

Editor's Introduction: Understanding Regulatory Enforcement

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This issue of Law & Policy adds to the growing body of empirical case studies of decision-making and enforcement in regulatory agencies. Summarizing that research, regulatory enforcement styles can be described in terms of two dimensions, one concerning the ways in which regulatory violations are defined and punished, the other concerning outcomes, described in policy-evaluative terms. In explaining variation in enforcement style, existing studies point to three sets of factors: characteristics of the regulatory "legal design"; features of agencies' "task environment"; and the regulatory "political environment." Weighting the relative importance of these factors, however, is difficult because of the number and fluidity of variables and the adaptiveness of regulatory agencies.

I. INTRODUCTION

Murphy's Law: "If something can go wrong, it will."

Kagan's Corollary: "Regulation grows."

Despite our best intentions, accidents and injustices slip through the cracks of existing regulatory programs. New health hazards and environmental threats bubble up in the wake of new products, processes and practices. Yet the more mankind can accomplish, the more intolerant it becomes of preventable sources of harm (Friedman, 1985). And so, despite a decade of deregulatory rhetoric, social regulation continues to grow. New laws seek to bolster existing systems for preventing pollution, negligence, discrimination, and fraud. Transforming those laws into effective and sensible social controls, however, is a difficult task. The study of regulatory administration, not surprisingly, has continued to command the attention of scholars.

For policy analysts, legal scholars, and economists, the guiding questions typically are normative. The regulations themselves are treated as substantively problematic, as potentially flawed products of a political process.

* The inspiration for this volume was provided by a weekly colloquium concerning administrative law and decision-making organized by Andre Hoekema, University of Amsterdam and Erhard Blankenburg, Free University, Amsterdam, in the Spring of 1987. The opportunity to attend those sessions, and support for the writing of an earlier version of this article, was provided by the Netherlands Institute of Advanced Study. A still earlier version was prepared during a residency at the Centre for Socio-Legal Studies, Oxford University.

The question is not, therefore, simply whether regulations result in "compliance" but whether the regulations, as administered, produce socially desirable outcomes. A recurrent concern is whether regulatory decisions strike a reasonable balance between their overt "police mission" and their implicit secondary function—maintaining the economic health and efficiency of the regulated industry or governmental process (Kagan, 1978: 9–13)—and whether they advance the police mission in a cost-effective manner.

Socio-legal scholars, in contrast, usually have examined regulatory agencies through more narrowly legal lenses, focussing on decision-making processes or methods rather than on regulatory outcomes. Regulatory inspectors and administrative officials are viewed as legal decisionmakers. Researchers typically assume that the laws being implemented are socially desirable, and ask questions about the fidelity with which the law is enforced, or about the regulators' "legal style." How do they define "violations" of law in day-to-day, case-by-case decision-making? Do they often seek statutory penalties against detected violators, or do they usually negotiate with them about what would constitute "substantial compliance" and a "reasonable time" for achieving it? Is the law applied equally? Finally, how can we account for variations, across agencies and across cases, in the ways in which regulatory law is interpreted and enforced?

For some socio-legal researchers, the focus on legal aspects of regulatory decisions as an end in itself reflects the difficulty of obtaining data about and evaluating the consequences of regulatory decisions in a scientifically acceptable manner. For others, however, understanding regulatory legal method is a first step, isolated for analytic purposes, in studying the relationship between "legal style" and regulatory outcomes. Under what conditions, they ultimately want to know, does a discretionary, non-punitive enforcement style lead to cooperation and effective social control, and when does it result in excessive leniency and ineffective regulation? Conversely, when is a deterrence-oriented legal style—characterized by strict rulings and frequent resort to legal sanctions—essential to effective control, and when does it lead to "overregulation," legal contestation and political backlash that saps the regulatory effort? Underlying questions that relate regulatory legal style to concepts such as "under-regulation" or "over-regulation" is the notion that regulatory effectiveness should not be measured simply by the degree to which "compliance with the law" results, but in terms of the economic, political and moral effects of regulatory activity.

This issue of *Law & Policy* seeks to advance that intellectual project. It presents five case studies of administrative processes in The Netherlands and in Great Britain, analyzing methods of regulation or legal decision-making, and in some cases, the relationship between legal method and regulatory outcomes. The focus on The Netherlands and Great Britain is deliberate. Regulation in European countries, previous studies have found,

usually is less legalistic, punitive and contentious than comparable programs in the United States (Kelman, 1981; Vogel, 1986; Jasanoff, 1986; Badaracco, 1985). Variation in regulatory legal style, accordingly, often is attributed to cross-national differences in political culture or political structure.

The articles in this volume, however, highlight differences in regulatory legal style and effectiveness within individual European nations, and sometimes within the same regulatory program. Bridget Hutter describes variation in enforcement styles among British environmental health and safety inspectorates. Bert Niemeijer shows that Dutch building code enforcement officials adhere more closely legal rules in some kinds of cases than in others, and that their legal methods differ from those of more politically-sensitive land-use planning agencies. Robert Knecht describes how the Dutch legal bodies that enforce regulations prohibiting arbitrary dismissal of workers adopt different evidentiary standards in different categories of cases, and differ in legal method from office to office. Jack Tweedie's article deals with a form of indirect regulation of public school boards—statutory grants of parental rights to select the school of their choice; English and Scottish school districts, Tweedie shows, respond differently. Finally, Gjalp Huppes and I compare two Dutch programs that rely on taxation as well as direct regulation to deter environmentally harmful activities, showing that they vary markedly in effectiveness.

Attempting to summarize these articles' contribution to our understanding of regulatory enforcement soon led me into an intellectual maze. Regulatory programs and issues are so diverse that conclusions from one case often seem, at first blush, wholly inapplicable to others. Apples can be compared to oranges, however, if one has a taxonomy of "fruit", specifying the several dimensions along which all fruits vary. Building that taxonomy, or framework for analysis, is the task of this introductory article. Part I presents two dimensions along which regulatory enforcement style varies, one concerning legal method, another policy consequences. Subsequent sections outline three sets of factors that appear important in explaining variation in enforcement style—the "legal design" of the regulatory program; the agency's sociological and economic "task environment"; and the regulatory "political environment."

II. HOW DOES REGULATORY ENFORCEMENT STYLE VARY?

No aspect of regulatory activity seems to have captured as much attention from socio-legal scholars as case-by-case decisionmaking by front-line officials. Perhaps this reflects the conviction that the real meaning of regulatory law can be determined only by observing what occurs "on the ground." In any case, it is clear that regulatory enforcement and decision-making styles do vary substantially, even across different offices that enforce the same law (Hutter, 1988; Shover *et al.*, 1984; Scholz and Wei,

1986; Hedge *et al.*, 1988), and across cases in the same office (Kagan, 1978).

The terminology used by different scholars to describe these variations is not uniform, but they generally postulate a continuum of approaches. At one pole, aggressive regulatory offices or officials are called "legalistic", or "sanction"-oriented, devotees of a "deterrence" model or "coercive" style of regulation. Toward the other pole, they are labelled "conciliatory" or "accommodative", as more interested in "compliance" than in deterrence, as oriented toward seeking results through "cooperation" rather than by coercion, as "consultants" rather than "cops."

There are, in fact, two activities embedded in the idea of "enforcement style." One concerns the way officials assess "compliance" or "non-compliance" with regulatory objectives. When the regulations prescribe procedures and define violations with great specificity, do officials interpret and apply the rules literally, or are they more flexible, taking the regulated enterprise's arguments for leniency into account? If the rules are less specific, giving officials discretion to determine what regulated enterprises must do, do the regulators lean toward substantively stringent interpretations of general legal standards, or are they accommodative toward regulated enterprises' economic arguments or claims of virtue?

The second aspect refers directly to enforcement: what officials do once they have decided that the regulated enterprise's actions are "violations." To pose the question as an overly sharp dichotomy, do officials punish the offender or negotiate about appropriate changes? "Legalistic" or "coercion-oriented" officials would respond to detected shortcomings by immediately issuing notices of violation, assessing fines, or shutting down the operation until the violation is fixed. "Conciliatory" or "cooperation-oriented" officials would give second (or third) chances to "come into compliance", give advice about how to comply, agree to ignore violation A in return for faster action to correct violation B. In *ex ante* regulatory programs—enforced by regulatory screening of planned activities via permit procedures—the legalistic agency would simply deny a permit when the application has not satisfied all requirements. The conciliatory agency would allow the project to continue, despite some shortcomings, in return for a promise to take certain mitigating actions.

