

Review Essay

**Negotiation Versus Litigation:
Industry Regulation in Great Britain
and the United States**

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DAVID VOGEL, *National Styles of Regulation: Environmental Policy in Great Britain and the United States*. Ithaca, N.Y.: Cornell University press, 1986. Pp. 325. \$12.95 paper.

KEITH HAWKINS, *Environment and Enforcement: Regulation and the Social Definition of Pollution*. Oxford: Clarendon Press, 1984. Pp. 251.

National Styles of Regulation and *Environment and Enforcement* are two books which together give a comprehensive picture of how British environmental regulation differs rather starkly from American environmental regulation. Contemporary debates about regulatory policy generally, at least in the United States and the United Kingdom, are rather preoccupied with assessing the relative merits of the "American model" and the "British model." In this essay I will argue that understanding the differences between the two models is a first step toward analyses of regulation which are more fertile and less culture-bound; Vogel and Hawkins have served us well by helping us take this step. The regulatory policy debate, however, is equally at risk of becoming sterile if we do not transcend dichotomies between British and American regulation, between "compliance" and "sanctioning" regulatory systems.

Contrasting Styles of Regulation

National Styles of Regulation is a book written about British business regulation for an American audience. What a disservice the editors of an American journal have done to David Vogel by asking an Australian scholar of regulation to review his work! Australians, of course, have a chip on their shoulder about both of the great English-speaking imperial powers of this century: the British gave us convicts and Gallipoli and the Americans gave us "Dallas" and subsidized wheat sales to the Soviet Union. So what am I to make of the disconcerting spectacle of an American more or less depicting the British as having superior regulatory policies? At the end of the day, it may well be that the sensible position to adopt is the Australian inclination to view the American and the British ways of doing things

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as hopelessly flawed. Having foreshadowed that my conclusions will remain faithful to my cultural prejudices, I will now start at the beginning by describing what Vogel sees as the characteristics that distinguish the British from the American model of regulation.

Vogel's book assumes a reasonable knowledge of American environmental regulation and therefore devotes more detailed attention to the British situation. According to Vogel, no two nations exhibit a more striking contrast in their approaches to environmental policy than do these two. While American regulation is adversarial, litigious, and rule-bound, British regulation is mostly cooperative and consensual and grants great discretion to government officials. There is more conflict in American environmental regulation: the process is more open at multiple decision points to nonindustry interest groups, notably the environmental movement. Environmental decisions are mostly made by cross-cutting institutions of the state (the regulatory agency, Congress, the courts) that adjudicate gladiatorial battles between industry and various public interest groups. In Britain decisions are more likely to be made by a single institution of the state—the civil service—obtaining the consent of industry, and occasionally community groups, for a negotiated compromise. This consent of the regulated is mobilized through heavy reliance on industry self-regulation and decentralized administration. In contrast, American policy relies minimally on self-regulation and is more prosecutorial and centralized. In Hawkins' terms, American regulation tends more to "sanctioning" enforcement systems, while British regulation tends more to "compliance" social control systems.

To the extent that the environmental movement is effective in Britain, according to Vogel, it is by occasionally succeeding in being co-opted into somewhat corporatist styles of regulatory decision making, in securing concessions as sometime insiders to regulatory negotiation. In America, the environmental movement's effectiveness comes more from mobilizing public opinion for outside challenges to adjudication. While Britain, like the United States, is a pluralist rather than a corporatist democracy when it comes to economic policy generally, Vogel argues that with environmental and other types of "social regulation" interest group mediation is decidedly corporatist. Industry associations represent the interests of companies, trade unions those of workers in occupational health and safety matters. Even community interest groups (e.g., the environmental movement) are organized into umbrella bodies, sometimes with government funding, for the purpose of assisting them to agree on a single voice with which to speak to government.

One advantage to negotiating resolution of regulatory conflict in Britain is that the parties tend to be more committed to their negotiated resolution than are Americans to their litigated resolution. While British business has a certain respect and deference toward the civil service, American business tends to be deeply resentful of government regulators. In Bardach and

Kagan's terms, the adversarial style of American regulation generates an "organized culture of resistance" in the business community.¹

Consequently, while American regulatory standards for environmental protection, occupational health and safety, and pesticide and drug regulation tend to be considerably stricter, the British can get standards in place more quickly to deal with a new risk. They can also secure superior voluntary cooperation than can American regulators. Thus, Vogel suggests, tougher American standards do not produce superior environmental protection. On the whole, there have been roughly similar improvements to the environments of both countries. However, the British model might be regarded as more of a success because it gets there with the consent of the governed, with less political conflict, less prosecution, and less waste of societal resources on other forms of litigation. British regulation might be less just, open, and democratic than American regulation, but it is also less divisive, more efficient and flexible, and no worse at achieving goals of social improvement. Moreover, because British regulation is more flexible and less rule-bound, to some extent the same improvement can be achieved at lower cost.

