TWO VISIONS OF REGULATION

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Regulation has entered both political and academic debate in a way almost unimaginable a couple of decades ago; indeed it is convincingly claimed that we now have a ‘regulatory state’. This debate has been hugely beneficial in raising the profile of previously neglected areas of social and economic life, and in focussing attention on how their operation can be improved. However, much of the debate has suffered from a serious lack of focus. Particularly in political debate, the meaning of regulation has often been simplistic and taken for granted; it is treated in a deceptively simple manner as imposing a burden, as the opposite of free markets. Thus, whilst regulation may be needed, it is portrayed as a second-best choice for social organisation; in principle free markets giving us economic freedom and consumer choice should be preferred wherever possible. Regulation is thus an always regrettable means of correcting market failures. This concept of regulation is, by implication, a narrow one; regulation is part of economic management. The paradigmatic regulatory bodies are those concerned with public utility services such as water and energy where problems of natural monopoly prevent markets from operating freely on their own. There are other areas of market failure, for example in the case of financial services, but here also regulation performs economic functions of

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1 This paper is an edited version of some themes of Prosser, The Regulatory Enterprise (Oxford University Press, 2010), and is based on arguments developed more fully there.
3 For an earlier example of concentration on these regulators at the expense of others see Prosser, T., Law and the Regulators (Oxford: Clarendon Press, 1997).
protecting savers and investors, maintaining market confidence and making markets work smoothly and transparently. In contrast to state regulation, private regulation may appear to offer a desirable alternative which does not impose burdens but which both runs with the grain of markets to maintain efficiency, and respects values of individual freedom and autonomy. Indeed, on this approach private regulation hardly amounts to regulation at all.

In quite different developments from those in political debate, academic writing has developed a concept of regulation which has become ever wider. This is evident in the range of institutions which are counted as engaged in regulation; it has expanded from government departments to independent agencies, to ‘self-regulation’ and ‘co-regulation’ and finally to regulation by private organisations. It is also apparent in an acceptance of the variety of goals of regulation, and in a dissociation of regulation from the economic sphere. Thus earlier definitions of regulation stressed its role in relation to markets; regulation was ‘fundamentally a politico-economic concept and, as such, can best be understood by reference to different systems of economic organization and the legal forms which maintain them.’ However, more recent accounts have expanded regulation to include a wide range of other types of social control, incorporating insights from sociology as well as economics. One definition shows this broad approach particularly clearly:

‘regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly

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identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.⁷

On this model, private regulation is part of a continuum, and regulatory regimes characteristically cocktails of public and private regulation. However, in principle similar accountability mechanisms are applicable to both; rather than private regulation representing a radical alternative to public regulation it is simply one technique for making regulation more effective and to secure a proper information base for its operation. Regulation is not so much a burden but a range of techniques (and in particular, procedures) for coordination of public and private interests.

The theoretical debates are themselves made more complex through the growing importance not just of economic theories of regulation, but of the salience of social theory as well. This has in itself shifted the nature of the debates; ‘[e]conomic theories of regulation have tended to follow economic thinking generally in positing a sharp distinction between markets and regulation … Sociological analysis, oriented towards the analysis of power in its diverse forms, has tended to reject this sharp distinction.’⁸ Such theory is far to complex to analyse in any depth here.⁹ Important strands include the legal theory of autopoiesis, particularly associated with the work of Gunther Teubner and derived from that of Luhmann, governmentality theories finding their origin in the work of Foucault, and responsive regulation, particularly associated with the work of Ayres and Braithwaite.¹⁰

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⁸ Scott, ‘Regulation in the Age of Governance’, 146.
This broadening of the concept of regulation has been very welcome, both in permitting a wider variety of institutions to be compared, and in accepting the wide range of different rationales for regulation extending far beyond the economic. This new approach is more realistic than the more restrictive one, given that one of the most important characteristics of regulation in recent years has been the creation of a considerable number of regulatory institutions with social rather than economic responsibilities, or indeed with a mix of the two. Thus the economic regulator of the public utilities is no longer the paradigmatic regulatory body, and there is no new single paradigm. There are many regulatory bodies which perform social functions, do not operate on any predominantly economic logic based on mimicking market outcomes, and which are not restricted to areas where there are definable market failures. Instead, regulation may be a first-choice to administer an area of social provision for which markets are considered in principle inappropriate. Moreover, unlike in the case of the economic regulators, the concept of regulatory independence may have limited application in these areas; instead they may be involved in a regulatory partnership with government. Indeed, with the growing recognition of private regulation, the line between regulation and private ordering has become much harder to draw. This new approach clearly offers considerable scope for a mixture of public and private regulation.