Agency officials, as Hutter's article in this issue points out, argue among themselves about which legal style is better. Many strive for the ideal of flexible rule-interpretation and enforcement, that is, to be legalistic and tough in some cases, accommodative and helpful in others, depending on their analysis of the reliability of the particular regulated enterprise and the seriousness of the risks at hand (Bardach and Kagan, 1982: ch. 5). Nevertheless, offices as a whole, as Hutter shows, seem to adopt positions that on average *lean* more toward the legalistic pole or toward the accommodative one.

Finally, lest it be forgotten, some agencies' enforcement style might be located at the very far end of the spectrum, beyond reasonable "accommo-

dation" or "conciliation," reaching into the realm I would call "retreatism". Here officials limit themselves to uncontroversial matters, backing down at the least sign of opposition. They postpone decisions and delay taking action. This may be because they lack leadership, or time, or legal power to gather evidence and impose meaningful sanctions; or because they are corrupt, or intimidated by political authorities sympathetic to the regulated industry; or because, like whiskey control officers at the end of Prohibition, they genuinely believe the law they are assigned to enforce is meaningless or unjustified.

The legalistic-to-conciliatory (or retreatist) axis is jurisprudential in nature. Its focus is on legal issues: the strictness with which officials interpret legal standards and apply legal sanctions. It does not speak to another way of describing enforcement decisions, one that refers to regulatory *consequences*. One might posit, therefore, a policy-oriented typology of decision styles, described in terms drawn from welfare economics. At one pole would lie a "zealous" agency, where regulatory officials are indifferent to the possibility that their demands and penalties may err in the direction of "over-regulation" or "excessive strictness", imposing compliance costs that exceed social benefits, punishing practices which pose no serious risk of harm or injustice under the circumstances. Toward the other extreme stands the "ineffective" agency. Overly reluctant to impose high compliance costs, it is prone to errors of "excessive leniency," tolerating (or failing to punish) practices that risk imminent and serious harm, even when the costs of prevention would be moderate.

Midway between these extremes (but inevitably leaning more toward one pole than another, in practice) lies a "welfare-maximizing" enforcement style, where agency officials seriously weigh costs and benefits in applying regulatory standards and formulating remedial requirements, listening to but skeptically probing regulated enterprises' technical and economic arguments, conscious of the risk of excessive leniency as well as excessive stringency. The welfare-maximizing style also entails selectivity in targeting enforcement activities. The ineffective agency allows its energies to be diverted toward relatively insignificant regulatory problems and superficial remedies, rather than mounting enforcement efforts that try to change entrenched patterns or practices (Silbey, 1984; Posner, 1972). The zealous agency is prone to tilting at windmills, demanding perfection and depleting its resources on unwinnable cases.¹ The welfare-maximizing agency strives to focus its energies where it can do the most good, guided by a sense of what is legally, technologically, economically and politically possible.

The challenge, of course, is to describe regulatory enforcement styles both in terms of the policy-dimension (which is not easy) and in jurisprudential terms, for the latter, by itself, conveys too little information. When we read that Agency A brings prosecutions, recalls cars, or imposes fines more frequently than Agency B, that does not tell us whether Agency A is punishing "bad apples" for serious violations or whether it is building up a

flashy record by bashing relatively "good apples" for trivial violations.² Conversely, knowing an agency prosecutes rarely does not indicate whether that is because it rarely encounters serious violations that it cannot cure promptly through threat and negotiation, or because it is prone to excessive leniency.

III. WHY DO REGULATORY ENFORCEMENT STYLES DIFFER?

Why do regulatory agencies lean toward one enforcement style rather than another? The answer, as our review of the case study literature will make clear, is rather complicated. One wonders if it can ever be formulated with economy and precision. Perhaps the best that can be done at this stage is to organize the search for explanations as clearly as possible, distinguishing carefully among different kinds of regulatory programs, and types of explanatory factors.

Social scientists tend to offer two basic kinds of explanations for regulatory enforcement styles. In one perspective, the technical, economic, and legal problems encountered in implementing regulation shape the regulators' enforcement style. Regulatory officials, it is assumed, are like public-spirited carpenters. The laws they enforce provide the blueprint that shapes their mission and define the tools they can use. Working within those constraints, the regulatory carpenters adapt the plans to the raw material with which they work—the hazards to be abated; the attitudes, capabilities, and economic resilience of regulated entities; the problems of detecting and preventing noncompliance; the unexpected disjunctions between the plans and what seems feasible in the particular situation. To understand enforcement style, therefore, one must look first of all to the "legal design" of the regulatory program: its substantive goals and standards, the powers it gives the agency, and the constraints it imposes on agency discretion. Concomitantly, one must consider features of the "task environment" (Scholz and Wei, 1986) to which the regulatory administrator must adapt: the nature and seriousness of noncompliance; the characteristics of regulated enterprises; and the detectability of violations.

The second approach emphasizes the regulatory agency's "political environment." Regardless of the law and regulators' notions of what would be best, it is assumed, regulators work within a charged political atmosphere. Interest groups attempt to control the agency's leadership. Officials who offend politically significant government officials or private organizations face public criticism, budgetary cutbacks, and replacement. Understanding variation in enforcement style, therefore, requires us to focus on the intensity and predominant direction of political pressures brought to bear on regulatory officials by political leaders, industry and pro-regulatory advocacy groups, and the newsmedia.

There is no reason to suppose that either approach is wholly right or

wrong. Logically, all three sets of explanatory factors—regulatory legal design, the social and economic task environment, and the agency’s political environment—can simultaneously influence agency action. The intellectual problem is to analyze the relative weight of each under varying circumstances. As a preliminary step in that direction, the following subsections discuss each set of explanatory factors in turn.

IV. REGULATORY LEGAL DESIGN

It may be true, as the Legal Realists said, that “Rules don’t decide cases. People do.” But the cases regulatory officials get to deal with, and the choices they are forced to make, are powerfully shaped by the characteristics of the laws they are expected to implement. Those characteristics include (A) the ways that the authorizing legislation and the primary regulations define the agency’s regulatory mission; (B) the powers the statute grants the regulators, the rights it accords regulated enterprises, and the rights it gives to advocates of strict regulation; and (C) the specificity with which the law prescribes the standards, procedures, and remedies to be employed in case-by-case administration.

A. LEGAL MISSION: DEGREE OF STRINGENCY

Common observation tells us that some regulatory laws are far more ambitious, or *stringent*, than others, demanding significant, costly, or controversial changes in existing patterns of human behavior. “Technology forcing” regulations, for example, require regulated entities to develop and adopt novel or untried protective measures, such as computerized braking systems for trucks (see Mashaw & Harfst, 1987), or “kneeling buses” to accommodate the physically handicapped (see Katzmann, 1986). Very stringent statutes, such as some U.S. Food and Drug Law provisions, adopt a “no risk” stance, ruling out any administrative-level accommodation to the degree of risk, compliance costs or other competing values (Lave, 1981).³

At the other end of the stringency continuum are regulatory statutes that demand only incremental changes in the plans or practices of most regulated entities. Many building code provisions, maintenance regulations for airliners, and pasteurization regulations governing milk product producers fall in this category. In these and many other industries, market pressures and exposure to private lawsuits threaten economic disaster to regulated firms that depart from prevalent safety standards; the regulations mainly provide an additional “fail-safe” layer of protection. Moreover, many, perhaps most, regulatory statutes explicitly command regulators to balance “police mission” goals against compliance costs and other competing values. They demand, for example, the best “economically practicable”

pollution control technologies, or land use decisions that consider developmental concerns when imposing environmental protection standards.

The relative stringency of legally-defined regulatory standards influence—even if they do not control—the implementing agency's day-to-day enforcement decisions. Officials in Workplace Safety Agency A may feel more zealous about worker protection than those in Agency B. But if the regulation that Agency A enforces requires vinyl chloride fumes to be reduced to a maximum of 25 ppm, while Agency B's regulation demands reductions to 1 ppm, Agency A can't punish a manufacturer whose fumes average 15 ppm, while Agency B can. As compared to A, B's case-by-case determinations of what constitutes "compliance" are likely to be substantively more stringent in an absolute sense.

