

Michigan Law Review

Volume 83 | Issue 4

1985

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Recommended Citation

Albert J. Reiss Jr., *Compliance Without Coercion*, 83 MICH. L. REV. 813 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/17>

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COMPLIANCE WITHOUT COERCION

*Albert J. Reiss, Jr. **

ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION. By *Keith Hawkins*. Oxford: Clarendon Press. 1984. Pp. xiv, 253. Cloth, \$32.50; paper, \$14.95.

Environment and Enforcement: Regulation and the Social Definition of Pollution is a brilliant account of how law is used to regulate economic life. Hawkins shows us through the eyes of a perceptive participant observer how the field agents with whom he went about translated the law into administrative action and compliance with it. The central focus of this book is how compliance with the law is achieved without having to resort to formal processes of the law, especially those of the criminal law.

This work is not the usual sociological treatise about bureaucratic enforcement. In a refreshing departure from that mold, Hawkins takes us into the nitty-gritty of the everyday life of field agents, their compliance strategies, their negotiating tactics, and their evolution of a reasonably effective compliance system. We are brought squarely to an understanding of how regulation comes to rest ultimately on informal rather than formal organization and how bargain and bluff by field agents replaces formal legal processes.

There is much in this book that will interest those who would make or specialize in administrative law or who are responsible for its enforcement. This review focuses on a number of such topics to whet the reader's appetite for what is surely one of the best empirical studies ever done of enforcement by an administrative law agency. The fact that this is a study of water pollution control in England should make it all the more interesting to readers in common-law countries, because it brings us to think about a comparative administrative law. Moreover, *Environment and Enforcement* attempts to show the essential similarity in the behavior of all those who enforce legal rules (p. 7).

The control of water pollution in England is framed in terms of strict liability under a 1951 Act of Parliament.¹ Causing pollution or

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1. Rivers (Prevention of Pollution) Act, 1951, 14 & 15 Geo. 6, ch. 64.

discharging directly to watercourses without the consent of local authorities is strictly prohibited,² and the Act provides for personal as well as corporate liability.³ But, as Hawkins argues, in practice neither strict liability nor rule making about when pollution occurs defines pollution. From a sociological perspective, pollution is a social construction created from the existence and scope of an enforcement action. In Hawkins' words: "It is an organizational and moral rather than a legal construct" (p. 74). For practical purposes, he notes, pollution is normally something that requires that some action be taken by an enforcement officer (p. 74). It is not a randomly discretionary enforcement action but is inevitably governed by implicit moral, organizational, and situational considerations. These range widely. Agricultural pollution in many instances is expensive to remedy, and the moral sympathies of the enforcers lie with the family farm, most often a modest operation. Or a particular site may not lend itself to the most effective pollution control, so that a compromise plan that yields a higher pollution rate is agreed upon. An organization that potentially could control its own pollution more effectively than it is now doing has the responsibility to do so, provided it does not jeopardize its competitive position unduly. At the core of regulating water pollution in England, then, are moral notions of traditional rights, considerations of economic harm, and assessments of organizational power.

Particularistic v. Universalistic Enforcement of Law

Administrative law enforcement in the United States is controlled by elaborate procedures for promulgating and enforcing rules. The guiding principle is that any enforcement action must be constrained by some rule. Enforcement in the field, however, is a discretionary action applying rules.

Quite the opposite generally prevails for administrative enforcement actions in England. Parliamentary acts giving responsibilities to administrative agencies require no such rule-making or enforcing procedures. The 1951 Rivers Act⁴ and the 1973 Parliamentary Water Act⁵ for the control of water pollution in England contain almost no detail to guide administrative action, and the Regional Water Authorities given responsibility for carrying out the Act are under no obligation to promulgate rules before taking an action. Rather than prescribing generalized standards, the Authorities grant licenses ("consents") to discharge polluting substances. As Hawkins concludes:

Pollution is in effect qualitatively and quantitatively controlled by the

2. 14 & 15 Geo. 6, ch. 64, § 2(1).

3. 14 & 15 Geo. 6, ch. 64, § 2(8).

4. See note 1 *supra*.

5. Water Act, 1973, ch. 37.

water authorities since standards are administratively negotiated. . . .

. . . . The pollution standards in a consent are defined locally by each water authority and are specific in application, with each consent negotiated on an *ad hoc* basis. [Pp. 23-24.]