All this is cogently argued, and Vogel richly illustrates the analysis with references to case studies of how environmental conflicts have been handled in Britain compared with the United States. He then goes on to show that these conclusions are not unique to environmental regulation, but also apply to occupational health and safety regulation, drugs, consumer protection, chemical regulation, securities, antitrust, banking, and insurance regulation. The treatment of each of these areas of regulation is brief, and at times Vogel slips into a glibly acritical stance toward the British model.

For example, the section on drug regulation reads as if it were written by a joint working party of the U.S. Pharmaceutical Manufacturers' Association and the British Committee on Safety of Medicines. In one quotation from an American Enterprise Institute publication, British regulators congratulate their regulatory system as "admired throughout the world" (at 212). Far from being "admired throughout the world," British drug regulators have a long history of incompetence dating from the time of the thalidomide catastrophe. The drug caused devastation in Britain but was never approved for marketing by the Food and Drug Administration (FDA). It is not unreasonable to wonder whether lack of openness with British drug regulation—the limited exposure of regulatory judgments to critical scrutiny from university pharmacologists and others outside the bureaucracy and the drug companies—is causally related to its comparative incompetence. Vogel lauds the British performance in dealing with the "drug lag" without balancing the greater "death lag" it has also suffered by allowing deadly products to be sold prematurely.

1. E. Bardach & R. A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982).

According to one drug company, Eli Lilly, the seven best-selling drugs it introduced between 1970 and 1979 were approved for use on average twenty-three months earlier in Great Britain [than the United States]. The world's best-selling drug, Tagamet, an anti-ulcer medication developed by SmithKline Corporation, was approved by British authorities in two months; the FDA took thirteen months to process the application. (At 213)

But Lilly also gave us Oraflex, which was associated with 61 deaths in Britain. In the United States, the FDA pursued Lilly on Oraflex; they were fined \$25,000 in 1985 for covering up deaths and illnesses caused by the drug. Similarly, it was the FDA that pursued SmithKline and fined the corporation \$100,000 in 1984 for covering up adverse reactions to Selacryn, which was associated with 36 deaths in the United States. Could it be that the British regulatory propensity for burying its mistakes and the U.S. pressure to flush out mistakes is part of the very reality which leads Professor Vogel to believe that "on balance, the American public appears to be worse off [than Britain]" (at 213) from its drug regulation?

Professor Vogel quotes figures on the average length of time it takes for drugs to be approved in Britain versus the United States. Most drugs introduced to the market do not involve therapeutic advances; their major contribution is to add to the confusion in the minds of prescribers and increase the costs of health systems. This is why the World Health Organization is urging member countries to reduce the number of drugs on the market. Keeping drugs that do not involve therapeutic advances waiting while regulatory resources are devoted to intensive and rapid evaluation of genuine advances is sound policy. If the speed with which FDA approves therapeutic breakthroughs is considered separately, it has a much better record than the figures touted by industry-funded economists show.

Drug regulation is one area where one clearly might look beyond both the American and British models for a better way. Vogel points to comparable failures of the American and British models with Oraflex. Could it be that rather than agonizing over the choice between the two systems, we might do better to look at countries that steered altogether different regulatory courses, resulting in Oraflex and similar disasters being kept off their markets while achieving minimum delay in getting genuine therapeutic breakthroughs approved?

Generally, in these other areas, Vogel is overly harsh on the failures of his own country and overly charitable toward the British. The U.S. Securities and Exchange Commission could easily be held up as an agency that has levered impressive co-operation with self-regulation by the stock exchanges, the National Association of Securities Dealers, and the accounting profession, while the Bank of England and Lloyds could well have been more severely criticized for the failures of their self-regulation in the British banking and insurance industries respectively.

The United States and the United Kingdom as Polar Extremes

Vogel, I think, is correct in how he describes the thrust of the differences between British and American regulatory policy. He is probably also right in suggesting that by and large these differences are generalizable to areas of regulation beyond the environment. However, there are important ways in both respects that he would seem to overstate the differences.