On the other hand, the legally-defined mission does not dictate an agency's "jurisprudential" style. Agency B, enforcing a more stringent standard than Agency A, might expect more resistance and hence might adopt a more legalistic, deterrence-oriented enforcement style. However, Agency B officials may be inclined to adopt a flexible style, accepting 10 ppm for an interim period, for example, because they think that would be adequate and more affordable than the regulation's 1 ppm. Conversely, non-stringent statutes, especially those that allow balancing of values, seemingly authorize, and may be more likely to evoke, a conciliatory enforcement style. But not always: some laws that codify prevalent safety practices—good manufacturing practice regulations for manufacturers of intravenous solutions and blood products, for example—evoke a legalistic enforcement style precisely because everyone agrees that the law deals with serious hazards and calls for protective measures whose safety benefits exceed their costs.

B. LEGAL POWERS, LEGAL RIGHTS

Many regulatory laws prescribe protective standards for *ongoing* activity, enforced by the threat of *ex post* detection and sanctioning of violations. Traffic regulations as enforced by patrolling police officers provide an everyday model. So do regulations specifying workplace safety rules, housing standards for low-income apartments, and non-discrimination rules for employers; these rules are enforced by *ex post* detection of violations by potential victims (who complain to regulatory agencies) or by governmental inspectors. The threat of legal sanctions against detected violations, it is hoped, will encourage *ex ante* compliance measures.⁴

In *ex post* control programs, regulatory power is limited by the difficulty of monitoring scores, if not hundreds, of far-flung potential violators. Like highway patrolmen, there are never enough regulatory inspectors to detect all violations or re-check on compliance with remedial orders. Secondly, in many *ex post* programs, regulatory power is constrained by legal traditions drawn from criminal law, with its emphasis on due process for the accused

and separation of law enforcement, prosecutorial, and adjudicatory powers. Regulators who want to prosecute an enterprise that fails to remedy deliberate violations must first gather reliable evidence and present it to an independent prosecutor, who, if he decides to proceed formally, must prove his case in court. The regulated entity gains the protections—and the manifold opportunities for negotiating and temporizing—provided by rules of notice, evidence, and appeal, not to mention the delays in getting to trial in over-loaded court systems. Agencies operating within this legal structure inevitably must think twice about undergoing the expense, delay, and diversion of inspectorial effort associated with formal legal action. It often seems wiser to work out a compromise and get some preventive or remedial action *now* than to insist on optimally stringent regulatory restrictions, which might evoke legal resistance and block any remedial action while the legal process drags on.

Recognizing this dilemma, some regulatory statutes deliberately enhance *ex post* regulators' legal power. To facilitate detection, the laws require enterprises to maintain records of compliance-related actions (log-books, emissions levels) or send periodical reports to the agency, "proving" compliance. Sanctioning and adjudicatory powers are brought inside the agency. Agencies are given summary powers to seize hazardous products, halt dangerous operations, or impose fines, all without first seeking judicial authorization. Regulated enterprises' appeals from agency decisions must be taken to an administrative board before going to court. Some statutes impose very large financial penalties on violations, designed to increase rapidly with each day of continued non-compliance, which discourages regulated entities from seeking legal delays (Bardach and Kagan, 1982: Ch. 2). The agency, enjoying more autonomy to act promptly, without external review, gains bargaining power vis-a-vis regulated entities.⁵

Still stronger are agencies operating under laws that call for *ex ante* screening of regulated enterprises' proposed activities before they get under way. No one, says the law, may build a new factory, market new pharmaceutical products or pesticides, offer nursing home care or banking services, or obtain a government contract or grant, without *ex ante* regulatory review of compliance with standards for environmental protection, safety, financial responsibility, affirmative action, and so on. The primary sanction for failure to meet regulatory standards is quick and direct: denial of the initial application for a license, permission, government grant or contract. (Of course, licensing agencies usually also have *ex post* sanctions at their disposal, too, such as suspending or revoking operating licenses.)

Regulated entities denied permits usually can appeal to court or another tribunal, but in an *ex ante* program the cost of delay pending the decision rests upon *them*—rather than on the agency (and the intended beneficiaries of regulatory protection), as in *ex post* control programs. Compared to *ex post* regulators, therefore, *ex ante* regulators are less likely to trigger legal resistance and delays when they interpret regulatory standards strictly

(or unreasonably strictly). When stringent *ex post* regulatory orders close down or constrain ongoing operations, the social costs of regulation are very visible and often controversial. *Ex ante* agencies, however, typically can impose stringent requirements more easily, because they only postpone enjoyment of intangible *future* benefits from planned products or projects, or add to their expense (Bardach, 1989; Huber, 1983; Mashaw, 1979; but see Knegt, this issue).

Again, the strength of an agency's legal powers does not dictate its enforcement style. The stronger the agency's position, the more likely it can compel changes by a veiled threat—like the Australian agencies Braithwaite *et al.* (1987) label “benign big guns.” But that says nothing about whether the agency, in using those powers, interprets protective standards legalistically or flexibly, or where its decisions fall on the under-regulation/over-regulation dimension. *Ex ante* screening, the power to issue summary remedial orders, and authority to impose large fines merely make it more *feasible* for an agency to be very strict, because they diminish the likelihood of legal resistance.

Just as strong due process rights for regulated enterprises decrease agency power and freedom of action, so do regulatory statutes that give citizens and advocacy groups rights to intervene against or appeal agency decisions they think too lenient. The U.S. Occupational Safety and Health Act and implementing regulations, for example, give workers the right to stop working on jobs they think are dangerous until an OSHA inspector comes, and to accompany the inspector on his rounds (without losing pay); discrimination against workers who complain to OSHA is a serious offense. In the *ex ante* Dutch legal regime for protecting employees against unjust dismissal (Knegt, this issue), agencies processing employer applications to dismiss workers are obligated to get the employee's side of the story. Neighbors and environmental groups, many land use regulatory laws provide, must be given notice of permit applications and rights to participate in hearings, comment on impact statements, and so on. In such cases, the agency risks appeals from decisions which complainant groups think too lenient, and this often exerts pressure for more stringent and legalistic decisions (Niemeijer, this issue; Coyle, 1988; Frieden, 1979).

C. SPECIFICITY OF LEGAL RULES AND REMEDIES

In some regulatory designs, legislators and regulatory rule-makers articulate with considerable precision the behavioral standards required of all regulated entities throughout the nation, as well as the procedures to be followed by regulatory officials. In *ex ante* control systems, regulations may specify the forms, plans, certifications, tests, and impact statements that must be filed to get a permit. In *ex post* programs, the regulations may specify records to be kept, reports to be filed, processes to be monitored, and even technologies to be used. Surveyors in New York's nursing home regulation

program must fill out a 63 page protocol concerning structural requirements, records, and “negative outcome indicators” in the facilities they visit (Day and Klein, 1987). In the U.S. Mine Safety and Health program, regulations specify the legal penalties or remedial orders that must flow from different categories of detected non-compliance (Braithwaite, 1985).⁶

A contrasting regulatory strategy assumes that detailed preventive rules inevitably will fail to anticipate the inexhaustible forms of human heartlessness and negligence, and at the same time will often be harshly overinclusive, condemning actions regardless of legitimate extenuating circumstances. From this perspective, the appropriate strategy is to draft broadly-worded statutes and regulations, laced with words such as “reasonable” and “so far as feasible”, enabling regulatory officials to “custom tailor” regulatory requirements and penalties to particular enterprises and situations (Baar, 1986). In contrast with New York, this is the approach taken by British nursing home regulations (Day and Klein, 1987). The underlying assumption is that regulatory objectives usually can best be advanced by helping regulated firms find cost-effective solutions—through what Braithwaite *et al.* (1987) call diagnostic inspectorates—or by reasoned appeals for cooperation, backed by implicit threats of prosecution or adverse publicity.

Many regulatory statutes, of course, seek a middle ground. Some call for specific, universal rules, but establish procedures for seeking variances, exceptions or exemptions from higher-level officials. Some articulate regulatory objectives but “delegate the details” through regimes of government-supervised self-regulation. Under the U.S. Environmental Protection Agency’s “bubble policy,” instead of specifying control measures for each point source, the EPA allows petroleum refineries or large chemical plants to submit their own detailed plans for reducing pollution within an imaginary bubble enclosing their installations (see Levin, 1982). Meat-packing plants (see Grumbly, 1982) and large construction companies (see Rees, 1988) are authorized to devise their own purity or safety rules, tailored to their own operations, to be enforced by designated, in-house quality control officials or safety committees; agency officials receive regular reports and make spot-checks, and are authorized to penalize enterprises for failing to follow their own rules. Regulation through taxation, as in Dutch charges against industrial emissions to surface waters (Huppel and Kagan, this issue) represents another kind of compromise. Officials set very specific tax levels per unit of pollution, for example, and enforcement officials are expected to follow uniform rules in monitoring emissions and collecting taxes. Some sensitivity to contextual variation is preserved, however, because each regulated enterprise decides for itself what control technologies would be cost-effective.