However, this broadening of the concept of regulation also carries with it a danger; that the focus of the regulation debates is lost. If regulation is wide enough to extend to almost all types of social control, what principles can we have for assessing how it should work? Are we restricted to pragmatic examination of what works on the ground within a specific context? That is not likely to be enough, for

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1 For a similar argument see Black, ‘Critical Reflections on Regulation’. 
how do we determine what ‘working’ or ‘working successfully’ mean, and how do we
know what to extract as relevant from the complexity of any social context? In the
political debate, there are many examples of how good regulation should work, but
these are almost exclusively procedural. Substantively, the assumption is often that
the less regulation the better (‘less is more’ to quote the title of an influential
publication from the Better Regulation Task Force); regulation imposes burdens
which must be lightened. In much of the economic work on regulation, economic
principle itself gives guidance to regulators; they should promote market forces where
possible and mimic them where it is not. Otherwise, social regulation is at the whim
of politicians or of elected majorities; the economists’ ‘words “merits” and “equity”
are names for black holes. You have no substantive account of these…’. Then how
do we judge the success of non-economic regulation? This is a particularly pressing
concern where regulation is undertaken by agencies which are to various degrees
autonomous from elected government; if they cannot claim electoral accountability,
what other sources are there for their legitimacy? This question of legitimacy in
spoken or unspoken form haunts much of the debate.

It is in fact possible to classify regulation and assess its performance in ways
which acknowledge its developed social role. This can be done firstly by mapping the
position of different regulatory bodies and examining their relations with government
and other institutions; are they engaged in partnership or is independence the guiding
principle? Secondly, we can accept a variety of different regulatory rationales, and

12 See notably the UK Government Better Regulation Executive’s Principles of Good Regulation:
13 Regulation-Less is More: A BRTF Report to the Prime Minister, (Better Regulation Task Force,
2005).
14 The classic statement of this philosophy was of course the Littlechild report which was enormously
influential in shaping the design of the British utility regulators; Littlechild, S., Regulation of British
draw from them models which can be used for classificatory purposes. We can also
draw from these rationales principles of regulation, both procedural and substantive,
which have a normative role and tell us what regulators ought to do to achieve
legitimacy. The principles do not provide easy answers to particular regulatory
problems, and may often come into conflict; one of the most interesting questions is
how deliberative institutional arrangements can be created for attempting to resolve
such conflicts. Nevertheless, these models and principles should promote better ways
of understanding regulation, and will permit greater clarity whilst keeping the
advantages of the expanded concept of regulation described above. The first stage in
developing this new understanding, and the one to which this paper will limit itself, is
to point to two radically different visions of regulation in the current literature;
regulation as infringement of private autonomy and regulation as a collaborative
enterprise.

Two regulatory visions

As the discussion above suggests, the increased salience of regulation in political and
academic debates has not been accompanied by any unanimity about its meaning or
its legitimate role. Indeed, there are wide divergencies between different versions of
regulation and, in particular, different conceptions as to its legitimacy. A major
distinction is between regulation as infringement of private autonomy and regulation
as a collaborative enterprise. 16 Each vision of regulation is associated with a cluster

of different characteristics. Thus regulation as intrusion on private autonomy sees the major, or even the sole, objective of regulation by regulatory agencies to be the maximising of economic efficiency; social or distributive concerns are to be left to elected governments. Secondly, in designing institutional arrangements independence is the key principle; this assures investors of a framework of stability and calculability free from unpredictable government intervention. Thirdly, such stability may also require that so far as possible regulatory tools take the form of rules; a good example would be the price controls applied to public utilities over a period of years. However, rules imposed by regulators are not appropriate for all regulatory contingencies, and may be unnecessarily constraining. Fourthly, alongside rules, private contracting may be an adequate mechanism for social coordination and as such an adequate substitute for direct regulatory interventions through creating appropriate incentives; an aim of the regulator should be to encourage the creation of mechanisms which require the minimum of public intervention, through systems of self- or co-regulation. Fifthly, the relationship between regulator and regulated themselves can be seen as analogous to a contract, so establishing stability and calculability for private investors. Sixth, where deliberation and taking account of outside interests is necessary, this will take the form of the regulator receiving evidence through consultation procedures rather than direct participation of stakeholders in the regulatory agency itself. To do more than this would risk regulatory capture. The final element in this vision is an emphasis on the use of ordinary private law mechanisms, for example tort actions, as a means of regulatory accountability. This vision thus emphasises the values of private autonomy, the role of self-correcting markets, and the facilitation of contractual stability.
According to this model, then, private regulation is desirable in principle; it sustains private autonomy and so respects basic rights to be left alone. It may also promote economic efficiency, but only if it is sufficiently calculable. Thus private regulation should be based on contracting rather than informal agreements or practices. If this can be achieved, self-regulation should be preferred to co-regulation.