Here we have, then, two radically different approaches to administrative rule making and enforcement. The American model begins by establishing rules that are to be applied universally and procedural safeguards to be heeded when applying them. Enforcement is almost always discretionary with the agency, however, so that there is a risk the system will be undermined by particularistic or selective enforcement. The English model begins with case-by-case decisions out of which grows a body of standards virtually unique to a given situation — standards that the agency more or less holds to in enforcing its mandate. The English Authority always maintains the flexibility to decide matters in each case without being bound by a rule, provided only that its decisions are consistent with its mandate to control pollution.

One may fairly ask whether these two different approaches to administrative rule making and enforcement lead to substantial differences in standards. Although Hawkins provides only the English experience, parallel studies in the United States suggest that in both countries, in practice, most enforcement actions conform to rules and allow discretion and bargaining. Why so?

One reason is that both systems are bound by norms of distributive justice or fairness and by practical considerations of avoiding complaint. In England, the Authority *negotiates* the standard in each case, deciding on grounds of what is reasonable and feasible given its legal mandate, but always bearing in mind that each case invites comparison with cases already decided and those that are yet to come before it. Conformity to precedent is one way to control challenges to authority and insure one's legitimacy to act. These considerations of practicality — feasibility, avoidance of complaint, and the legitimation of one's authority — result in the emergence of a rather clear notion of what the standards are, and the awareness that one must negotiate to obtain conformity with them in the long, if not the short, run. In the United States, the central strategy likewise is one of negotiation to achieve conformity with the adopted rules; the justification for such a strategy, however, lies in legitimating administrative discretion, a more tenuous matter.

Perhaps the main difference between these two approaches is the greater flexibility officially accorded the administrative agency in England to exercise discretion in the setting of standards as well as in their enforcement and thus to permit greater diversity in negotiating compliance with standards. The English approach also insures that each potential polluter has an opportunity to affect the standard to be ap-

plied in its particular case and to negotiate more openly both the standard and the time available to achieve conformity with it. What is formally acceptable standard-setting in Britain is regarded as informal in the United States. In both systems, though, the purpose of negotiation is to achieve compliance with standards. And in both countries enforcement activity centers upon the handling of individual cases by field agents who negotiate compliance with standards. As Hawkins notes: "A compliance strategy works . . . because it does *not* use the formal processes of law."⁶

Mens Rea and Law Violations

One of the central problems in developing and enforcing law and in making and enforcing rules is whether and how one shall take into account intentionality or motivation to break the law. The criminal law seems most comfortable with the notion that law breaking is at its core the intentional act of an individual or agreement among individuals. But as organizations supplanted individuals as the major actors to be controlled by law, treating organizations as mere individuals under the law was not enough. The behavior of organizations cannot effectively be controlled simply by searching for white-collar criminals or responsible agents who are to be sanctioned by one means or another. Individuals, after all, are replaceable and substitutable within organizations. Within organizations, moreover, it is often difficult to prove intent to violate the law. Hence, when dealing with organizations, administrative law often substitutes for the criminal law. And in England, strict liability substitutes for proved responsibility.

Yet it seems clear on the basis of recent social science research, and Hawkins' investigation is among such research, that often it makes little sense to reduce the behavior of organizations which violate laws or rules to the behavior of individuals within that organization. At the core of this problem lies an old problem of essence and accident, of intentional behavior versus accidental behavior. Hawkins calls our attention to the inevitability of water pollution, especially from large establishments, due either to ignorance or to lack of knowledge. This is inevitable partly because organizations are dynamic entities characterized by employee turnover, temporary replacement of employees during holidays and vacations, and so forth. Individuals often are but simple links in a chain of events where "accident" becomes but a convenient form of explanation. Indeed, as Charles Perrow has recently shown in his seminal work entitled *Normal Accidents*,⁷ organizational failures (though they may be called rule or law violations) are often attributed to individuals when in fact they are but consequences of the

6. P. 153 (emphasis in original).

7. C. PERROW, *NORMAL ACCIDENTS* (1984).

way that systems are designed — how elements are coupled together in ways that make failure unpredictable but inevitable. What is interesting is that men and their laws persist in holding someone — some persons — accountable for those organizational coupling failures.

Hawkins' pollution control agents recognize these organizational difficulties and inevitabilities and tailor their enforcement to them. They intuitively recognize that organizations are dynamic entities. Even their attempts to secure compliance by instruction often are doomed to failure because the word is not passed on, or because a supervisor forgets to instruct subordinates, or some crisis sets off a chain of events that leads to pollution.