Specific rules and remedies are not necessarily associated with substantively stringent regulatory laws. Stringency and specificity vary independently.⁷ Similarly, regulatory designs that specify standards and penalties in great detail do not necessarily produce a legalistic enforcement style—even

though they seem designed to. Enforcement officials in such programs often "go by the book" (Bardach and Kagan, 1982), but sometimes they bend detailed rules to fit their own vision of good regulation, adopting a flexible enforcement style (Day and Klein, 1987). Still, when legally-prescribed standards and penalties are specific *and* complainants and advocacy groups can detect violations and exert pressure on the regulatory agency—two features of the task environment and political environment discussed below—agencies are more vulnerable to criticism for lack of fidelity to law; legalistic enforcement and excessive stringency are somewhat more likely. Where the standards and penalties are not carefully specified, conciliatory methods are more legitimate, legalistic enforcement is unlikely, and the risk of excessive leniency is somewhat larger.

V. THE REGULATORY TASK ENVIRONMENT

Assume that regulatory enforcement officials strive to maximize social welfare as they see it, striking an intelligent balance between regulatory control and economic efficiency, between precaution and innovation. They seek to accomplish those goals through cooperation whenever possible, but through coercion when necessary, adapting their actions to the risks and compliance costs presented by case at hand, and the character of the regulated enterprises they deal with. They respond, in sum, to the interactions between the law's abstract demands and the concrete features of the "task environment."

Striking support for this assumption is provided by Shover *et al.*'s (1984) study of the U.S. Office of Surface Mining (OSM), which enforced an ambitious federal law that requires coal companies to limit erosion during strip-mining operations and to restore the scarred land as far as possible. The statute is specific about penalties, requiring enforcement officials to issue citations for every violation spotted and cessation-of-work orders for serious or repeat violations. Officials in OSM's Western Regional Office, however, adopted a conciliatory, cooperation-oriented enforcement style. During the period studied (1979–1981), they issued relatively few citations and very few cessation orders. Their counterparts in the Eastern Region, in contrast, defined themselves as deterrence-oriented cops. They issued many more citations and cessation orders—per inspector, per regulated enterprise, per ton of coal mined.

These differences in enforcement style seem to reflect entirely rational responses to differences in the two Offices' task environments: (1) the "visibility of violations" (and repeat violations), that is, the ability of officials to detect noncompliance or breaches of promises to cooperate; and (2) the capacity and willingness of regulated enterprises to comply with regulatory requirements. When violations are more visible and enterprises more willing to comply, it seems reasonable to expect, regulators can more sensibly adopt a cooperation-seeking enforcement style.

But when are those conditions likely to be present? Existing studies point to three task-environment features: (A) the frequency of interaction between regulators and regulated enterprises, (B) the size and sophistication of regulated firms, and (C) the cost of compliance, viewed in terms of the economic resilience of regulated enterprises and the seriousness of the hazards to be controlled.

A. FREQUENCY OF INTERACTION AND VISIBILITY OF VIOLATIONS

OSM's Western Region officials policed the vast plains of Wyoming and Montana. Mining operations there were conducted by a relative handful of huge corporate enterprises. Each inspector was responsible for only 23 sites, on average, enabling him to visit each enterprise often. The Eastern Region covered the Appalachian Mountains, where mining operations were small and numerous. There was one inspector for every 111 firms; intervals between inspections undoubtedly were much longer than in the West.

Scholz's (1984) analysis suggests why frequency of interaction between regulator and regulated firm affects enforcement style. In programs enforced by *ex post* monitoring, Scholz argues, rational regulators would adopt a "tit-for-tat" enforcement strategy. That is, they would apply regulatory requirements flexibly and suspend imposition of legal sanctions when they encounter first-time violations, but only so long as the regulated enterprise, in return, acts cooperatively. If a regulated enterprise tries to take advantage of the agency's cooperative stance, rational regulators would immediately impose strong legal sanctions. A uniformly legalistic approach, in contrast, is suboptimal, because strict rule-interpretation and automatic sanctions often would be perceived as unreasonable and would provoke resistance. Trading legal forbearance for cooperative problem-solving maximizes regulatory goals, so long as it is backed by credible threats of sanctions. From this standpoint, it should not be surprising that most regulatory agencies described in socio-legal studies employ a predominantly non-legalistic enforcement style.

The tit-for-tat strategy, however, depends on prompt punishment of any betrayal of trust. That is most feasible when regulator and regulated interact frequently. If the inspector comes often, the regulated firm knows that breaking its promises to take corrective measures will be detected, increasing the likelihood of legal punishment for a "repeat violation" and related adverse publicity. Moreover, when the inspector comes often, he learns more about the regulated enterprise, its technologies, vulnerabilities, resources and strengths; he can better evaluate the seriousness of non-compliance and proposals for alternative ways of achieving regulatory goals. Both visibility of violations and firm-specific knowledge make a flexible enforcement style more feasible.⁸

If the inspector comes infrequently, regulated enterprises can more easily avoid detection of non-compliance and the inspector has less knowledge of the conditions and the people he encounters. This makes a cooperative

stance riskier and it becomes more rational for regulators, like the Eastern Region OSM inspectors described by Shover *et al.*, to adopt a deterrence-oriented posture, imposing sanctions even on first-time violations. Thus Grabosky and Braithwaite (1986), in a multi-variate analysis of 91 Australian regulatory agencies, found that infrequency of contact with regulated enterprises was strongly correlated with frequency of prosecution. Bridget Hutter's article in this issue shows that British air pollution control enforcement officials, responsible for monitoring a relatively limited number of firms, prosecute violators far less often than workplace safety inspectors, who visit a much larger number of firms more infrequently. Moreover, prosecutions by the British air pollution regulators are disproportionately concentrated on "cable burners"—which often are "fly-by-night" operations that may not even be in business when the inspector comes back again to check on compliance.

In *ex ante* control strategies, officials can compel repeated interaction with unknown or suspect enterprises simply by treating their initial applications strictly, requiring them to adjust their plans or conduct further tests until their good faith and reliability have been established. In subsequent applications, the same enterprises, now repeat players with a reputation for cooperating to achieve regulatory goals, can be dealt with less legalistically. Thus in Niemeijer's account of Dutch building code permit procedures, regulatory officials often approve plans drawn by architects and contractors known to be reliable, even though some features may not comply strictly with the building code, because they are confident the building will conform to professional norms of solid construction.

In *ex post* programs, even if inspectors cannot visit individual firms often, there may be a functional substitute if violations are visible to citizen complainants, such as workers who spot violations of workplace safety regulations. Thus workplace safety regulators, to take one example, are in a better position to adopt a flexible enforcement style, knowing that workers, once informed of the problem and the promised solution, can call the agency if the enterprise backslides. When violations are less visible to complainants (as in the case of many kinds of air or groundwater pollution) or visible only to vulnerable complainants (as in the case of nursing homes), the agency faces a more difficult task environment, making a flexible style a bit riskier.⁹

B. SIZE AND SOPHISTICATION OF REGULATED ENTERPRISES

Western Region OSM officials dealt with large corporate mining companies; their everyday interactions were with corporate environmental specialists; the regulated enterprises adopted a cooperative stance. Eastern Region inspectors, who more frequently resorted to legal sanctions, dealt with much smaller and environmentally unsophisticated mining firms, which often adopted a non-cooperative posture.

The pattern is familiar. Regulating elephants is different from regulating foxes. It is harder for elephants to hide. Larger regulated enterprises, simply because of their prominence and potential for doing harm, can expect more frequent contact with regulatory officials (and pro-regulation advocacy groups). Partly because their violations are more visible, partly because they often are more concerned about maintaining a public image as responsible corporate citizens, larger enterprises are more likely to have a staff of in-house experts responsible for keeping the company out of trouble with regulatory officials. These environmental engineers, safety experts, industrial hygienists, affirmative action officers, nurses, auditors and so on constitute an intra-corporate shadow regulatory bureaucracy, knowledgeable about and often supportive of the regulatory regime to which they owe their livelihood. They generally desire a good working relationship with regulatory officials, offering to negotiate differences according to technical criteria. In dealing with them, legalistic rule-interpretation and sanctioning methods often seem counter-productive.