By contrast, the alternative vision is one of regulation as an enterprise. In this vision, regulators are ‘governments in miniature’.

They have responsibility for both economic and social or distributive goals, which are anyway inseparable. Secondly, regulatory independence is not the key principle of institutional design, because regulation is a collaborative enterprise between regulatory agencies and other government bodies; although there may be particular contingent reasons for creating independent agencies, their responsibilities are shared with government and other bodies and may overlap in a complex ‘regulatory space’.

Thirdly, legitimacy is the product of government delegation; discretion may be more important than rules and its exercise can be held accountable through procedural means. Fourthly, on this view there is no such thing as pure self-regulation based on private autonomy. Self-regulation simply reflects further delegation to enable regulatory tasks to be carried out more effectively. Fifthly, rather than relations between regulator and the regulated being analogous to a contract, they form part of a complex network of interaction between a large number of stakeholders who inhabit the broader regulatory space. Sixth, deliberation can take place through direct representation of stakeholder interests within the regulatory agency itself, for example through board membership,


and through the policy-making of the regulator being undertaken publicly. Capture is less of a danger than is lack of regulatory responsiveness. Finally, regulators should, at least in part, be immune from ordinary private law liability; instead, accountability should be secured through public law mechanisms of proceduralisation, Parliamentary scrutiny and judicial review; accountability is more a matter of ensuring good governance than of compensating for private wrongs.

On this model, the arguments for private regulation are more contingent ones. Thus it may be more flexible than state regulation as it does not require the use of demanding democratic procedures for change. It is likely to be better informed than state regulation as it is shaped by actors closer to the ground. The arguments are thus based on efficiency rather than on rights, and such regulation remains part of public law, especially given that it is conceived as a delegation by the state of its powers to promote the public interest. Co-regulation is likely to be preferred to self-regulation as the state may retain a major role in the regulatory process and may retain ‘long-stop’ powers to intervene when it considers that private regulation has proved inadequate. These competing visions are comprised of clusters of characteristics; no individual regulator will display all of them, and indeed there may be internal tensions between them, for example between reliance on calculable rules and support for self-regulation. Nevertheless, the distinction between the visions is of considerable importance in practice as well as in theory, especially when it comes to matters of institutional design.

**Regulatory visions and regulatory independence**

Clearly there is ample evidence of both visions in UK regulatory institutions. Thus in the case of the more ‘economic’ regulators (Monitor undertaking economic regulation
of the health system, Ofcom regulating communications and the utility regulators covering energy, water and rail) there has been greater emphasis on independence, rules and calculability. However, other regulatory bodies examined fall closer to the second vision. For example, many work closely with government, often applying standards developed by government departments or through the European Union (for example, the Care Quality Commission covering health and social care and the Environment Agency). There is less emphasis on rules as a necessary basis for relations with those regulated; instead the emphasis has been on collaboration and partnership, perhaps most strikingly in the case of the Food Standards Agency and through the tripartism of the Health and Safety Executive. In these cases attempts have been made to build participation and deliberation into the heart of the regulatory process, not only through tripartism but also through public meetings of the boards and other procedures such as the use of advisory committees. Indeed, the Food Standards Agency is a regulator which works extensively through partnerships whilst being extremely transparent.

What is most important, though, is that neither vision offers a complete account of any regulator. The visions are ideal types for use in analysis rather than descriptions and in practice both are mixed. This is most striking with Ofcom which has both major economic and social regulatory functions. Perhaps most important of all, even in the more ‘economic’ regulators, a growing collaborative role with government is developing, notably on sustainability and, in the case of Ofgem which regulates energy markets, fuel poverty. This involves government setting goals and also some joint decision-making for regulators and government.

