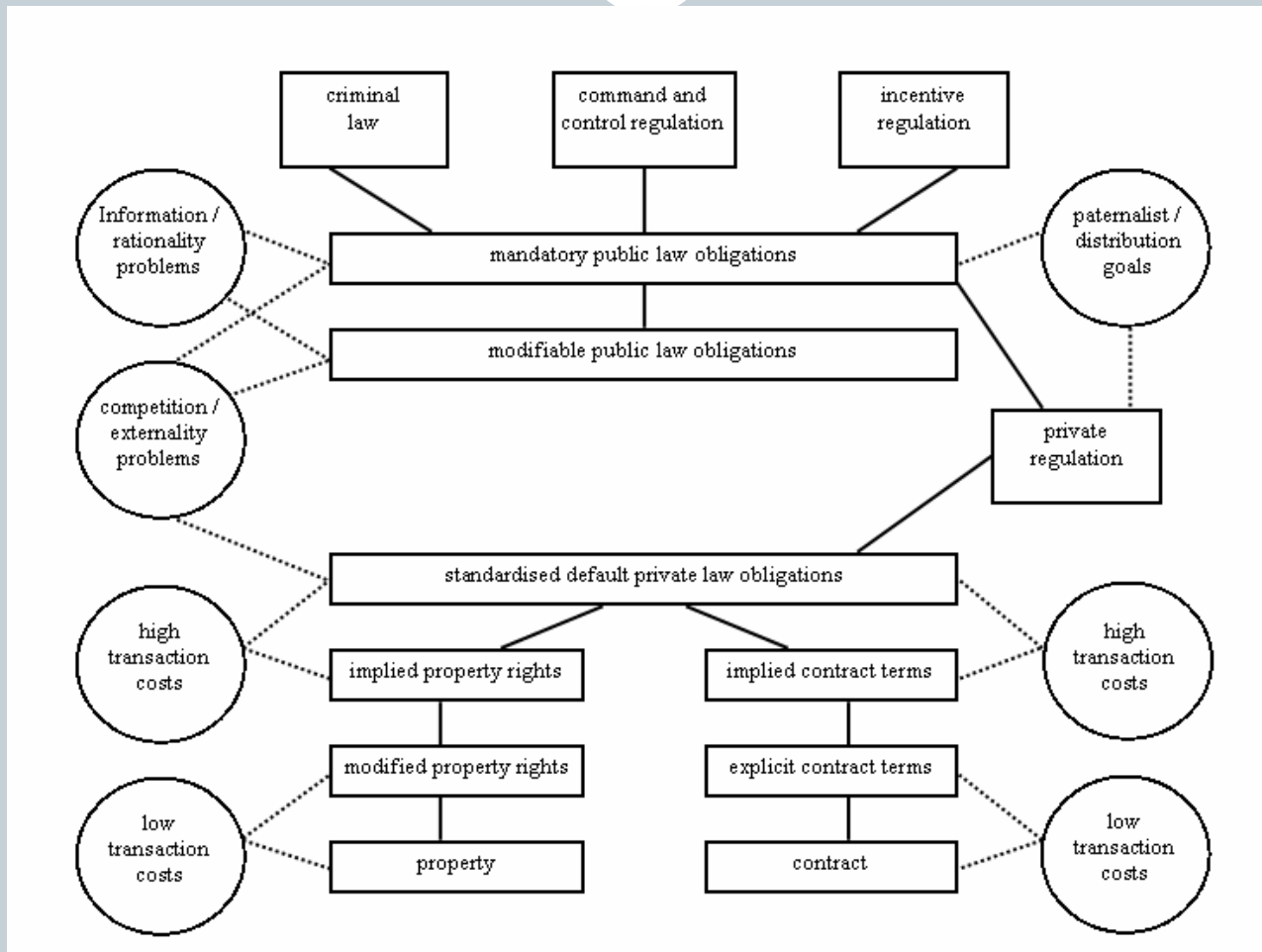
- **(In general) formulated and enforced by public agencies – public law but nb**

- **private law regulation**

- **self-regulation**

- **co-regulation**

# NATURE OF REGULATION: ROLE OF MANDATORY PUBLIC LAW OBLIGATIONS



# Economics of regulatory law



- **Choice of instrument for optimal harm reduction at lowest administrative cost - minimisation of:**
  - Costs of harm
  - Costs of preventing/reducing harm
  - Administrative (tertiary) costs
    - **information costs**
    - **monitoring costs**
    - **error costs**
- **Enforcement: optimal level of compliance at lowest administrative costs**

# “REGULATORY CRIME” AND “MAINSTREAM CRIME”



**OFFENCES FROM ACTIVITIES WHICH DO  
AND DO NOT HAVE SOCIAL UTILITY  
IMPLICATIONS FOR DECISIONS ON  
“OPTIMAL LEVEL” OF CRIME**

# REGULATION: ALTERNATIVE ENFORCEMENT SYSTEMS



- A) primary reliance on the criminal justice system for financial penalties
- B) primary reliance on administrative agencies which have power themselves to impose financial penalties
- C) primary reliance on self-regulatory arrangements

# GOAL OF ENFORCEMENT



- **Not elimination of regulatory contraventions BUT**
- **Optimal level of regulatory contraventions where social benefit in reduction of harm caused by contraventions approximates to social (primarily administrative) cost of achieving that level of compliance**



# DETERRENCE MODEL



- Predictably compliance with regulation where  
$$U < pD$$
  - $U$  = profit from contravention
  - $p$  = probability of condemnation
  - $D$  = losses from penalty and associated costs
- Or  $U < pD + qE$ 
  - $q$  = probability of detection
  - $E$  = costs arising from detection (pre-condemnation)

# POLICY VARIABLES: $q$



- **Ex ante monitoring (licences)**
- **Ex post monitoring (standards)**
- **Role of third parties & victims – facilitating whistle-blowing**
- **Bluff! (subjective perceptions)**

# POLICY VARIABLES: $p$

Criminal justice v. administrative processes



- **Strict liability or mens rea**
- **Rules of evidence**
- **Burden of proof**
- **Institutional: juries – rights of appeal**

**Administrative costs**

**Type 1 error costs (erroneous convictions)**

**Type 2 error costs (erroneous acquittals)**

# POLICY VARIABLES: *D*



- (Imprisonment)
- Loss of licence (nb negative licensing)
- Fines (size of)
- Administrative penalties (size of)
- Compensation orders
- Disgorgement of profits/confiscation
- Naming & shaming
- Corporate probation orders

Administrative cost

Cost to offender

# POLICY VARIABLES: $E$



- **Hassle!**

**But nb Type 1 error costs**

# INSTITUTIONAL CONSIDERATIONS



- **Criminal = separation of power; administrative = integration of powers**
  - rule-making
  - determination of liability
  - imposition of penalty
- **Bargaining between agency/prosecutor and offender**

# BRAITHWAITE'S ENFORCEMENT PYRAMID



**Licence  
Revocation**

**Licence  
Suspension**

**Criminal Penalty**

**Civil Penalty**

**Warning letter**

**Persuasion**

# CRITICAL FEATURES OF REGULATORY ENFORCEMENT PRACTICE



Enforcement discretion

Reliance on criminal justice system

Low prosecution rate (e.g.  $<0.05$  of known contraventions)

Non-prosecution of first-offenders

Harnessing victim/third party involvement



# CONCLUSIONS



- Importance of non-criminal sanctions and processes for cost-effective regulatory enforcement
- UK key reform (Regulatory Enforcement and Sanctions Act 2008): administrative financial penalties
- Addressing problem of Type I error costs