Eastern Region OSM officials faced a very different task environment. They dealt with a population of smaller, entrepreneurial enterprises, few of which had full-time specialists in repairing the environmental effects of strip-mining; their owners often were ignorant of the regulations and their rationale, and hostile to agency on ideological grounds. This task environment suggests the need for a more deterrence-oriented enforcement style: hit them with penalties until they begin to invest in compliance programs. Similarly, Graboski and Braithwaite (1986) found that Australian regulatory agencies that dealt, on average, with smaller enterprises were more likely to resort to prosecution. Size of firm seems to operate as a rough proxy for "disposition to comply", which in turn affects enforcement style.

Of course, in some fields, where regulatory concerns are generally well-accepted (and supported by market pressures), many smaller firms, too, are sophisticated about regulatory standards and geared-up for compliance. In health-related regulation of dairy farming, for example, legalistic enforcement seems to be rare and frowned-upon (Frank and Lombness, 1988). Where small firms are represented by professionals in regulatory compliance, such as architects who help them apply for building permits, cooperative enforcement styles usually prevail (see Niemeijer, this issue, for an example). On the other hand, where regulated firms are small and not geared-up for regulatory compliance, there are limits to coercive enforcement strategies. Dutch officials enforcing emissions taxes against large industrial firms established cooperative relationships that helped reduce pollution sharply. Conversely, in enforcing detailed controls on manure use by thousands of small, entrepreneurial farms, Dutch officials initially sought to compel uniform compliance, but encountered such resistance that they ultimately relaxed certain recordkeeping and reporting rules (Huppes and Kagan, this issue). Thus while size of firm, as a proxy for "disposition to comply", influences enforcement style, other task environment features affecting that disposition may be more important.

C. COST OF COMPLIANCE, SERIOUSNESS OF RISKS, AND
ECONOMIC RESILIENCE OF REGULATED ENTITIES

Why doesn't ambitious, stringent regulation always evoke a legalistic enforcement style? One explanation arises from the non-linear relationship between enforcement style and another crucial feature of regulatory task environment: cost of compliance with regulatory demands.

Consider again federal strip-mine regulators, enforcing a very ambitious and novel environmental protection statute, employing a conciliatory style in the West and a legalistic style in the East. Shover *et al.* do not explore the issue, but it appears that for large strip-mining companies on the plains of Wyoming, compliance costs per ton of coal were far lower than for smaller firms working the steep and forested hillsides of Eastern Kentucky. When enterprises experience regulations as very costly to comply with, disadvantaging them vis-a-vis their competitors, the temptation to avoid compliance is greater (Leone, 1986). Other things being equal, where compliance costs are higher (which is a function of the stringency of the agency's legal mission), regulators should encounter more noncompliance. It seems logical, then, to adopt a more legalistic enforcement style. Thus British local environmental health officials in urban areas with more severe problems of crowding and sanitation—that is, more and costlier-to-cure noncompliance—are much more likely to resort to formal prosecution than their counterparts in other regions (Hutter, this issue).

That strategy, however, is likely to work only up to a point. When compliance costs reach a level which threatens the economic viability of a regulated enterprise, department or project, legalistic enforcement often becomes counter-productive. Nursing home regulators become reluctant to revoke the license of non-compliant facilities if government funding for impoverished patients is inadequate and there is a shortage of "good" facilities in the community. Environmental and occupational health regulators often pull back from strict enforcement if economically marginal employers in job-poor regions can't absorb the costs of compliance and still make a profit on the operation (Melnick, 1983; Gunningham, 1987). The *economic resilience* of noncompliant regulated enterprises (their ability to absorb or pass on compliance costs)—together with the availability of compliant firms that can take over their social functions—thus becomes a crucial feature of the task environment, limiting the stringency and punitiveness of regulatory legal style (Kagan, 1978: ch. 4; Ould, 1986).

Reluctance to adopt regulatory methods that close down regulated enterprises is, of course, only an extreme example of taking compliance costs into account. Short of that extreme, enforcement officials are repeatedly called upon to gauge whether the imposition of additional compliance costs is "worth it", in terms of added public protection. The more stringent the regulatory legal mission, the more specific and dense the web of prophylactic rules, the more often such questions are raised. The judgments are difficult.

They require officials to make intuitive cost-benefit analyses, assessments of the economic resiliency of particular regulated enterprises, the social costs of stopping noncompliant projects or operations, and most importantly, the *seriousness of the risks* posed by an accommodative decision in the case at hand. Where mistakenly lenient cost-benefit analyses can result in imminent catastrophe, as in airline or coal mine safety regulation, one might expect a greater reluctance to make such judgments, and hence in a more legalistic style, than when mistaken leniency would result in an incremental increase in air pollution. But persistent refusal to make cost-benefit judgments (which is a good definition of "legalism") can easily produce cooperation-depleting resistance, at least for *ex post* control agencies, which is why many agencies, even in coal mine regulation (Braithwaite, 1985) prefer a flexible enforcement style, deciding in each case what burden of proof to impose on regulated enterprises who argue that it is safe to relax a regulatory requirement.

Knecht's article on Dutch employment-termination law indicates how the relationship between risk and compliance costs affects legal decisionmaking. When an employer seeks permission to fire a worker because of misconduct or incompetence, and the employee protests, the Dutch agencies strictly enforce the employer's legal burden of proof, demanding and carefully scrutinising documentary evidence concerning the employee's faults. But when the employer argues that employees simply are no longer needed and that the added labor costs threaten the firm's competitiveness, the agency much more readily accepts the employer's word for it. The difference, I suspect, reflects an assumption that the employer's decision about employee "incompetence" is more susceptible to arbitrariness; in those cases, the agency believes, it is worth imposing the extra compliance costs on the employer—building up a dossier of the employee's shortcomings, keeping a possibly inept worker on the payroll until the agency has completed its evaluation. Conversely, the agency may assume, economic redundancy dismissals are less likely to be unjustified; hence it usually would cause increased economic losses if the agency prevents dismissal until the employer can generate detailed cost-accounting evidence—unless the employee plausibly alleges economics is not the true reason for dismissal. In any case, it is hard to explain such differences in strictness of evidentiary standards—choices which pervade and crucially affect regulatory decision-making—on the basis of factors other than rational cost-benefit calculations, keyed to specific features of the task environment.

VI. THE POLITICAL ENVIRONMENT

Regulation is a political process. It emerges from political demands and political struggles, and is shaped by competing political ideas and theories. The features of a regulatory "legal design"—the first set of explanatory

factors discussed earlier—often reflect the views of the winners in a political debate over how stringently an agency's legal mission should be stated, the powers it will have, the discretion administrators will be granted. Such regulatory legal designs are shaped by many political factors, including national political culture, political party strength, interest group structure, legal doctrines concerning administrative power, and the vulnerability of the regulated industry to foreign competition (Vogel, 1986; Badaracco, 1985; Kagan, 1988: 735–39; Katzenstein, 1988).

In discussing the relationship between a regulatory agency's "political environment" and its enforcement style, however, one can focus on a more limited set of political influences, those that impinge on front-line, day-by-day regulatory administration, after the basic regulatory laws and policies have been formulated. To argue that ongoing political influences affect enforcement style requires a shift in the assumptions about regulatory behavior that governed the discussion in the preceding sections. Earlier, we assumed that regulatory officials seek to maximize the public welfare, and their enforcement style reflects rational adaptation to the problems generated by the regulatory law and the task environment. Political environment-based explanations move us, however, from the "welfare-maximizing agency" to the "criticism-avoiding agency."¹⁰ The underlying assumptions are as follows:

- * With varying degrees of intensity, interest groups and political leaders seek to affect agency behavior through the appointment of sympathetic administrators, manipulation of the newsmedia, threats of budgetary restrictions, and appeals to the courts.
- * Regulatory officials, in varying degrees, seek to avoid political trouble in order to keep their jobs and maintain their agency's powers and budget.
- * Regulatory officials shape their enforcement style to avoid political trouble, adopting a legalistic style when they are most subject to criticism, by political leaders or influential outsiders, for real or suspected laxity, favoring a more accommodative style when those risks are not present and criticism or political and legal attack based on charges of excessive strictness is more likely.

Among the variables that affect the balance of political pressures are (A) the organization of interest groups, and (B) the preferences of political authorities.