A key issue which has emerged from this work is the importance of the location of regulators within complex networks involving government, the EU and
other levels of governance with multiple accountabilities running through them. This is not surprising; a similar point was made strongly in the most developed empirical examination so far of an economic regulator. Thus, in examining the former telecommunications regulator, Oftel, ‘[w]e found that what we call extended mechanisms of accountability, the day to day involvement of interested public and private actors in Oftel’s activities, provided a more important check on Oftel’s activities than those formal accountability mechanisms to which Oftel was subject.’

Indeed, the extended division of power between regulators and others, especially government, has some major advantages; it provides a means of coordination with other policies, an ability to rely on a range of different types of expertise and (as in the case of the Human Fertilisation and Embryology Authority) the ability for each actor to spur the others into action.

This division of responsibilities also raises major questions of what we mean by regulatory independence. Independence is clearly different from autonomy; thus many regulators claim to be independent, but none are autonomous in the sense of being able to develop on their own the regulatory context in which they work. In fact, independence of regulators means two things. The first is that there is a clear and transparent division of powers between the different bodies involved in the overall regulatory process, especially between regulator and government. The second is that the regulator is not subject to governmental pressure in areas which clearly do fall within its own powers; this autonomy will be more important for day-to-day decision-making rather than policy development. Thus government issuing general guidance under statutory powers to regulators does not infringe their independence; putting pressure on a regulator to change a decision clearly within the latter’s responsibilities

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clearly does (a celebrated example was that of the minister attempting to prevent the rail regulatory from reviewing Railtrack’s rail access charges in a way which might have prevented the latter’s move into administration\textsuperscript{20}).

This version of independence is ultimately compatible with the requirements of independent regulation under EU law. Where national governments have retained a role in operational functions effective structural separation is required between regulation and activities associated with ownership or control; this does not prevent a governmental role in policy-making. The European Court of Justice has emphasised that a ministerial role in regulation is acceptable so long as the ministerial authorities are neither directly nor indirectly involved in operational functions.\textsuperscript{21} Moreover, in the most recent legislation on electricity, aimed at enhancing regulatory independence, Member States are required to guarantee the independence of national regulatory authorities; this includes both ensuring that they act independently from any market interest and ‘do not seek or take direct instructions from any government or other public entity when carrying out the regulatory tasks.’ However ‘[t]his requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by government not related to the regulatory powers and duties under [EU law].’\textsuperscript{22}

In UK experience, the clarity of relations with government has varied. In some cases it is underdeveloped, especially where there was uncertainty about the roles of the two bodies in policy development; the Human Fertilisation and

Embryology Authority was heavily criticised by Parliament on this point. However, there were also some examples of excellent practice. These include the publication by the Food Standards Agency of its advice to government, Ofcom’s publication on its website of letters from ministers, and the use of social and environmental guidance (so long as this is properly done to set out a framework coordinated with government policy). A further important improvement has been the publication of a clear statement of government policy and of what it is prepared to fund before the regulator takes decisions reflecting these requirements; this is now the position in rail and water. A means of coordination with potential but which seems to have worked less well is that of concordats or memoranda of understanding which have generally been brief and vague.

The situation is now made more complex by the centralising role of the regulatory reform initiatives, and we have seen that some regulators have criticised the role of the Better Regulation Executive as producing ‘initiative overload’, losing sight of how regulation can be made more effective, and confusing lines of accountability. A key point which can however be taken is that regulatory independence is relative rather than absolute; and this is likely to remove a key argument against private regulation.

Private regulation

In those areas such as standard-setting where one is talking of industry self-regulation within the market place, something like the first vision will be most appropriate, with an emphasis on clarity and calculability, though obviously not regulatory independence in a self-regulatory context. However, in other areas the

