Enforcing Regulation

Law in Social Context Series

Edited by Keith Hawkins and John M. Thomas

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Enforcing Regulation

Law in Social Context Series

Studies of law, legal institutions, and legal processes have become prominent in virtually every area of social sciences. This series is established to encourage and to publish research which will increase understanding of the role of law in society. The series encourages the preparation of manuscripts that are accessible to scholars in many fields and from many countries.

Preface

"To the present day", wrote James O. Freedman in *Crisis and Legitimacy,* "Americans have failed to develop or agree upon a coherent philosophy of governmental activism in economic matters." The general premise of this collection of original essays is that the study of regulatory enforcement can provide a valuable framework for understanding the ways in which governments intervene in everyday social and economic life. Moreover, as various topical approaches to regulatory reform are debated, it is important that proposals for change be informed by an understanding of the way regulatory bureaucracies carry out the essential tasks of enforcement. New approaches should reflect knowledge of patterns of enforcement common to many problems of regulation, as well as practices unique to particular regulatory tasks. To this end, the authors of the chapters in this book address a number of important issues in the enforcement process: the feasibility of adopting formal procedures to control the discretion of enforcement officials; the process by which enforcement officials judge violators and attempt to secure compliance with the law; the impact of resource constraints on enforcement practice; the relationship between enforcement officials and the regulated; the impact of legal sanctions and the threat of prosecution on strategies for negotiating compliance; the influence of professional ideologies and values on enforcement outcomes; and analysis of the difficulties encountered in initiating comprehensive, proactive strategies of enforcement.

The idea for this book grew out of a panel on the use of discretion in regulation which we organized at the 1980 annual meeting of the Law and Society Association in Madison, Wisconsin. *Enforcing Regulation* is the first of two volumes on the subject of regulation in the Law in Social Context series. The second will focus on the problem of policy formation in the regulatory process. We would like to acknowledge the generous assistance and encouragement of Philip D. Jones of

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I THE REGULATORY PROCESS: ISSUES AND CONCEPTS

1 THE ENFORCEMENT PROCESS IN REGULATORY BUREAUCRACIES

Keith Hawkins
John M. Thomas

Introduction

The explosive growth over the past two decades in government programs designed to regulate the workplace, consumer rights, the environment, and many other areas, has been well documented [Bardach, 1979; Bardach and Kagan, 1982; Lilley and Miller, 1977; Weidenbaum, 1978]. More recently, the intensity of this movement has been accompanied by strong appeals for moderation and change based on judgments of the economic impact of regulatory policies [see Schultz, 1977]. Prompting this debate has been an increased awareness that social, or protective, regulation encompasses fundamental problems involving the role of corporations in society and tradeoffs between efficiency and equity. The impact of regulation on these basic values has led one historian of the field to note: "Regulation . . . is a complex and sometimes intractable topic, but nonetheless, an irresistible one" [McCraw, 1982: vii].

Fortunately, these concerns have also brought about an interest in understanding the nature of the regulatory process itself: the day-to-day decision-making behavior of regulatory agencies, particularly those informal bureaucratic practices that affect performance and have unintended consequences. This work has become broadly multidisciplinary, including the fields of sociology, law, political science,

organization theory, and the economics of decision making. In part, this interest is reflected in a changing conception of American administrative law, part of whose task is to govern the regulatory process. The received wisdom of traditional administrative law has been that regulatory agencies are capable of implementing clearly definable, objective goals requiring technical expertise [see Freedman, 1978]. Today, however, it is recognized that the expert model has become irrelevant, if, indeed, it ever existed in practice. Administrative law is now more properly viewed from a political and organizational perspective — a balancing of competing demands and interests through the actions of a government bureaucracy [see Stewart, 1975; Rabin, 1977]. The purpose of this chapter is to present an overview of the principal concepts and issues in regulatory enforcement from this perspective.

The Nature of Protective Government Regulation

The debate over the design and enforcement of protective regulatory laws is complicated by the nature of the problems that these regulations address. Unlike many areas of traditional economic regulation, the problems governed by the legal framework of protective regulation are, for the most part, not specific to any one industry. The number of potential targets of regulation confronting the agency bureaucracy is vast, resulting in resource constraints on finding violations as well as patterns of partial enforcement [see Diver, 1980]. The field of protective regulation represents what Fuller has termed a class of "polycentric" legal problems [Fuller, 1960]. The administrative process is confronted with numerous economic and political tradeoffs and the need to think ex ante about the allocation of scarce resources. This is particularly clear in the environmental protection area, but these characteristics are also present in such diverse areas as consumer protection, worker health and safety, and housing code enforcement [see Boyer, 1972: 117; Ross and Thomas, 1981]. In the political arena, protective regulatory issues have been defined as evils to be eliminated by the lawmaking process rather than conflicting objectives to be accommodated. As Wilson has pointed out, these are a class of regulatory problems that impose "diffused benefits" and "concentrated costs": the public at large is the perceived beneficiary, while corporations and industry confront increased burdens through legislation [see Wilson, 1974: 143]. The political definition of these problems has resulted in a legalistic enforcement ethos. Bardach and Kagan have summarized this characteristic as follows: "In the most significant regulatory areas, the law has been deliberately structured to prevent capture, to program inspectors to apply regulations strictly, to pressure enforcement officials to apply formal penalties to violators and to adopt a more legalistic and deterrence-oriented stance vis-a-vis regulated enterprises"

[Bardach and Kagan, 1982: 57]. This creates conflict, however, because a principal goal of protective regulatory enforcement is the elimination of a highly undesirable condition or practice. These offenses lend themselves to what is termed a "compliance orientation" in law enforcement where it is felt that negotiation between the regulator and the regulated is important to correct a problem.