A. INTEREST GROUP PRESSURES

A generation ago, drawing on studies of regulatory agencies responsible for rate and entry regulation in a single industry, such as rail or air transportation, political scientists formulated the "capture theory." The idea was that repeated contact with representatives of a single industry, intensely interested in regulatory policy and appointments, would gradually draw regulatory officials toward an "industry orientation", in which their view of the public interest coincided with that of the dominant firms in the regulated

industry (Bernstein, 1955; Truman, 1953). A basic feature of those industry-stabilizing regulatory programs was that diffuse, politically-unorganized consumer interests rarely appeared before or exerted pressure on the regulatory agency, counteracting industry influence.

The capture theory has collapsed as a general proposition (Quirk, 1981). Even in economic regulation, increasing political participation by representatives of consumer groups often have pressured agencies to enact stringent policies, overriding industry objections (Anderson, 1981). Agencies have pushed cartelized industries into a risky new competitive world (Derthick and Quirk, 1985). Many protective regulatory agencies, moreover, confront a more balanced pattern of interest group representation. Environmental protection and worker safety agencies regulate many industries, not one; they have little interest in favoring any particular group of firms, and strong incentives not to. In many protective regulatory programs, organizations advocating stringent regulation—labor unions, civil rights groups, environmental groups, neighborhood associations, and so on—actively monitor compliance and participate in rule-making and enforcement proceedings. In the U.S., they take the agency to court over decisions they don't like, and influence selection of agency personnel (Wilson, 1980).

Case studies demonstrating that many protective regulatory agencies have not been "captured" does not eliminate the possibility of strong industry influence on agency decision-making. "Capture" simply becomes a variable, rather than a constant. And political organization of relevant interest groups is definitely an important influence on regulatory enforcement, as Scholz and Wei (1986) demonstrate in their study of the 50 state and federal agencies that enforce the U.S. Occupational Safety and Health Act. Scholz and Wei found differences in the frequency with which these agencies formally cited regulated firms and in the amount of fines they assessed. More frequent and tougher penalties, Scholz and Wei's regression analysis established, were associated with characteristics of the agencies' task environment—such as a higher workplace accident rate—and with political factors, such as Democratic Party dominance of electoral offices in the state in question. But by far the most powerful influence was the strength of organized labor in the state, as indicated by the frequency of complaints to the agency about potential regulatory violations. Similarly, studies of land use regulation indicate that active participation by politically-organized environmental groups, acting on their own or providing support for individual complainants, is associated with more stringent regulatory decisions (Sabatier and Mazmanian, 1983; Steele, 1987). Conversely, case studies of highly conciliatory enforcement styles, where the agency declines to prosecute even serious violations, often involve programs or situations in which there are no politically organized advocates of stringent regulation to detect the laxity and protest (Frank and Lombness, 1988) or they are weak and ineffective (Gunningham, 1987).

The precise relationship between pro-regulation interest group influence

and regulatory enforcement style, however, is complicated. In The Netherlands, complaints by neighbors about building permits seem to drive officials toward a more legalistic decision style, but primarily as a way of defending their decisions against citizen complaints, not as a way of being more responsive to their substantive demands for more stringent regulation (Niemeijer, this issue). One reason, it appears, lies in the legal design, which obligates officials to approve any permit application that formally complies with regulatory standards. In the U.S., strong pressure from organized labor seems to evoke a more legalistic enforcement style from OSHA, along with a considerable amount of legal resistance from employers who contest the frequent fines and citations and criticize the agency for over-regulation. In Sweden, however, where labor is politically far more influential, actually dominating the administrative regime for workplace safety regulation, legalistic enforcement is almost never called for (Kelman, 1981). Here, too, the legal design plays a role in explaining the difference: Swedish law gives considerable power to union safety stewards, creating an in-house safety inspectorate with which employers have to cooperate; OSHA mandates a legalistic enforcement style, requiring penalties even for first-time violations, while giving employers strong due process rights to contest citations (and delay remedial action) by appealing citations to administrative tribunals.

B. THE PREFERENCES OF POLITICAL AUTHORITIES

In Western nations, administrative agencies are structured to enjoy a substantial degree of autonomy from political officials. Day-to-day administration, both in principle and to a substantial degree in practice, is immune from political intervention. Elected political officials have little interest in many regulatory programs. Even when, in more controversial programs, they are pressured to intervene, politicians often do not want to get involved in the technical issues of protective regulation.

Nevertheless, political authorities, with varying degrees of frequency and intensity, do affect some agencies' enforcement style. They do so by appointing, or influencing the appointment of higher agency officials;¹¹ by expanding or contracting agency resources through the budgetary process; and by occasional direct interventions, such as critical oversight hearings or telling agency officials how they would like particular regulatory matters of urgent political concern to be handled.

Under what circumstances is political influence likely, pushing an agency's enforcement style away from a purely "rational" response to its legal mission and task environment? A number of influence-triggering events or situations might be noted.

1. *Catastrophes and Scandals*

Widely publicized catastrophes that fall within an agency's jurisdiction often trigger agency-changing political intervention. In the aftermath of a

televised hotel fire, a death-dealing tunnel collapse, or a highly-visible oil spill, political leaders often respond by holding hearings, replacing agency heads, and calling for new, more rigorously enforced regulations. A recent catastrophe is a reasonably good predictor of a more zealous, legalistic enforcement style, at least for a while. Scandals, including revelations of unpunished violations or regulatory incompetence, can have the same effect (Bardach and Kagan, 1982: ch. 7).¹²

2. *Economically Urgent Projects*

On occasion, political authorities encourage agency officials to relax regulatory restrictions that impede a project the politicians (or their political allies) deem economically important. A sense of urgency about development of off-shore oil wells in Great Britain generated political pressures to relax worker safety regulations that, it was feared (probably incorrectly), would delay a vital flow of wealth to the nation (Carson, 1982). In Dutch cities, time-consuming procedural rules concerning land use plans and building permits often get bent when municipal officials feel a planned project is important to the community's economic health (Niemeijer, this issue). Much depends, however, on whether bending the rules is likely to spark political opposition and whether opponents have legal rights to appeal the agency's decision; in such cases, building and land use officials at least follow the form of the law, as in Niemeijer's account of a large project in Groningen. In the U.S., where citizens have strong rights to appeal land use and licensing decisions to court, political authorities have often been stymied when they try to get agencies to relax the environmental protection rules governing permits for port dredging projects (National Research Council, 1985) or other large undertakings.

3. *Political Controversy*

Occasionally, a stringent, legalistically enforced regulatory program generates sustained and organized political opposition, which political leaders try to defuse (or capitalize upon, depending on whether they are in or out of power) by appointing new agency leaders or pressuring the agency to change. In the U.S., this occurred in the late 1970s with respect to OSHA (Levin, 1979); after his election in 1980, following a campaign in which he denounced "excessive government regulation," President Reagan sought to change OSHA's enforcement style by appointing a new agency chief. The result, as Scholz and Wei (1986) have shown, was a marked decline in citations for violations and in fines.¹³ More recently, well-publicized protests by AIDS victims generated political pressure to relax FDA regulations that prevented distribution of experimental AIDS treatment drugs until they were fully tested for safety and efficacy (*Regulation*, 1988b). Conversely, opposition attacks on alleged laxity by EPA officials forced President Reagan to appoint new leaders who promised to enforce the law more vigorously. These events indicate that some regulatory issues

are moving toward the center of the contemporary political stage, and that enforcement style is somewhat more likely to become a matter of political controversy and intervention than it has in the past.

4. *Electoral Shifts in Political Leadership*

More common are less-publicized changes in agency leadership and enforcement style following shifts in governmental control between conservative and liberal political parties. Hutter's article in this issue indicates that British environmental control officers working under an elected local council dominated by the Labor Party prosecuted violators more often than officers in districts controlled by the Conservative Party. Hutter is reluctant, however, to attribute the variance to political influence (as opposed to differences in the officials' task environments). In the U.S., Scholz and Wei (1986), controlling for task environment differences, found that state-run OSHA offices in states with Democratic governors and Democratic-controlled legislators employed a more legalistic enforcement style than those in Republican states.

