Escuela Nacional Indecopi

Paper delivered to Indecopi for the author on the occasion
of its participation in the
"III International Forum of Strategies to ensure compliance with the law"
Lima, Peru, March 2016.

ENFORCING REGULATION:

Working Theories of Compliance and Punishment

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TABLE OF CONTENTS

INTRODUCTION 4

THINKING ABOUT ENFORCEMENT STRATEGIES 7

THINKING ABOUT ENFORCEMENT DECISION-MAKING 10

Surround 11

Field 11

Frame 12

ENFORCERS' WORKING THEORIES OF COMPLIANCE 15

Principled complianc 17

Instrumental compliance 18

Self-interest 18

Custom 19

ENFORCERS WORKING THEORIES OF NON-COMPLIANCE 19

Self-interested calculation 19

Mismanagement 20

Culture 20

ENFORCERS' WORKING THEORIES OF PUNISHMENT 21

A NOTE ON DETERRENCE 22

SOME IMPLICATIONS AND CONCLUSIONS 24

REFERENCES 26

INTRODUCTION

This paper addresses law enforcement practices in British regulatory agencies, exploring how ideas about punishment and compliance held by low level enforcers shape the actual enforcement of regulation. [1] It also suggests a way of thinking about law enforcement. I want to consider two related questions. First, what does it mean to talk of enforcing the law? Second, what does law enforcement look like when conducted by regulatory agencies? The paper is premised on the position that the actions of law enforcement officials, and more generally the shaping of law and policy about enforcement, are derived from working theories, assumptions, and beliefs about reasons why individuals and businesses comply, or fail to comply, with legal demands. These ideas pervade the creation and implementation of criminal law at all levels, from the legislature to the most junior legal official, though it is the latter upon whose behaviour I want to concentrate.

The analysis is based on the idea that a clear understanding of how the words and commands of law are interpreted and acted on (if they are acted on at all) is essential, since it is important to appreciate how legal rules are actually put into effect, and under what conditions they may be distorted or subverted, or simply overlooked. Such an understanding is necessary not only to further our knowledge about the nature of law and legal processes, but also, if the task is to change law and policy for the better in some way, to ensure greater sensitivity to the social reality of the law.

Some background is necessary. First, the paper reflects a strong bias towards certain forms of regulation because it draws from empirical research into the enforcement of so-called 'social regulation': those forms that seek, for example, to protect and advance the health, safety, and welfare of people in the workplace, the cleanliness of the environment, the pursuit of public health, and so on. I shall draw heavily from my own research into environmental regulation and the regulation of occupational health and safety.[2] These biases should not limit the relevance of the paper for those interested in other forms of regulatory control or law enforcement because research suggests that in other areas of life addressed by the criminal law – public policing, financial regulation, taxation, and the like – law enforcement behaviour is, at a fundamental level, strikingly similar.[3]

Second, note that I am speaking from a common-law perspective, namely English law, which has its own distinctive kinds of legal structure and procedures, and its own regulatory arrangements and institutions. The apparatus of the criminal law in the UK, the primary tool of regulatory control, coexists with the possibility of private actions in many areas of life also addressed by criminal law, though these are less used and I will not touch on them. My focus is on the use of the criminal law to pursue regulatory objectives. Here the law attempts to achieve broad societal aims by employing a criminal law originally intended to guide or control the behaviour of individuals, but which since the early 19th century has been increasingly deployed to regulate business or other organisational forms of behaviour. This involves a move from repression to regulation: a shift from using criminal law conceived of as a series of commands to citizens intended ostensibly to stamp

[1] An earlier version of this paper was presented at a conference on the enforcement of regulation in Lima, Peru, organised by The National Institute for the Defense of Free Competition and the Protection of Intellectual Property (Indecopi in its Spanish acronym) in March 2016. I am extremely grateful to Karina Montes and Tessy Torres of Indecopi for making my participation in the event possible.