A significant trend in the protective regulatory movement has been the search for more effective ways to control the behavior of the large corporate enterprise [see Stone, 1980]. One aspect of this effort has been an increased willingness on the part of the federal government to promote the use of criminal sanctions as a means of deterring corporate regulatory offenses [see McAdams and Miljus, 1977]. Traditionally, criminal penalties were viewed as ancillary to other sanctions, and applied as a last resort when other legal controls proved unworkable [see Harvard Law Review, 1979]. An example of the more recent prominence given to criminal penalties is the case of *U.S. vs. Park,* 421 U.S. 658 (1975). In this case Acme Markets, Inc. *and* its chief executive officer, J. R. Park, were found guilty of violating the 1938 law against storing food, shipped in interstate commerce, in a rodent contaminated, unsanitary building. In interpreting the Food and Drug Administration (FDA) legislation, the Supreme Court upheld the conviction and argued that a corporate officer with the authority and responsibility to prevent or correct a violation of the FDA act, and who does not do so, may be held criminally liable for the violation. Recent legislation in environmental regulation also supports this trend. The 1972 amendments to the Federal Water Pollution Control Act provide for the criminal prosecution of corporate officers for abuse of the environment by their organizations. First offenders face imprisonment up to one year and fines of $2,500 to $25,000 per day; additional offenses can be punishable by up to $50,000 per day and a prison term of up to two years. In practice, however, many regulatory agencies have been loathe to use available criminal penalties. While the teeth in such remedies have been sharpened by the courts and Congress, their implementation by agencies has been more problematic. Edelhertz has summarized this phenomenon in the case of IRS and SEC regulation as follows: "Except in rare instances agency enforcement officials are prone to avoid considering cases for criminal prosecution. Agents or auditors alert to criminal issues lose their goal in a climate of discouragement and delay, or in the course of administrative and civil settlement negotiation" [*Subcommittee,* 1978: 8]. Moreover, the compliance orientation in regulation tends to create uncertainty and ambivalence about the role of criminal sanctions. The use of these sanctions by officials is frequently influenced by their perceptions of the underlying goals of the law being enforced.

The field of administrative law has become complicated by the fact that many protective regulatory statutes incorporate a goal that embodies what has been

termed the "utilitarian ethos" in the American legal tradition, specifically economic efficiency [Kagan, 1978: 10]. The Consumer Product Safety Act, for example, states that the promulgation of standards shall include consideration of the public's need for the product involved, the probable impact of a regulation on the cost and availability of the products, and efforts to achieve objectives which minimize adverse effects on competition and commerce (*Consumer Product Safety Act of 1972,* 15 U.S.C. § 2058 (c)(1)(1976)). Similarly, the Toxic Substances Control Act of 1977 specifically requires the administrator of the act to consider the economic impacts of proposed action and not to "impede unduly or create unnecessary economic barriers to technological innovation" while fulfilling the "primary purpose" of the statute (*Toxic Substance Control Act of 1977,* 15 U.S.C.A. § 2601(b)(1978 Supp.)). Again, the Occupational Safety and Health Administration (OSHA) legislation of 1970 states that the "feasibility" of standards should be considered relevant to the attainment of the highest degree of health and safety protection for the employee, and feasibility has been interpreted to allow the secretary of labor to take account of economic dislocation in enforcing OSHA regulations (*Occupational Safety and Health Act of 1970,* 29 U.S.C. §655 (b)(1976)). The end result of legislation that attempts to accommodate both goals is a high degree of policy-making and enforcement discretion available to the regulatory agency. Indeed, regulatory control is fundamentally influenced by the way agency officials interpret the conflict between the protective issue, which led to the law, and pressures for economic efficiency which arise in particular cases.

Regulatory agencies are created to take sides on the issue of control. Their statutory mandates and legal powers are explicitly committed to the guiding principle of regulation: it is proper for government to restrain social and economic activity through law in certain circumstances. Yet the behavior of agencies and officials reveals a considerable ambivalence about the use of law in regulating conduct [Kadish, 1963; Hawkins, 1980]. The recognition that economic activity is the source of material prosperity is coupled with moral unease about associating such conduct with the stigmatizing effects of legal sanctions. This dilemma between tolerance and restraint represents contrasting ideological positions about the propriety of regulation.