It is enough for Vogel to show us that these two countries have very different regulatory approaches and that important consequences flow from this. But he insists, without relevant data from the other nations of the world, that British and American "approaches to environmental regulation differ from each other more than do those of any other two industrialized democracies" (at 21). Yet the British approach does not seem very different to me from that applicable in most Australian states. The tendency of some of the 49 Commonwealth countries to be more British than the British in some matters of public administration is well known. And surely the voluntarism and deference of Japanese business executives toward their civil service considerably surpasses that evident in Britain.

We are told that "over the last fifteen years in no action has environmental policy been the focus of so much political conflict as in the United States" (at 21). I would have thought that the Green Party in West Germany and the impact of the Tasmanian dams issue on recent Australian elections might rival political conflict over environment in the United States. On the same page we are also told that "no other business community is so dissatisfied with its nation's system of environmental controls as the American business community," with no evidence to support such a sweeping claim. Similarly, we learn: "The British make less use of legally enforceable environmental quality or emission standards than does any other society" (at 75-76). The use in British legislation of the word "practicable" to qualify mandated preventive measures is highlighted as evidence of the distinctive British commitment to discretionary trade-offs between the costs and benefits of compliance. Yet in all the countries of which I have experience, examples can be found of either the "practicable" construct or something like it in their regulatory statutes.

While Britain may be clearly distinguishable from the United States on the dimensions identified, Vogel has not provided the evidence that Britain is an extreme case when compared with the rest of the world on these dimensions. British exceptionalism becomes even less persuasive as one moves to other areas of regulation; while British environmental regulation may be less rule-bound and more subject to flexible negotiation than in any of the Continental countries, one wonders if this is true for occupational health and safety, drug regulation, consumer protection, and other domains.

It may be that most of the rest of the world has more corporatist styles of regulatory accommodation which can be contrasted with the pluralist con-

flict, adversariness, and litigiousness of the United States. In other words, American exceptionalism might have substance, while Britain might be viewed as rather like most of the rest of the world. But even American exceptionalism must be kept in perspective. Professor Vogel uses quotes from British bureaucrats to the effect that litigation should be seen as a last resort, that regulators did not want to be seen as policemen, and so on. Yet anyone who has interviewed American regulatory officials has no trouble in extracting these kinds of quotes from their field notes. Even for U.S. regulatory agencies, law enforcement is a disfavoured way of getting the job done. The world over, business regulatory agencies may be better understood by what they have in common: business regulatory agencies have a strong aversion to law enforcement and a clearer preference for persuasion compared to agencies (mainly police) that regulate individuals.²

American Exceptionalism

I will not tarry with Vogel's historical analysis of why British business is cooperative and deferential in its relations with regulators—not that I dispute it, but it becomes less important if one doubts British exceptionalism. The important point is that Vogel contrasts the aspirations of British businessmen to be “gentlemen” in their dealings with government authority with the sense of superiority American business people exude toward government officials. America, in contrast to Britain, has remained very much a business civilization, “a nation whose business community remains suspicious of public authority and whose public has little confidence in either the ability or willingness of government officials to control corporate conduct effectively” (at 242).

Vogel does not draw out the historical reasons for business mistrust of government in America as clearly as he does the reasons for British business deference. It may be that in most societies a powerful state bureaucracy preceded the flowering of industrial capitalism, and business leaders had to develop a close working relationship with their governments from the outset. The American state, in contrast, played no indispensable role in guiding the industrial development of the frontier society. American business did not learn to cooperate with government, and when bureaucrats began to intrude into American business, a pervasive ideology of resentment toward government intervention took hold. The frontier society also may have been responsible for self-assertive values—rugged individualism that undermined deference to government authority. Ironically, this anticorporatist business culture may have been involved in radical critiques of business as well as business itself viewing adversarial regulatory relationships as healthy. And so procedures for consulting business and public interest

2. Hawkins (at 196) points out that when the police deal with states of affairs and with a familiar population, their enforcement approximates a compliance rather than a sanctioning model. It might be overstating things, however, to suggest that the police turn away from sanctioning in these circumstances to the extent that business regulators almost invariably do.

groups about new regulations came to be modeled on adversarial trials rather than small group discussion and consensus building.