Pollution control agents in England try to deal with these dilemmas of responsibility for violation by permitting pollution so long as it falls within tolerable limits, does not become so visible as to attract public attention, or does not encourage repeat violation. When pollution does go beyond these constraints, however, someone must be found who can be treated as an accountable agent. And as pollution control staff are quick to realize, those agents usually are not drawn from among the men at the top, from among the potential white-collar criminals. The individuals to be faulted — if such there be — are more often the "little guys" far down in the hierarchy, or their immediate supervisors.

Negotiating Compliance

The relationship between a regulatory agency and its regulated population must be open-ended when the agency must repeatedly determine whether there is compliance with its mandate. It is not surprising, therefore, that these agencies and their agents prefer voluntary to coerced compliance. The work of enforcement is easier, as Hawkins notes (p. 122), when there is good will. Nonetheless, the regulated do not choose to comply without some resistance, and so as Hawkins concludes: "Compliance takes on the appearance of voluntariness by the use of *bargaining*."⁸

To negotiate or bargain, the field agents must determine with whom to strike the bargain as well as how to do so. This is no simple matter when one is attempting to control the behavior of organizations, for as Hawkins observes, it is difficult for the enforcement agent to know with whom to negotiate in the organizational hierarchy, who will make the decisions about compliance, and who will be responsible for carrying them out (p. 145).

Negotiation under these circumstances poses an interesting dilemma for the regulated and regulating organizations. It is in such negotiations that lawyers traditionally have found their niche, acting

8. P. 122 (emphasis in original).

as representatives of the organization in the negotiations. Lawyering is an efficient, if costly, solution. Yet in reading *Environment and Enforcement*, one is struck by the fact that lawyers, like field agents, cannot easily deal with or for large organizations in negotiations to secure consents in pollution control.

At the core of many pollution control problems in large organizations is an organizational problem — how the organization can gain control over not only what is the immediate cause of pollution but over its internal management. As Hawkins wryly concludes:

“Responsibility” for pollution incidents is correspondingly complex: the person who is legally responsible is probably not administratively responsible, and almost certainly not the individual who did the act which caused the pollution. The threat of the law may still, however, be unveiled as a negotiating tool to concentrate the collective mind [P. 146.]

Bargain and Bluff

The function of threats in administrative regulation as well as in public policing is not well understood. Hawkins deftly draws our attention to their functional significance by characterizing the negotiation strategy between enforcers and polluters as one of “bargain and bluff” (pp. 122, 149). To secure compliance in negotiation, the pollution control agents in a form of patterned evasion commonly resort to bluffs to the effect that they will invoke penalties if the polluter resists the bargain proffered. And, indeed, to secure agreement, enforcement agents misrepresent both the likelihood of those penalties and their severity.

Pollution control agents are well aware that in bluffing they misrepresent their power and authority to invoke sanctions. Hawkins’ perception of why agents bluff is that they use sanction threats to secure agreement when compliance is their goal but they lack the means to secure it, either because they do not control the imposition of the penalty or, more likely, because the penalty itself is too light. The enforcement machinery, moreover, is inefficient, slow, and cumbersome. Polluters with full information on the likelihood of the penalty and its severity might well choose to evade the law because the trade-offs are on the side of violating rather than negotiating. In this imbalance of power, exaggeration of the power of the agent to sanction becomes a means to negotiate compliance.

There is a clear message here for lawmakers and rule enforcers. When the law or its administration places the major burden of insuring compliance upon enforcement agents, but their means to fulfill that mandate are limited or inadequate, *i.e.*, when the enforcement agents perceive impotence in the face of a requirement to reach a prescribed organizational goal, they are more likely to resort to the illegal

or improper use of authority. It is incumbent, then, upon those who design the rules and the organizations who enforce them to endow their enforcement agents with means that are suited to secure compliance, so that agents need not resort to coercive threats unless explicitly authorized to do so. Whenever the trade-offs are on the side of non-compliance or violation under their working mandate, enforcement agents will do their own justice. A system of adequate means to the ends of compliance coupled with accountability for their use is the best way to insure that those who seek compliance will also comply with the law. The dangers, it would seem, are especially great where legal agents have the discretionary power to negotiate the law's outcome. Perhaps, then, there are relatively few differences in the negotiation strategies employed by officials engaged in administrative matters and those engaged in "plea bargaining" of criminal law matters.

As the foregoing sampling of thought-provoking themes and findings illustrates, Hawkins is to be praised not only for telling us so much that is worthwhile about the role of law in regulating economic life but also for telling it so well.