Thus regulatory agencies, in effect, find themselves assailed on two sides by interested publics or constituencies with different positions on the question of the extent to which legal rules justify intervention in economic life. One such public might be regarded as "activist" because of its vigorous commitment to a policing mission. This group urges substantial restraint on what it views as serious harms caused by unregulated activity, even though this may impose heavy costs upon productive enterprise. Activists have few qualms about employing law to mitigate the consequences of unfettered economic activity. The formal procedures of the law are in the forefront of what is regarded as "enforcement" and these tend to be

viewed as an index of such policing activity. So far as the activist public is concerned, agencies run the risk of criticism of ineffectiveness or co-optation by business interests if they appear to be insufficiently aggressive. The "business" public, on the other hand, takes a very different position. It is, in the extreme, critical of the very principle of regulation, which it sees as an unjustifiable inroad by government into free enterprise. This results, it is claimed, in productive industry suffering under the burdens of constraints imposed by overbearing bureaucracies.

These contrasting views are the stuff of political debate and activity, as recent conspicuous attention given by government to the alleged burdens of regulation suggests. Regulatory agencies meanwhile remain caught between these two opposing constellations of interests. Their behavior in implementing statutory mandates reflects the dilemma between what Kagan [1978] has called "stringency" and "accommodation" and expresses the ways in which they adapt to these conflicting values. The dilemma is played out in the creation and refinement of regulatory policy and is made all the more poignant by expectations aroused through the provision of complex legal sanctions among the tools of regulatory control. This is not to suggest that agencies adopt a relatively static position between the activist and business publics, but rather that they may be observed to shift towards or away from greater stringency in response to their definitions of a significant audience. The essay by Shover et al. (see below, chapter 6) shows that such shifts over time are paralleled by regional variations in regulatory enforcement. This study suggests that it is possible to discern such variations in agency enforcement policy (in this case, federal surface mining regulation) as a response to more localized differences in the agency's perceived environment.

The tension between the conflicting values of stringency and accommodation has been observed recently by a number of writers as reflected in two contrasting systems, styles, or strategies of regulatory enforcement [e.g., Hawkins, forthcoming; Kelman, see below, chapter 5; Mileski, 1971; Reiss, see below, chapter 2; Reiss and Biderman, 1980]. This work has focused on contrasting conceptions of enforcement in which punishment (stringency) or compliance (accommodation) are central values. The contrast is analytically helpful in thinking about enforcement strategies that are, on the one hand, directed towards meting out punishment for harm done and, on the other, those that are concerned with securing conformity to a rule or standard.

The Problem of Enforcement in Regulation

The problem of enforcement is an acute one in regulation for reasons that are intrinsic to the nature and task of regulatory control. The problem, essentially, is

one of an all-pervasive uncertainty. In the first place, the concept of regulation implies a toleration of conduct that causes, or possesses the potential for harm, not the eradication of existing harmful acts. This tolerance requires administrative choice as to the kind and level of harmful activity deemed to fall within the regulatory agency's mandate, as well as discretion as to its enforcement at the field level.

The notion of tolerance is closely linked with a second source of uncertainty, namely a major dilemma surrounding the objectives of enforcement. "Launched on a wave of concern about a specific social problem," Kagan writes [1978: 9], "regulatory agencies typically are charged with a single publicly emphasized *police mission*" (his emphasis). The common conception of policing is that harms or evils falling within the ambit of the law should ideally be repressed or eradicated. In keeping with the conception of a policing mission, the regulatory law establishing and defining the legal mandate and creating the enforcement bureaucracy also provides in theory for the ultimate use of legal sanctions for noncompliance. Where the sanction is criminal, the law, in effect, aligns the conduct subject to regulation with more familiar rulebreaking addressed by the traditional criminal code. In other words, a sanction associated with *repressive* law enforcement is made available to further the interests of *regulatory* law enforcement. As discussed earlier, however, missionary zeal is diluted by other objectives in realization of the fact that unrestrained policing in pursuit of an ideal of full enforcement has major implications for economic efficiency. The choice about the degree of commitment a regulatory agency should display to a policing style of enforcement, therefore, "actually involves fundamental problems of equity: what is the just allocation of the costs of ameliorative measures?" [Kagan, 1978: 11] This choice is made doubly difficult, for, apart from the value question, there are problems in making the necessary predictive decisions.

A final part of the uncertainty surrounding regulatory control stems from the issue of moral ambivalence. Regulatory control may lack the moral mandate necessary for the legitimacy of an agency's enforcement work. Law enforcement, in general, tends to be associated with conduct widely regarded as *mala in se,* yet the acts, events, and states of affairs subject to regulatory control do not often lend themselves to easy moral categorization. Instead, they are typically regarded as *mala prohibita,* matters where a breach is not often viewed as morally reprehensible (see below, chapter 3). This is so because in many types of conduct covered by the regulatory laws there are technical and economic constraints upon the regulated that have major implications for the issue of choice in rulebreaking (see below, chapter 3). Many areas of regulatory control have only recently been defined as requiring intervention through law, and, as a result, there is an uneasiness about exerting control by means of direct legal orders. What may, in short, be "illegal" is often not regarded as "criminal" [Conklin, 1977].