One of the impressive things about Vogel's book is that while it looks longingly across the Atlantic, it recognizes that these cultural legacies may mean that the "British model" could never work as well in the United States. Up to a point, Vogel argues, the American business community gets the regulation it deserves; given the adversarial posture of business, "a less adversarial style of enforcement might well have led to less progress" (at 258). There is indeed a case for cultural relativism in regulatory strategy.

One is reminded of Kelman's comparisons of attitudes about the trustworthiness of business among American and Swedish occupational health and safety inspectors.³ They were asked to indicate where on a seven-point scale their attitude lay, when one end of the scale was defined by the statement, "Most employers are law abiding, and try to follow the standards simply because a government agency has issued them," and at the other end defined by "Without the penalty-imposing powers we have, many employers would simply ignore the standards." Fifty-six per cent of the American inspectors and 15% of the Swedish inspectors placed themselves at the end of the scale defined by the second statement. While the greater propensity of American regulators to assume business bad faith may in part be a self-fulfilling prophecy, it may also partly reflect the realities of how regulators get results in the United States. Consideration of how inspectors view the social realities of getting compliance leads us to Hawkins' book, which is the most systematic contribution to our understanding of this in the literature.

Regulation Through the Eyes of British Water Pollution Officers

Environment and Enforcement is based on rather extensive participant observation by the author at two British Regional Water Authorities. In my view, it is the most thorough and methodologically impressive empirical study in the regulation literature. Yet authors like David Vogel and myself, whose research has used cruder methodologies, should not be chastened by Hawkins's systematic ethnographic work. The study of regulation needs both detailed participant observation studies of one or two agencies and comparative studies of many agencies based on less time-consuming methods such as interviews and analysis of agency records and policies. The latter are the canvas on which the finer strokes of the former can be painted.

Indeed this essay is partly about putting Hawkins's work onto Vogel's canvas. We have seen that Vogel has instructed us on how, in contrast to American regulation, British regulation tends to be decentralized, consensual, flexible, and nonlitigious. Let us then consider some of the rich in-

3. S. Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (1981).

sights Hawkins's study provides on how these tendencies are manifested in the regulation of water pollution.

Decentralization is clear in both the formal and informal reality of British water pollution control. National control of regional water authorities is limited, and within authorities the primary regulatory instrument is a particularistic "consent" which licenses and imposes conditions upon the discharge of pollutants by a particular plant. The conditions of the consent are negotiated between the corporation concerned and the water board without strong reference to overarching national or regional standards. Indeed, the conditions of the consent are shaped by judgments of the polluter's capacity to pay balanced against the nature of the watercourse being polluted. If the water is used a short distance downstream as a potable water supply or for fishing, or if the river is already in danger from other industry, a more stringent consent will be written than in cases where there is no important use or amenity downstream or where the river is already so polluted that it is regarded as an effluent channel. These consents are subject to local judgments based on local knowledge of and sensitivity to the concerns of local citizens. Flexibility is further introduced by ad hoc reviews of consent conditions in light of changing circumstances.

At the same time, Hawkins reveals how polluters' conceptions of equity place some practical constraints on particularistic "scientific" assessment of the amount and kind of pollution load any watercourse can bear. Given the concern of the water board to secure the agreement of the polluter to the conditions of the consent, concessions tend to be made to equity when the polluter complains of the less onerous requirements being imposed on a competitor. Hawkins also documents how requirements imposed in the writing, varying, and interpreting of consents are guided by a perception of attainability. In contrast to American regulation, water board officers are anxious to impose requirements that will be agreed to through negotiation and complied with so that a challenge to the authority of the water board does not arise.

Much of the activity of the field officers of the water boards was interpreted by them as maneuvering to preserve their authority and in particular to sustain the myth that compliance with their requirements was inevitable. Hence, backsliding and cross-negotiation would be used to extricate the agency from the risk of an appeal or an unsuccessful prosecution. The field officer's job is to get compliance and to improve water quality. Her role, as described in the following passage, is so multifaceted that it requires the skills of a diplomat more than those of a scientist or lawyer, though the latter are needed as well:

Pollution control work is not regarded by its practitioners as a scientific enterprise in which a dispassionate discretion is informed primarily by technical concerns. Instead it is an art in which personal qualities are most important. The enforcement agent in a compliance system has a wide variety of roles to

fulfil. He may sometimes be consultant and analyst; sometimes investigator and policeman; but he must also be negotiator and judge; inspector, educator, and public relations representative. This is because compliance is the end of enforcement and its effective attainment requires a constant display of helpfulness and reasonableness. (At 56).