The influence of electoral shifts is complicated when local and national governments are controlled by different parties. Hedge *et al.* (1988) compared enforcement strip-mining laws by state (West Virginia) and federal officials. The state agency faced the same task environment as the Eastern Region OSM officials studied by Shover *et al.* Yet state officials were less legalistic, writing fewer formal violation notices. Hedge *et al.* attribute those differences to the political attitudes of agency leaders and susceptibility to local political pressure. Federal officials, unlike their state counterparts, resisted local politicians' pressures for more flexible enforcement and instilled a more legalistic ethos in their staffs. Despite similarities among individual inspectors in training and years of experience (both of which, by themselves, were associated with a more flexible enforcement style), OSM inspectors had a more negative view of coal operators than state agency inspectors and were more supportive of the stringent regulations.¹⁴ All too little is known, however, about whether local political pressures and appointments of agency leaders have significant enforcement-style effects in countries which, as compared to the U.S., have stronger traditions of bureaucratic government and in which political intervention by individual, entrepreneurial politicians is less common.

5. *Budgetary Cutbacks*

Most regulatory agencies feel chronically understaffed and underbudgeted in relation to their caseload. To some observers, this is the product of cynical "symbolic politics", in which politicians pass stringent-sounding laws to placate the electorate and then, as political attention fades, underfund the regulators to placate the capitalists (Edelman, 1964). Another view is that "under-budgeting" reflects the gap between aspirations and resources that pervade all human institutions: most urban police depart-

ments, customs services, and machine maintenance departments in factories owned by wealthy corporations can't afford to do everything they are supposed to, and complain about being short-changed and understaffed when budgets are formulated. In any case, agency budgets are always limited by the allocational preferences of political authorities. Highways, defense and farm subsidies usually take political precedence over regulatory enforcement. As implied in our discussion of legal powers and task environments, the capacity of agencies to detect and prosecute violations, given the constraints of their "normal budgets," shapes their enforcement style, sometimes pushing them toward conflict-avoiding conciliatory or retreatist approaches. Moreover, in periods of overall governmental retrenchment, political authorities, simply by making across-the-board budget cuts, may force regulators to adjust their enforcement methods.

Occasionally, however, in reaction to controversies over agency performance, political authorities intervene directly to influence enforcement via budgetary changes. Catastrophes or scandals, for example, sometimes induce political leaders to promise big increases in the size and professionalism of regulatory staffs. Conversely, political complaints about regulatory overaggressiveness led the politically conservative Reagan Administration, stymied by Congress in its efforts to moderate regulatory statutes, to cut enforcement budgets in some agencies, although it did not succeed in doing so with respect to EPA (*Regulation*, 1988b).

The impact of budgetary cutbacks has not been well-studied. Logically, if the ratio of regulators to regulated enterprises shrinks and inspectors in *ex post* programs can't come as often, one might expect the agency to adopt a more legalistic, deterrence-oriented style, as suggested by our earlier discussion. On the one hand, smaller budgets may encourage agencies to save resources by avoiding legal contestation, and hence to adopt a conciliatory style. Between those extremes, they might target resources more accurately toward the worst problems, adopting a legalistic stance toward "bad apples", but a more conciliatory approach toward a majority of regulatory firms. Finally, if translated into salary reductions, agencies sometimes substitute lower-salaried "clerks" for more highly-trained professionals, which tends to induce a more mechanical, rule-oriented approach. Clearly, agency leaders have choices in this regard, and factors other than the cutback itself will be determinative.

6. *Government as Regulated Entity*

Political leaders' preferences affect enforcement style under an additional set of circumstances: when a government body is the regulated entity. Generally, it seems hardest for regulators to maintain a legalistic posture in such cases. In the U.S., regulatory agencies responsible for enforcing controls on local school districts rarely use legal penalties, such as cutting off federal funds to non-compliant districts (Kagan, 1986). Pollution control regulators often are more accommodative toward governmental

entities, such as municipal water treatment plants or utilities, than to industrial sources within their jurisdiction (Ackerman *et al.*, 1973; Fitzgerald *et al.*, 1983). Dutch land use planning authorities are at their weakest, Niemeijer's article in this issue suggests, when the government seeks to build on municipally-owned land.

This may reflect the view that government bodies serve the public, and regulators should be cautious about forcing them to divert money away from other public services. Thus British school districts' arguments that compliance would impair their ability to serve the collective welfare underlay their half-hearted response to regulations requiring them to grant parents rights to select the school of their choice (Tweedie, this issue). But private entities, forced to spend money on regulatory compliance, also may see their other social functions incrementally diminished. I suspect, therefore, that reluctance to use legalistic enforcement vis-a-vis governmental regulated entities reflects their greater capacity to mount politically effective campaigns against aggressive regulation. Again, however, systematic comparisons of regulating government versus private entities are too rare to permit any firm conclusion (see Bardach, 1989).

VII. CONCLUSION

Regulatory enforcement styles vary along a jurisprudentially-defined dimension—from legalistic to flexible to conciliatory—and along an outcome or policy-oriented dimension—from over-regulation to under-regulation. Explaining why agencies favor one implementation style rather than another, is complicated. A number of variables seem important. These include the character of the law to be enforced, the agency's task environment, and its political environment, as summarized in Table 1. Obviously, a definitive explanation of regulatory enforcement would require a complex, multi-variate model. The enumerated independent variables interact. The effect of one is contingent on the strength and direction of others, suggesting complicated propositions such as:

* *If an agency has (a) strong ex ante legal powers, and (b) a stringently-stated regulatory legal mission, and (c) a task environment characterized by political pressure for pro-regulation advocates, then its enforcement style is likely to be (d) legalistic and (e) substantively stringent, unless (e) its decisions arouse substantial political controversy, or (f) threaten to stop economically or socially urgent projects, and (g) conservative political authorities are in power.*

* *If an agency has only ex post enforcement powers, and (b) enforces stringent regulations in (c) an industry characterized by low economic resiliency, and (d) pro-regulation groups are weak or unable to monitor violations and pressure the agency for action, then (e) conciliatory (or retreatist) enforcement and excessively lenient decisions are likely, unless (f) there has been a recent catastrophe or scandal.*

Table 1. Factors Affecting Regulatory Enforcement Style

LEGAL DESIGN FACTORS

Stringency of Regulatory Mission

Legal Powers (information-gathering/autonomy and immediacy of sanctions)

- * ex ante / ex post controls
- * legal rights of regulated
- * legal rights of complainants

Specificity of Legal Standards and Penalties

TASK ENVIRONMENT FACTORS

Visibility of Violations

- * frequency of agency interaction with regulated entities
- * visibility of violations to complainants

Regulated Enterprises' Willingness to Comply

- * size of enterprises
- * sophistication of enterprises
- * cost of compliance/economic resilience

Seriousness of Risks to be Prevented

POLITICAL ENVIRONMENT FACTORS

Strength and Aggressiveness of Pro-Regulation Interests and Groups

Preferences of Political Authorities, as implicated by:

- * recent catastrophes or scandals
- * economically urgent projects subject to regulation
- * political controversy over regulatory enforcement
- * electoral shifts/changes in agency leadership
- * budgetary cutbacks
- * attempts to regulate government entities

To take all the relevant variables into account, the number and complexity of such statements (or equations) in a full-dress model would be very large indeed.

Moreover, a fully developed model would have to impute appropriate *weights* to each factor. Scholz and Wei (1986) assign causative weights to a number of nicely-specified task environment and political environment factors, but they have done so only for different offices of one agency, OSHA. It is impossible to know without additional, similarly-designed studies whether the same pattern holds for agencies which, compared to OSHA, have less stringently and specifically-worded legal designs, or programs in which violations are less visible to individuals and groups positioned to complain, or agencies in countries where regulatory bureaucracies are better shielded from political influence. In addition, studies that rely on regression analysis of quantitative data, however useful, generally are limited to rather simple measures of regulatory enforcement style, such as frequency of prosecution or other enforcement actions, which are not

informative with respect to policy-oriented descriptions of enforcement style, such as the incidence of excessive leniency or excessive stringency.

Perhaps the most perplexing problem in developing a systematic analysis of regulatory enforcement arises from the *fluidity* of the regulatory task and political environment, and the ensuing adaptive behavior by agencies. Recurrent and unpredictable fluctuations in the profitability and resilience of regulated enterprises, stemming from changes in the marketplace and national economic policies, can diminish regulated enterprises' disposition and ability to comply, in response to which agencies change their approach from year to year, firm to firm (McKenzie and Shughart, 1987). Catastrophes occur virtually unpredictably; the resulting "crack-down" is sometimes short-lived, especially if budgetary resources are not expanded, sometimes lasting, if the agency acquires new legal powers. The incidence and targets of agency-shocking scandals change according to fashions in investigative journalism. The political party in power and its attentiveness to regulatory decisions both are subject to sudden change. Regulatory requirements that evoke resistance today become institutionalized tomorrow, as attitudes change, preventive technologies become cheaper, and established enterprises gain a comparative advantage through cost-effective compliance techniques. While compliance is increasing with respect to old regulation # 1, the same regulated enterprises might bitterly resent new regulation # 26. And new regulations, which are as inevitable as the tides, are constantly changing most agencies' task and political environments.