[2] Thus much of what I discuss in this paper is dealt with at far greater length in my books *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Hawkins 1984b) and *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Hawkins 2002). It is the latter from which I draw most heavily.

[3] A large number of enforcement studies were conducted in the 1980s and 1990s by researchers based mainly in British, Australian, and American universities. See, for example, Braithwaite 1985; Cranston 1979; Grabosky and Braithwaite 1986; Hawkins and Thomas 1984; Hutter 1988, 1997; Richardson et al. 1982; Shover et al. 1986.

out undesired behaviour to one in which the law gives instructions to administrators to pursue a broad, legally defined mandate to regulate (that is, not to repress but to tolerate up to a point) certain forms of behaviour capable in excess of producing harmful consequences. The fundamental task of the regulator is to induce a potentially unwilling business or individual to bear costs in complying with legal requirements which for commercial reasons they would not wish to assume.

Third, one consequence of moving from repression to regulation is that regulatory control is characterised by an ambivalence about law enforcement which has both political and moral dimensions (Hawkins 1984b). This ambivalence is to be seen at all levels, from the formal approach and design of legislation, to policy-making in regulatory bodies, as well as to the everyday working practices of those field inspectors whose task is the actual enforcement of the law. Legislatures and regulatory bodies operate in a political environment which demands that they balance the interests of economic activity on the one hand and the public interest on the other. This is doubtless, for example, the explanation for the particular form of s. 2 of the Health and Safety at Work Act, 1974, which is the central piece of occupational health and safety legislation in the UK. The act imposes a duty on an employer 'to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees…'. The idea of reasonable practicability gives extensive room for manoeuvre to those who must implement the legislation, while allowing the legislature to avoid having to take a specific position on how much health, safety, and welfare is actually desirable.

At the same time, enforcers find it difficult to regard many beaches of regulation as morally reprehensible, in contrast with many of those behaviours which are the stuff of traditional criminal law. Most breaches of regulation are probably regarded by the public as well as those who enforce the law as *mala prohibita* rather than *mala in se* (technical violations, rather than real wrongs). This may be partly the result of the recency with which the criminal law has been imposed upon business behaviour, the widespread use of strict liability in regulatory legislation (making ideas of intent, deliberation, or negligence irrelevant in proving a violation of the law), or the fact that it is sometimes difficult to point directly to personal victims of rule breaking suffering loss, damage, or harm. These matters contrast with attitudes to self-evidently unacceptable behaviours embodied in traditional criminal law, such as murder, rape, robbery, arson, theft, and so on. One important consequence of this ambivalence about law enforcement is that, in the view of many critics, the formal sanctions provided in English law, as well as the penalties imposed by courts, are too lenient. This has also led to criticism that, just as penalties are said to be too lenient, the day-to-day enforcement of regulation is insufficiently aggressive. The key point here, however, is that ambivalence poses the crucial problem of enforcement for regulatory agencies and their inspectors because their authority is not secured on a perceived moral and political consensus about the undesirable things they seek to control (Hawkins 1984b: 12–13).

Fourth, the usual legislative approach to regulation in the UK is to create an inspectorate whose task is to advance the public interest in controlling the particular matter which is the cause for concern. Regulatory enforcement is conducted by a variety of inspectorates whose structure is extremely important in determining whether and how law is enforced. There are two important aspects to structure. First is a matter observable in various forms in other parts of the legal system, namely the serial character of legal processes. This has significant implications for the use of both informal and formal mechanisms of enforcement. A serial decision-making system involves a sequence of decisions which work toward the disposal of an event or problem at some point in the regulatory process. Sometimes this decision sequence culminates in formal legal action by way of prosecution and trial in a criminal court. In England, however, this is quite rare, and formal legal