When noncompliance with a consent or when a pollution not covered by a consent occurs, the field officer decides what to do or what to recommend based on a judgment of how tolerable the pollution is; whether it is technically and financially within the discharger's capacity to fix; the impact of the pollution; its noticeability (e.g., dead fish); and whether there is likely to be an adverse public reaction.

During negotiations, most polluters are assumed to be "socially responsible," though part of the art of inspectorial diplomacy is being able to recognize those who are "unfortunate," "careless," or "malicious" and therefore require a different demeanor. Even when a discharger is not classified as "socially responsible," there is a reluctance to escalate too quickly to an adversarial posture; however, ultimately the threat of prosecution might be raised. An important stage in the escalation of regulatory response is the sober ceremony of taking a statutory sample which requires witnesses to the splitting of the sample, signatures, and other activities that signify that the agency is getting serious. Hawkins describes how this ceremony is regarded as a deadly serious step that can shock business into conciliation, a description no doubt curious to observers of American business-government relations.

Regulatory escalation occurs within an exchange relationship. The polluter can offer goodwill, cooperation, and conformity to the law in this relationship, the regulator forbearance and advice. Forbearance might mean a willingness to accept a less costly way of solving the problem and agreement not to prosecute or expose the polluter to adverse publicity. Forbearance is more than just a bargaining chip; it builds goodwill and encourages self-reporting whenever there is an escape of effluent.

The credibility of the field officer's bargaining tools is fragile, however, because they involve a certain amount of bluff, and the actual fines that flow from prosecutions are derisory. Puny penalties are dealt with by a degree of misrepresentation of the terrible consequences of prosecution and by alluding to the humiliation of a court appearance and adverse publicity rather than emphasizing the fine. The credibility of implied threats to be tougher on new development proposals or in enforcing existing consents turns very much on how successful the regulator is at managing appearances. "Negotiating tactics are organized to display the enforcement process as inexorable, as an unrelenting progress, in the absence of compliance, towards an unpleasant end" (at 153). Hawkins's work is masterful in portraying how field officers go about managing these appearances successfully to persuade compliance. Given, however, that this effective impression management

rests on a relatively impotent legal foundation, it is worth posing the counterfactual, What if we set a competent American general counsel or vice-president for regulatory affairs loose on one of these field officers? The answer is probably that the adversarial American professional would quickly deflate the appearances, call the bluff, and paralyze the agency with litigation.

We could dismiss this question by saying that there is no place in British business culture for American general counsels, but increasingly there is. Vogel detected some tendencies toward greater adversariness and rejection of the gentlemanly rules of polite conciliation in British business culture, and indeed toward Nader-style consumer and environmental group activism. Some of the adversariness has been imported from the United States. Vogel illustrates this by using as an example the role of an American company in breaking down the British traditions of genteel insurance industry self-regulation under the auspices of the council of Lloyds (at 219).

I am not suggesting that in 50 years Hawkins's ethnography will be a priceless record of an extinct business-government culture, destroyed by the predations of American business cowboys leaving a trail of litigious destruction in a succession of more civilized lands as the internationalization of capital inflicts more and more of them on the rest of the world. We must remember that it is the extreme adversariness of American business-government relations that is out of step with the rest of the world, and that there is a degree of commitment among both regulators and business in the United States to reap the mutual advantages of adopting the more conciliatory styles of other cultures.

However, it only takes one or two litigious cowboys to shatter the fragile appearances the subjects of Hawkins's study struggle to sustain, and if they were shattered, putting the pieces together again would be difficult. What follows is a warning against uncritically embracing the "British regulatory model" as something that "works well" on the basis of impressive data such as those provided by Hawkins.

I read Hawkins as showing both that a great deal can be achieved without tough law enforcement and that the achievement is potentially fragile. The thin ice on which the British water boards skate should be reinforced as an insurance policy against some cowboy calling them to their high noon. It would be better to install the enforcement backstops that will prevent a bloody shootout and allow the flexibly negotiated regulation to continue indefinitely than to have to patch it up afterwards.⁴

If the American regulatory model is self-destructive, the British model sows seeds which could destroy its own success. British success turns on