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second model seems more appropriate to characterise activity where there are strong public interest elements involved. A couple of examples from UK practice can illustrate this. The first is the area of health and safety, where the Health and Safety Executive has adopted important elements of self- or co-regulation to secure both efficiency and legitimacy.\(^2^4\) There have taken the form of tripartism with the direct involvement of employers and the workforce in regulation through membership of the regulatory body itself, and through extensive delegation of power to workplace-based safety representatives and committees. Thus, in addition to adopting the structured arrangements for the consultation of interest groups and for transparency characteristic of other regulators discussed in this book, the HSE incorporates the major stakeholders into the heart of the system through tripartism, both in its own board and in the advisory committees, and combines public regulation with self- and co-regulation in which regulatory tasks are delegated within a statutory framework and are subject to monitoring by the regulator. Those affected by regulation are in a sense ‘internalised’ within the regulatory system; rather than the regulator receiving evidence from outside which it considers in reaching its decisions, the key interests are themselves put at the heart of decision-making, more so than for any other regulator. Regulatory responsiveness is more important than fear of capture, especially as several different interests are represented through the tripartite structures and the role of the HSE is to act as an ‘honest broker’ between them. It is these factors that best explain regulatory stability and the general satisfaction with the HSE expressed by major stakeholders, in marked contrast to media myths about over-intrusive and petty health and safety requirements. Regulation as a collaborative

enterprise is at the heart of the HSE; it is not private regulation, yet not entirely regulation by the state.

A further example is that of Ofcom. Ofcom is required by the Communications Act to have regard to ‘the desirability of promoting and facilitating the development and use of effective forms of self-regulation’.\footnote{S 3(4)(c).} This has proved controversial; the only major criticism of Ofcom by consumer stakeholders referred to in an otherwise highly favourable Consumer Focus report on Ofcom was that of an over-reliance on self-regulation even where there was only a slim chance of success.\footnote{Brooker, S. and Taylor, A., Rating Regulators: Ofcom, (London: Consumer Focus, 2009), paras 6.7-6.11.} Ofcom has published criteria for promoting effective co- and self-regulation.\footnote{Ofcom, Criteria for promoting effective co and self-regulation (2004); and now Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation (2008).} These are quite restrictive, requiring that new schemes meet good practice criteria of public awareness, transparency, significant industry participation, adequate resources, clarity of processes, ability to enforce codes, audits of performance, a system of redress, involvement of independent members, regular review of objectives, and non-collusive behaviour (though not all would be necessary in every case). This is very much co-rather than self-regulation, and such an approach is also evident in some major examples. Thus a controversial decision was to delegate broadcast advertising content to the self-regulatory Advertising Standards Authority.\footnote{See Ofcom, Ofcom’s Decision on the Future Regulation of Broadcast Advertising (2004).} This was accompanied by important safeguards, including establishing an independently-chaired Advertising Advisory Committee to bring lay and expert input to the industry code-making body; maintaining Ofcom’s right, as a last resort, to insist on changes to the broadcast advertising codes and to retain a right of veto over proposed changes;
and requiring clearer definition of which advertising regulation functions would be contracted out and which would remain within Ofcom.

A further example concerns the regulation of premium rate services, where the Communications Act empowered Ofcom to set conditions requiring operators of such services to comply with a code of practice approved by the Ofcom but administered by the self-regulatory Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS), with backstop powers for Ofcom to issue its own rules.\(^{29}\) The system was, however, subject to major criticism as ineffective after serious scandals involving misuse of premium rate services in television competitions. The system was then subject to major reform, with ICSTIS renamed PhonepayPlus and subject to a new Formal Framework Agreement with Ofcom, which amongst other things, requires that a senior member of Ofcom’s staff is the sponsor for relations between the two bodies with a right to receive information; that Ofcom is represented on appointments panels for membership of PhonepayPlus; and that it can give directions to the latter body, as well as being able to reserve in advance matters for Ofcom’s own decision-making. Ofcom also agrees and approves the scope of, and strategic approach to, regulation.\(^{30}\) Once more the approach is very much one of co- rather than self-regulation.

**Regulatory visions and regulatory reform**

This brings us to the different types of regulatory reform which can be identified in governmental initiatives seeking ‘better regulation’. They can be divided into three. The first can be described as the ‘lifting burdens’ approach, which

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\(^{29}\) Ss 120-4.

is designed to remove or minimise restrictions on the working of open markets; it thus fits most closely with the regulatory rationale of maximising efficiency and consumer choice. This type of regulatory reform involves some ambiguity. If it is limited to lifting administrative costs, it can be applied to all regulators; no-one outside the artificial world of bureaucrats caricatured by public choice theory is against streamlining administrative burdens, and indeed simplification may help regulators meet their duties to protect consumers. However, the ‘lifting burdens’ approach may go further than this. To quote the Better Regulation Commission, ‘[t]he BRC believes that regulation plays an important role in society – but only appropriate regulation that meets our Five Principles and is brought in reluctantly as a last resort rather than first instinct. As we have said before, where regulation is concerned, “Less is More”’.  