proceedings really are a matter of last resort (Hawkins 2002)[4]. In a serial decision-making system, senior officials are very much at the mercy of the initial decisions made by their most junior staff (I shall term them 'field inspectors' – people such as police officers, regulatory inspectors, or immigration officials) who act as gatekeepers to the legal system. They may close off discretion afforded to subsequent decision-makers entirely (by failing to act on a matter, that is, failing to create a case, or later discarding it) or partially (by narrowing the range of choice available to a subsequent decision-maker). Serial decision-making therefore grants enormous power to those making decisions early in the process to define a problem as a matter worth pursuing (or not), power which in certain settings rests with members of the public who act as front line enforcers of the criminal law as victims or onlookers. Otherwise, field inspectors proactively, but very selectively, enforce the law and bring in to the organisation acts or events capable of being transformed into legally relevant matters in the process of creating a case (Hawkins 1984a; 1984b ch. 5).[5] The real power of inspectors rests in deciding which matters, events or incidents can be ignored and which can be created as organisational cases, and from there as potential legal cases. It is quite possible also that a matter deemed appropriate for enforcement by a field inspector will be defined as such for internal organisational reasons, rather than for appropriate legal reasons (Hawkins 1984b: ch. 5).[6] The key point about formal enforcement – prosecution – in this connection is that it is a decision reached only after a sometimes complicated set of decisions have already been made about an event or problem (Hawkins 2002: chs. 3 & 12).

The second structural feature is that considerable discretionary authority is allocated to regulatory organisations to make and to implement policy. Discretionary power of different sorts resides at all levels in regulatory bodies, from the most senior officials at the centre who frame broad policy within the contours of the legislation, to the most junior recruit at 'field' or 'street-level' whose work as a 'screening' or 'gatekeeping' official means direct contact with the problems of the real world (Lipsky 1980). Regulatory agencies are presided over by relatively few senior officials whose task is to administer the organisation and to formulate general policy, in that way translating the mandate granted by the legislature into practical approaches to enforcement. Junior officials – the field inspectors – carry out enforcement on the ground. They are far more numerous individuals whose task is to scan the regulatory agencies' field of interest for problems which might require enforcement attention, or to respond to complaints or reports of problems. The field inspectors are the members of the regulatory agency who are in direct and immediate contact with everyday events and incidents – the point at which, so to say, the law touches people and problems. They are the ones who must make decisions about whether to define matters as relevant for law enforcement, as well as make decisions about whether, and how, to act. This is where the tensions, dilemmas, and sometimes contradictions embodied in the law are worked out in practice. The nature of the structure of any inspectorate in effect allows low-level officials to command access to the law enforcement system in generally less visible, thus less controllable, settings. Having discovered instances of actual or potential rule breaking, field inspectors must then detect rule breakers, and decide on appropriate enforcement action, if any. Field inspectors enjoy great power whether or not they are awarded discretion by law or by organisational policy, because the nature of their job is such as to allow them to operate largely invisibly, since the decisions about the way in which they

[4] Formal enforcement action in the form of prosecution in an English criminal court for a breach of law or regulation is statistically unusual and almost always brought in the magistrates' courts, that is, at the most junior level. Prosecution is almost always brought against businesses as defendants rather than individuals, and almost always punished with a fine. In a very small number of cases an individual, rather than a business, may be charged with one or more regulatory offences and, if convicted, fined. It is possible under certain conditions for a convicted person to be sent to prison, but this is extremely rare.

[5] Note that in the UK Health and Safety Executive (HSE), field inspectors actually prosecute most cases in court in person.

[6] From the point of view of public policy, it may be that control over the decision-making of junior officials is best exerted through recruitment or training programmes partly designed with this problem in mind.

deal with difficult problems or events, or the ways in which they negotiate with business representatives are seldom open to scrutiny by their organisational superiors, or, often, anyone else. This invisibility leads to one of the great ironies of law enforcement, that, as with any enforcement body (the uniformed public police being the most notable example), real power to choose whether and how to act, real power to decide whether the law is to come into play, resides with the most junior officials in the organisation. It is here that discretionary power not only permits the realization of the law's broad purposes, but also permits their frustration by allowing or even encouraging officials sometimes to distort the word of the law, sometimes to ignore it. And sometimes, of course, officials may assume a legal authority they do not in fact possess, or deny an authority or a discretion which they do.[7]