4. In our multivariate analyses of the policies and practices of 96 Australian business regulatory agencies, we identified a cluster of agencies we labeled "benign big guns." These were agencies that carried bigger sticks than all other agencies but also walked more softly than most other agencies. P. Grabosky & J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

maintaining a “posture of invincibility” that is a fiction—a dangerous fiction, because it forces British regulatory agencies to give away too much when confronted with a recalcitrant company on a critical issue. The British would rather give the game away than lose it. The British regulatory style may be preferable to the American, but it can better sustain that style and also remedy some of its backsliding by acquiring more enforcement backbone. I am not advocating wholesale replacement of flexible, negotiated, consensual regulation with tough law enforcement; rather, I advocate sustaining that very regulatory style with somewhat more frequent and much more potent enforcement than the British are inclined to use. Then they can successfully and securely maintain most regulatory activity at the base of their enforcement pyramid because they can escalate without bluff to potent enforcement options that are genuine bargaining chips at the tip of the enforcement pyramid.⁵

Hawkins’s ethnography shows us the way British regulators struggle with the perceived moral ambivalence toward the behavior they regulate: “their authority is not secured on a perceived moral and political consensus about the ills they seek to control” (at 13). This drives them to negotiate compliance rather than risk litigation for an offense the magistrate, the community, the local member of parliament, or the industry concerned might characterize as unblameworthy. Yet here is the cruel dilemma for regulators. Fear of prosecution risks worsening the very moral ambiguity that produces the fear. Laws that are rarely enforced lose their moral strength; when community resentment toward a type of illegality is not regularly nurtured by holding up offenders for public condemnation, the moral basis for voluntary compliance is eroded.⁶ If offenders are not shamed, refusal to comply with the law ceases to be seen by the business community as shameful. All of us who are practitioners of business regulation involved in decisions whether to prosecute know that the temptation in the particular case is to be mindful that a negotiated remedy will consume fewer agency resources and will avert any risk of undermining the goodwill of the company to comply in future. Mostly, it is good enforcement policy to yield to this temptation. But it is necessary to reject the easy regulatory option in favor of full-blooded enforcement often enough to show that the law can keep its promises and to fulfill the moral educative functions of the criminal law.

In this sense, Hawkins’s study reveals one of the weaknesses of the micronanalyses of the symbolic interactionist tradition of research. The tendency is to focus rather exclusively on the interpretations of the actors involved in regulatory interactions with insufficient location of these micro processes within some macro context of evaluation. Hawkins is not as guilty of succumbing to this tendency as many symbolic interactionists be-

5. See J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985).

6. A. E. McCormick, *Rule Enforcement and Moral Indignation: Some Observations on the Effects of Criminal Antitrust Convictions upon Societal Reaction Processes*, 25 *Soc. Probs.* 3039 (1977).

cause his analysis does focus on how the larger reality of societal moral ambivalence toward pollution offenses constrains the way field officers deal with the micro dilemmas Hawkins observed. But his book does not show how the choices in those micro dilemmas are a part of what constitutes the macro constraint. As usual, sociology does well in illuminating how structural reality constrains individual action, but falls down at the challenge of demonstrating how the structural reality is constituted from purposive social action by individuals.⁷

Finally, it must be considered that the perceptions of regulators as to the nature of the constraints imposed by community moral ambivalence toward corporate crime might be inaccurate or even actively misconstrued so as to rationalize a cozy bureaucratic life of comfortable interpersonal relations with business people whom they find likeable. There is now considerable evidence from many countries that, contrary to the conventional wisdom of criminology inherited from Sutherland,⁸ community resentment against corporate crime is strong, at least when harm results from the offense.⁹ Public opinion seems to be every bit as punitive toward corporate offenders in the rest of the world as it is in the United States. Hawkins found that most pollution offenses do not involve identifiable harm. Yet it is hard to sustain the view that British environmental regulators eschew prosecution because of moral ambiguity arising from the unspecifiability of harm. Vogel is right that the aversion to prosecution is fairly general in British regulation. Compared to their American counterparts, the British are also more inclined to reject prosecution in areas like securities and insurance regulation, occupational health and safety, drug regulation, and consumer protection where the harm tends to be clear. On the other hand, it is true that when British factory inspectors do prosecute, it is when a visible serious injury has occurred.