This clearly does not concern simply administrative costs but aims to limit regulation itself. It is thus not surprising that some of the regulators have expressed concern at ‘initiative overload’ and a failure by the Better Regulation Executive to consider how regulation can be made more effective, as mentioned above. The Chairman of the Healthcare Commission also delivered a stinging attack on this approach, suggesting that regulation is not inherently burdensome because it involves protecting patients’ rights; it may be seen as burdensome by those affected, but this may mean that it is good regulation. Proportionate regulation can simply be used as an argument for less regulation; ‘[w]e are in the realm of dogma, of ideology (or theology).’ Clearly the ‘lifting burdens’ version of regulatory reform does not sit easily with the approaches of all regulators and may be highly inappropriate for private regulation.

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However, there is a second approach within regulatory reform which is concerned with maximising opportunities for deliberation, through requiring consultation of stakeholders, using impact assessment to ensure that a range of options is properly considered when decisions are being made, and requiring fair enforcement procedures. Indeed, deliberation seems to have been the aspect of impact assessment that has been most successful, especially given the difficulties of quantification which have dogged attempts to use such assessment as a rigorous means of minimising regulatory burdens. This deliberative approach sits far more easily with the work of many regulators and with private regulation than does the ‘lifting burdens’ approach, largely because it repeats what would anyway be general principles of good administration. It is this deliberative approach which is most appropriate for future development of regulatory reform, as it does not have the bias towards treating efficiency maximisation and consumer choice as the sole goals of regulatory policy which can be detected in much of the ‘lifting burdens’ literature. Indeed, there may be some recent official recognition of this with the publication by the Better Regulation Executive of work on regulatory benefits, recognising their importance and proposing improved delivery through improved procedural approaches to clarity, commitment and compliance.33

Finally, a neglected area of regulatory reform is that which does not try to lift burdens or to increase responsiveness to business concerns, but which attempts to develop monitoring of human rights and social solidarity, both in the work of regulators themselves and, through their work, in the areas which they regulate. However, such monitoring is both very limited in comparison to the general better regulation initiatives and has as yet limited arrangements for central organisation of

the sort provided by the Better Regulation Executive, although the Equality and Human Rights Commission is undertaking important work to lay the foundations for more coherent monitoring. There is also space for considering these matters in the impact assessment process in its more flexible form since 2007. Given the importance of human rights and social solidarity as regulatory rationales, this is the major area where more work needs to be done. After all, ‘better regulation’ is not simple a matter of ‘less is more’; it is a matter of ensuring that, so far as possible, regulators do their best to implement properly the rationales for their work, not only in maximising efficiency and consumer choice but also in, for example, protecting the environment, health and safety and patients’ rights. The most appropriate approach will differ depending on the rationales; for, example, for those regulators concerned with protecting human rights the ‘lifting burdens’ approach will be less appropriate than monitoring their effectiveness in achieving such protection. Thus regulatory reform needs to be tailored more clearly to the differences between regulators identified in this book. The Regulatory Reform Committee of the House of Commons emphasised that better regulation principles should be applied to regulatory reform initiatives themselves; one such principle is that different types of regulatory reform are appropriate for the tasks of each regulator.  

### Conclusion

Clearly the two visions of regulation set out here go far beyond the area of private regulation. However, it is hoped that they will be relevant to private regulation in two ways. Firstly, they will show the complexity of the notion of regulation, both public and private. As a result, it makes little sense to think of private and public regulation

\[^{34}\] ‘Getting Results’, para 17.
as alternatives; as the examples referred to here suggest, there is a continuum with a cocktail of different techniques. The important problem is to secure legitimacy and accountability for the cocktail as a whole.

Secondly, there may be important lessons for regulatory reform. This has concentrated largely on lifting regulatory burdens, and has suggested a strong preference for private over public regulation. However, the reality is far more nuanced than this would suggest; the ‘lifting burdens’ model may be appropriate in those areas of regulation associated with the first vision, but more commonly the latter vision of a regulatory enterprise is more appropriate. Here regulatory reform should concentrate on ensuring responsiveness to a wide range of different interests (something which may of course be a particular problem in the case of private regulation) and to rights other than those of private autonomy, for example equal treatment. It could well be that the principles applicable to private regulation are very little different from those relevant to regulation in general, and so future institutional design can concentrate on issues of responsiveness as a whole rather than on a false public/private dichotomy or on ‘lifting burdens’.