THINKING ABOUT ENFORCEMENT STRATEGIES

In the last fifty years the work of scholars using socio-legal research perspectives has improved our understanding of the ways in which law operates in the real world. In particular, we now have a much better appreciation of how rules are interpreted and decisions made by legal officials as to whether and how to act on their interpretation of those rules. While in criminology the focus of research used to be on why people broke rules, many scholars now focus on exploring the conditions under which people comply with rules, partly in recognition of the fact that the predominant style of regulatory enforcement is aimed at securing compliance rather than administering punishment. In public areas of legal life especially, law is now regarded as merely one force in a field of forces shaping the decisions actually made in its name. Among these forces are moral, political, economic, organisational, and interpersonal features. Socio-legal research now needs to consider the conditions under which legal rules determine outcome, and the nature and extent of the ways in which law is shaped, distorted, subverted, or ignored by these competing forces.

The idea of law enforcement means different things in formal and informal settings. Prosecution is a method of formal legal enforcement whose processes are played out in the setting of the courtroom, and sometimes involve trial. This form of law enforcement contrasts with informal approaches like persuasion, education, advice, and so on which take place in factories, farms, restaurants, the street, and so on. In such places breaches of the law, if they come to light at all, may not be acted on by a law enforcer, but overlooked. If a breach is discovered and attended to, the usual response is to use some informal means of enforcement (this is often the response of the police as well: Black 1980). Informal measures depend for their impact and effectiveness upon the negotiating skills of individual inspectors as well as their experience.

Law may be enforced by compulsion and coercion, or by conciliation and compromise (Hawkins 1984b: 3). Research on regulatory enforcement in the UK, USA, Australia and other common law countries has shown a heavy reliance on what I have called compliance strategy (Hawkins 1984b), a collection of informal ways of enforcing the law. Enforcers' usual starting position when confronted with a problem is to use conciliatory measures such as persuasion, advice giving, and education. In some circumstances they may adopt a less conciliatory approach, perhaps issuing threats of formal action. Occasionally, however, they may adopt a strategy of sanctioning in which they respond with more formal and punitive approaches. These may

[7] On this latter point, I recall a case involving a senior HSE official who always prosecuted cases where a person had been struck by an overhead travelling crane, even though he had discretion to do otherwise (Hawkins 2002: 325-6).

culminate in the issuing of improvement or prohibition notices (where relevant), or even, in some highly selected cases, prosecution.

It is helpful to think of sanctioning and compliance strategies as two ends on a continuum. At the sanctioning end there is the formality and punitive power of prosecution, trial, conviction, and punishment; at the other, in contrast, there is help, benign advice, and education to secure compliance. Between these two extremes will be found an assortment of persuasion, advice, education, instructions, demands, and threats. If a conciliatory approach fails, a more threatening posture is usually taken in which a variety of moves, including bluffs about legal proceedings or legal sanctions, may be employed (Hawkins 1983). Law enforcers in reality use approaches at various points on this continuum depending on circumstances. And they move to different points in the continuum depending on the responses they receive to their enforcement efforts or on the severity of the problem encountered. Thus in some rare cases a very 'big' or very 'bad' problem may be deemed worthy of an immediate prosecution. The particular enforcement method adopted depends on a variety of considerations, prominent among which are the seriousness of the problem, violation or hazard, the damage done, or an evaluation of the response of a regulated business to earlier enforcement efforts. Unsatisfactory responses or failures to comply with enforcement demands usually prompt more punitive reactions (Hawkins 2002: ch. 2; 1984b; Rock 1973).