Hawkins also shows that his regulators viewed the community as unwilling to support enforcement if the offense was accidental or "unfortunate" rather than intentional or negligent. It is true that ordinary citizens tend to be mercifully tolerant of accidental offenses. However, it is also true that the community is unmercifully intolerant in assuming the worst of business—in assuming that their offenses are typically intentional and amount to a cynical attempt to maximize profits, even when this is not the case.¹⁰

7. J. S. Coleman, *Social Theory, Social Research and a Theory of Action*, 91 *Am. J. Soc.* 1309–35 (1985).

8. E. H. Sutherland, *White Collar Crime* (1949).

9. A review of data from the United States, Australia, Israel, Britain, Finland, Sweden, Norway, Denmark, the Netherlands, Kuwait, India, Indonesia, Iran, Italy, Yugoslavia, Poland, and Costa Rica is available in P. Grabosky, J. Braithwaite, & P. R. Wilson, *The Myth of Community Tolerance Toward White Collar Crime*, 20 *Austl. & N.Z. J. Criminology* 33–44 (1987); for evidence to 1982, see J. Braithwaite, *Challenging Just Deserts: Punishing White Collar Criminals*, 73 *J. Crim. L. & Criminology* 723–63 (1982).

10. D. Nelken, *The Limits of the Legal Process: Landlords, Law and Crime* (1983). Nelken's study is a British example of how community stereotypes characterized exploitative behavior by profiteering commercial landlords as blatant intentional harassment when, in fact, the latter behavior was compara-

One might have thought that the latter uncharitable, if somewhat inaccurate, community perceptions of white collar crime would be a resource for regulators who wished to be punitive.

Thus it would be a mistake to assume that Hawkins's regulators have accurate perceptions of the community's moral ambivalence toward the laws they enforce. Hawkins's own data show, on the contrary, that on the rare occasions when the water boards do prosecute, the reason often is that the pollution has come to public notice. Even if there is no blameworthy behavior on the part of the polluter, when there is "a great public outcry" an agency document explains that "the taking of a prosecution may be necessary, irrespective of the other practical circumstances of the case" (at 201). Notwithstanding this, in practice the cases in which public outcry is greatest are almost always cases in which blameworthiness is also clear.

Hawkins's findings that public concern is a circumstance that compels the regulators to abandon their preference for prosecution as a last resort (for fear that "the authority's not seen to be doing its job unless it does prosecute")¹¹ must cause us to challenge the officers' claims that they avoid prosecution because of moral ambivalence in the community except when intentionality or gross negligence is present. The evidence we have from the empirical literature on community attitudes to corporate crime is that citizens tend to assume the worst of business offenders and pay little attention to lawyers' distinctions between degrees of culpability.

One of the justifiable criticisms of the public opinion surveys which reveal punitive attitudes toward corporate crime is that they may overstate the punitiveness of community response by neglecting mitigating factors which are raised in real cases. Consistent with this critique, when Rossi and his colleagues added mitigating factors to their offense vignettes, respondents became less punitive in their recommended sentences for individual offenders.¹² But with corporate offenders, mitigating factors had no significant impact on sentences recommended, except the corporate plea in mitigation that "every competitor breaks the law in the same way." This plea significantly *increased* community punitiveness. Frank and his co-authors varied the levels of blameworthiness in their vignettes according to the culpability standards of strict liability, negligence, recklessness, and the "knowing" standard.¹³ Culpability had little effect on the punitiveness directed toward corporate offenders, but individual executives judged guilty of corporate crimes under lower standards of culpability were given lesser punishments than executives who were more culpable.

tively rare. The real problems which tenants faced were rendered immune from regulation partly as a result of the stereotype.

11. Senior water board man, quoted by Hawkins at 194.

12. P. H. Rossi, J. E. Simpson, & J. L. Miller, *Beyond Crime Seriousness: Fitting the Punishment to the Crime*, 1 J. Quantitative Criminology 59-90 (1985).

13. J. Frank, F. T. Cullen, & L. F. Travis, *Sanctioning Corporate Crime: Public Support for Civil and Criminal Intervention* (paper to Annual Meeting of Midwest Criminal Justice Association, 1984).

Transcending the British-American Dichotomy

Both these books are outstanding contributions to our understanding of business regulation, and this essay has not done justice to the diversity of insights they have to offer. This is particularly true of Hawkins's book because I have chosen to map it onto Vogel's framework of analysis; the useful thing about Hawkins's data is that I could have mapped it onto other frameworks to equally illuminating effect. It is the best microdata we have about regulation in action.