Perfect models of regulatory behavior, therefore, are not likely to be forthcoming. But that is not the only end of scholarship. Socio-legal scholars can continue to make a contribution to the ongoing political debate about how regulation should be designed and implemented, and about the conditions under which regulation is effective and responsive. They can do so by detailed, empirical analyses and comparisons of regulatory problems, decision-methods, and outcomes, pointing to the sources of variation in decision methods and outcomes in particular kinds of programs. The studies in this issue, I believe, advance that enterprise.

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NOTES

1. The U.S. Justice Department's Anti-Trust Division in the 1960s and 1970s provides one example of zealous enforcement, often indifferent to arguments about the economic consequences of its enforcement actions (Weaver, 1980), which led to extraordinarily levels of legal contestation, as in the ill-fated (and probably ill-advised) attempt to break up IBM (see Stewart, 1983).

2. For a useful effort to assess the policy significance of different approaches to motor vehicle recalls, see Tobin and Fitzgerald (1986).
3. The Delaney Clause of the U.S. pure food laws, for example, bans any food additive that is linked to cancer in laboratory animals, without regard to the product's degree of risk or benefits to humans. Until recently, U.S. Food and Drug Administration regulations, in their zeal to protect against adverse side-effects, required an extensive third round of controlled clinical studies of new drugs, although such tests rarely contradicted the results of earlier trials, while adding two more years of delay in getting efficacious drugs to dying or suffering patients (*Regulation*, 1988a).
4. For useful analyses of enforcement strategies and other design issues in regulatory programs, see Bardach (1989); Reiss (1984).

My use of the terms *ex ante* and *ex post* refers to modes of regulatory enforcement—(1) prescreening of planned products and activities, versus (2) field inspection or complaint-based investigation of ongoing or past activities. This usage may be idiosyncratic. Some scholars have used the term *ex ante* to describe all forms of regulation by governmentally-prescribed prophylactic standards that try to prevent accidents or other harms before they occur, whether those standards are enforced by prior permit and licensing procedures *or* by field inspections. In that context, *ex post* controls refer to standards that operate by the imposition of monetary penalties after the fact of injury or other harm, via civil lawsuits for damages, workers compensation claims, and the like.

5. A recent move to enhance *ex post* control systems' enforcement power is based on the U.S. Racketeer Influenced or Controlled Organization Act, which authorizes enforcement officials to seize the assets of enterprises accused of a variety of law violations, *before* the charges have been proved in court. Aimed primarily at organized crime-controlled enterprises, it has been used by the Security and Exchange Commission against securities and investment banking firms accused of insider trading.
6. Highly-specific legal designs seem to have been observed primarily in the U.S. (see Vogel, 1986). They reflect a certain mistrust of the capacity of regulatory officials, if allowed discretion, to deal sternly with locally important regulated enterprises. In addition, they reflect regulated enterprises' demands for guarantees of competitive parity throughout a large area. Consequently the growth of multi-national regulatory regimes, as in the European Community (Rehbinder and Stewart, 1988), and as will be required to control production of "greenhouse effect gases", suggests that pressures for highly specified regulatory laws will grow in other countries as well.
7. Makers of costly or controversially stringent policies often are tempted to opt for specific rules and remedies, telling regulated enterprises and front-line enforcement officials alike precisely what must be done and what the legal penalties will be for non-compliance. But some ambitious environmental control programs, as in Great Britain, choose to decentralize decision-making, relying on local water pollution control officials, for example, to tighten standards on a gradual, affordable schedule, tailoring abatement requirements to contextualized, intuitive cost-benefit calculations (Hawkins, 1984). Conversely, when the range of problems and appropriate remedies are well-understood, governmental regulations may be quite specific—as in the case of dairy product plants, canneries, and building construction codes—but not very stringent, in the sense that they do not require substantial and costly changes in the regulated industry.
8. Specialization of enforcement officials, either by professional training concerning the technology and economics of the regulated industry or by regular assignment of individual officials to particular kinds of problems or firms, may serve as a partial substitute for the "knowledge-enhancing" aspect of frequent

- contact between regulators and particular firms. Specialization, by increasing officials' self-confidence in judging hazards and suggesting cures, often is associated with a more flexible enforcement style (Hedge *et al.*, 1988). Niemeijer's portrait of Dutch building permit officials in this issue provides another example.
9. Where violations are not visible to complainants, the possibility of regulatory corruption also increases. Most reported examples of corruption involve agencies like building code inspectors checking in-progress construction projects or in-plant meat inspectors (see Schuck, 1972). Such agencies have strong *ex ante* powers to order very costly halts in operating or planned projects and have task environments in which violations, if ignored by officials, cannot be spotted by likely complainants in the near future. The fixed place of business of most regulated enterprises, however, and the continuing, readily-observable nature of many regulatory violations, seem to make corruption less likely than one might expect, given the stakes for regulated enterprises (see Kagan, 1984).
 10. One might argue that politics inevitably pervades any effort to make "apolitical" regulatory decisions that maximize public welfare, and indeed makes such a concept meaningless. In one sense, this is undeniable. Thus a decision whether to adopt conservative or looser estimates of the risk posed by a chemical (Nichols and Zeckhauser, 1986), or how heavily to weigh risks against the economic and opportunity costs of a stringent decision, ultimately comes down to questions of value, and hence often is influenced by the decision-maker's political attitudes. Nevertheless, I believe it is useful to distinguish between (a) choices based on the decision-maker's sense of what is "best" (acknowledging that the choice may be influenced by his or her political views), and (b) choices based on overt political pressures from external sources or from political superiors which push the decision-maker to deviate from his or her own "public-spirited" assessment of what would best serve the public interest. In discussing political pressures in the text, I mean to refer to pressures of the second type.
 11. In my review of political influences on regulatory enforcement, I have not mentioned the political dispositions of front-line regulatory officials. There is little doubt that officials' individual attitudes affect their personal decision-styles, and that the views of inspectors—about the trustworthiness of regulated enterprises, for example, or the value of strict control—vary from agency to agency (Kelman, 1981; Hedge *et al.*, 1988). Sometimes this reflects their professional training, or whether they have had experience in the regulated industry (Niemeijer, this issue), which sometimes is required by law. Nevertheless, in emphasizing *external* political influences, I assume that external political pressures, and the views of agency leaders responsive to political constraints, are likely to be more powerful influences on agency enforcement styles, regardless of the attitudes of front-line personnel (see Hedge *et al.*, 1988).
 12. Understanding when, and for what kinds of agencies, catastrophes and scandals are most likely to occur, has not been a subject of serious study. Scandals, one might suspect, partly reflect characteristics of investigative journalism in a community, for in some regulatory programs the gap between aspiration and control is almost always wide—for example, quality of care in nursing homes (Vladeck, 1980), safety in dangerous workplaces (Hager, 1979), air pollution control, fire safety regulation in slums, clean-ups of hazardous waste disposal sites—and a clever journalist can write a good exposé almost at will. Catastrophes are almost by definition harder to predict, although some calculations—and correlations with regulatory enforcement practices—probably could be made.
 13. It is by no means clear that the reduction in legalistic enforcement by OSHA has had any deleterious effect on workplace accident rates, which are sensitive to

changes in factors other than enforcement, such as the age and turnover of the workforce, union policies (Bacow, 1980), the targetting of inspections, and the intra-organizational dynamics of corporate safety programs (Gray and Scholz, 1989). Under vigorous enforcement in the 1970s, the positive effects seem to have been limited (Viscusi, 1986). Alternative, non-legalistic approaches apparently have considerable promise (Rees, 1988).

14. In contrast to Hedge *et al.*'s finding that federal strip-mine regulators were less susceptible to local political pressures than state agency officials, Scholz and Wei (1986) found that OSHA offices run by federal officials, responsible only to Washington, were, like state-run offices, more punishment-oriented in states dominated by Democratic local politicians and more flexible in Republican states.

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