Sanctioning strategy is bound up with the formal approach to enforcement and the idea that a violation of the law is followed by punishment. In sanctioning strategy the law is employed explicitly to serve retributive or deterrent purposes ultimately through the medium of legal trial and punishment. Those who adopt compliance strategy, in contrast, argue that negotiating to secure the compliance of those regulated is generally more desirable than punishing the breach of a rule. Their claim is that compliance strategy is more effective and more likely to lead to greater impact in the form of a reduction in undesired behaviour or events. Enforcers, however, frequently feel that adopting compliance strategy is morally compelled, because the acts or events to be responded to simply do not deserve a punitive reaction.

Though compliance strategy is the predominant style of regulatory enforcement, the performance of law enforcement bodies is, ironically, often judged in relation to indices of formal enforcement activity, such as the numbers of breaches of the law discovered, the numbers of lawbreakers detected, and the numbers prosecuted, convicted, and penalised. Various assumptions operate here. One is that the formal apparatus of law enforcement works to attain legal objectives, and another is that in adopting a strategy of compliance regulatory officials are somehow failing to enforce the law, overlooking the fact that they generally work with a different conception of law enforcement. For them, law enforcement is a matter of seeking to attain the objectives of their broad legal mandate (clean water, safe workplaces, etc.), and not a matter of punishing a violation of the law. Because regulation is articulated by means of legal rules, there is a tendency for enforcement agents to maintain a primary focus on compliance with rules rather than on the impact of regulation on the prevalence of undesired events or problems.

An important aspect of compliance strategy is justified in terms of its effectiveness in recognition of the need to maintain a continuing relationship with regulated businesses. The ease and appropriateness with which compliance strategy can be employed depends on the nature and degree of contact with regulated business, which in turn depends on the type of enforcement work (in health and safety regulation, for example, the work of those who regulate factories or construction sites is very different from the work of those who regulate nuclear installations). The creation and maintenance of relationships is dependent on the distribution of inspectors and their capacity to establish personal relationships with those against whom they are ostensibly enforcing the law. When inspectors are fairly numerous or the problems to be regulated

demand that they spend a lot of time in contact with particular regulated businesses, they have space and time to allow amicable personal relationships to develop and negotiations to take place. Such relationships can develop when inspectors have worked for long periods in a particular area, allowing them personal knowledge of those with whom they deal, or where there is a favourable ratio of inspectors to regulated sites (as in the regulation of nuclear power plants in the UK). Where enforcement relationships are unstable or non-existent because relatively few enforcers have a very large number of sites to monitor, there may be more encouragement for the use of sanctioning strategy if rule breaking is discovered. Policing a population of strangers fosters punitive responses.

The significance of personal relationships in enforcement work emphasises the state of mutual dependence that exists between regulatory official and regulated business or individual. Field inspectors depend upon businesses for information about the practices subject to regulation. Furthermore, inspectors need to have some confidence in the willingness of the regulated business to comply with regulatory demands now or in the future. For their part, regulated businesses depend upon inspectors for information about legal rules and enforcement practices, but perhaps more importantly information about what action they need to take for their business to be deemed compliant with the law. Regulatory inspectors often act therefore as the dispensers of free information and expert advice. Most importantly, inspectors can suspend their actual formal enforcement of the law in return for assurances from the regulated that efforts will be made to comply. In some areas of regulatory control, such as environmental pollution, immediate compliance is not always possible, and enforcers are prepared to accept promises of future compliance. These mutual dependencies create the conditions for bargaining to achieve an outcome acceptable to both sides. Law enforcement here is a symbiotic relationship in which bargaining between two sides with competing interests becomes crucial to the attainment of compliance with regulation (see generally Hawkins 1984b: ch. 6).