In all of this flattery, I should not forget that my mission here is to put the imperialists in their place. No, dear reader, the parameters of worldwide regulatory variation are not to be understood in terms of the two large English-speaking nations of the North defining polar extremes with the rest of the world falling in between. Hawkins's partition of regulatory processes into "compliance" and "sanctioning" strategies is not without empirical justification, indeed, work in which I have been involved on a multivariate analysis of the enforcement strategies of 96 Australian regulatory agencies identifies more or less a "compliance-sanctioning" polarity as the most important dimension of regulatory variation.¹⁴

Whether one sets up the dichotomy as "compliance-sanctioning" as Hawkins does or "British model—American model" as Vogel does, there are dangers in allowing our analyses to be driven by these dichotomies. The danger is most clearly demonstrated by the following passage from Vogel: "Broadly speaking, regulatory officials can choose one of two strategies to influence business behavior: they can pursue a policy of strict enforcement or one based on voluntary compliance. American environmental policy has tried to rely on the former, British environmental policy on the latter" (at 192).

This is not the regulatory choice at all. A policy of strategic strict enforcement supplies the mandate which makes it possible to secure voluntary compliance. Even Hawkins's data show this in a domain as "compliance"-oriented as British pollution enforcement is; business comes to the negotiating table when it perceives that the state has some bargaining chips. Moreover, I have attempted to argue that more aggressive use of punishment within the general parameters of flexible, negotiated British regulation is a way of securing the long-term maintenance of that very conciliatory style which Vogel, Hawkins, and I would probably agree is preferable. Also it can render more effective negotiated consensual solutions that rely heavily on industry self-regulation. "Bargaining in the shadow of the law" will not produce impressive results if the law casts no shadow.

The regulatory choice is not between compliance and sanctioning enforcement. It is to choose a hierarchy of regulatory response, to choose

14. Grabosky & Braithwaite, *Of Manners Gentle* (cited in note 4).

among alternative strategies for escalating between graduated ranges of compliance and sanctioning processes.

The danger is that work like Vogel's and Hawkins's, but particularly Vogel's, will be picked up by American business lobbies as demonstrating the need to "go British" in regulation rather like the glib calls of a few years ago to "go Japanese" in management. Vogel himself has outlined the risks of grafting British voluntarism onto the cultural traditions of adversariness between business and government in the United States. Different cultures and different regulatory domains require different hierarchies of regulatory response to ensure that regulation is maximally flexible, consensual, and cost-effective. American enforcement pyramids need to be taller than squat British enforcement pyramids (which are dominated by near-universal voluntarism at the base) because adversarial cultural imperatives will drive American regulators to escalate more often and more steeply up their enforcement pyramid.

Regulators on both sides of the Atlantic could be more sophisticated in how they think about designing their enforcement pyramids. A book like Vogel's should have a positive effect on them in providing a vision of other ways of skinning the regulatory cat, but it might have a negative effect if they see the matter as choice between the "American model" and the "British model."

In Defense of U.S. Imperialism

Let me finish by saying something very positive about American regulation. The openness and conflict of American regulation surely does have its costs, as Vogel shows, compared with the quick, clean deals which the British cut behind closed doors. American society bears all of these costs; yet the rest of the world derives enormous benefits from the American debate. These days most products and processes which pose risks warranting regulatory consideration are traded freely across international borders. The open gladiatorial battles fought over these risks in the United States are a priceless informational resource for the rest of the world. The regulatory agencies, business lobbies, university scientists, and public interest groups all have better resources in the United States than elsewhere; so the process of American conflict draws out most of the countervailing considerations for other nations. They get the information without the costs of conflict.

There is a sense, for example, that some small nations like the Nordic countries, even Australia,¹⁵ may have better drug regulatory systems than either the United States or Britain despite their superior regulatory resources. The reason for the success of these small countries is that they piggyback on the fruits of American conflict and openness. They can dispassionately observe all of the blood-letting that occurs in the United States

15. M. Dukes & I. Lunde, Review of the Restrictive Actions Under the Australian Drug Regulatory System, *Med. J. Austl.*, May 15, 1986, at 412-15.

and then make a consensual decision in their own countries. Like the audience at a bull fight, the foreign regulators relax in their seats, and as the bull and the matador stand exhausted toward the end of the contest, they place a bet on the one who seems to be winning. They enjoy the light, while the U.S. regulatory authority is paralyzed for a period by the heat rising from the conflict.

If what America is exporting is the clash of earnestly held alternative ideas about how modern industrial processes might be designed more safely, then maybe U.S. imperialism is not such a bad thing. While the United States continues to export light and import heat, it will deserve to be regarded as a benign regulatory imperialist.