Bargaining, explicit or implicit, is central to compliance strategy. Though prosecution is not actually used much in the UK, it makes systems of negotiated compliance possible. The formal law is a constant, but usually unintrusive, presence in negotiations, one which sits in the background, as a veiled threat to concentrate the rule breaker's mind on the legal context and the necessity of compliance (Hawkins 1983; 1984b). The formal legal position and the possibility of prosecution serve as a bargaining chip in enforcement negotiations, something to be given up by an inspector in return for some concession to the necessity of compliance by the regulated. Business wants to minimise the degree of regulatory intrusion and incur the minimum of costs, yet it has an interest in benefiting from the expert knowledge and advice of the regulatory official. The inspector wants to secure the compliance of a generally reluctant business, yet is conscious, in order to do the job, of having often to depend upon the cooperation of that business for information or warnings of difficulties. The metaphor of the game is helpful here in understanding the character of this enforcement relationship. New moves in the game may be made by either side as time passes, as one tries to achieve some tolerable notion of compliance while the other seeks to keep costs down, delays, tries to get away with doing as little as possible, or in some cases continues to avoid complying.

It is here that the two contrasting conceptions of law enforcement are exposed. Critics frequently complain that in engaging in bargaining inspectors are failing in their duty to enforce the law by surrendering the opportunity to prosecute. Field inspectors (and their seniors) prefer the idea that they are pursuing their broad legal and organisational mandate rather than punishing a particular violation of the law. They will justify their position by arguing that in suspending the actual enforcement of the law as a bargaining chip in negotiation, field inspectors are thereby more likely to attain the broad aims of the regulatory agency. It has been said of environmental inspectors, for example, that their interest is in clean water, not convictions. The abiding concern among enforcers is the risk of damage to relationships and thereby damage to the prospect

of achieving compliance now and in the future. A corresponding belief is that resort to prosecution is capable of damaging relationships since the alienated or hostile business is thought to be less likely to be cooperative, less likely to alert the regulatory agency when problems occur, less likely to share important information, and so on. This reinforces the familiar view of formal legal processes as a declaration of hostilities between the parties, which may well frustrate attainment of the broad purpose of the law.

The law, then, is not ignored when negotiations about compliance take place. Legal rules are valuable when enforcers use their discretion to suspend enforcement for they are an important resource to be surrendered in pursuit of some broader goal of social order or the public interest. The exchange relationship between enforcer and the regulated creates a paradox of legal control, since attainment of the broad mandate is sought by suspending actual enforcement of the law as part of a bargain to achieve compliance. This use of discretion by inspectors not only permits the realization of the law's broad purposes, but allows or even encourages them sometimes to distort or ignore the word of the law in pursuit of its spirit, or broader purpose. The irony of this is that broad legal objectives are often attained more efficiently, it is believed, by forbearing from enforcing precise legal rules. This paradox is possible because business is ultimately subject to the criminal sanction for non-compliance, yet regulatory agencies depend upon business for its cooperation in the enforcement of regulation.

THINKING ABOUT ENFORCEMENT DECISION-MAKING

The unit of analysis and evaluation in socio-legal studies of discretion is often the individual case. To take this as a focus is, however, inadequate as a means of understanding law enforcement decisions or other forms of legal decision-making. In *Law as Last Resort* (where these ideas are discussed in much greater detail, in ch. 2) I presented an argument that legal decisions can only be understood by reference to the environment in which they are made, together with the more particular context in which individual problems or cases are located, using the concepts of surround, field, and frame.[8] Properly to understand the nature of decision-making requires an understanding of how these features in the decision-making environment connect with the processes employed by regulatory agencies in making policy decisions and by individuals when deciding about particular matters and problems. The three concepts of surround, field, and frame, are intended to enable this connection to be made.

The argument is that decisions about whether and how to enforce the law are made in a complex environment – the surround – which is the setting in which unpredictable events occur. In addition to emergencies, the enforcement of regulation also occurs in a play of shifting currents of broad political, economic, moral, and other values, and it is this which helps to shape the particular fields in which laws and policies about enforcement are formulated and decisions taken in particular cases. For example, there is a political climate, one that in the UK can be at present characterised as generally pro-business, supporting less regulation, greater use of self-regulation, and less stringent enforcement. Thus decisions about legal standards and their enforcement – the making of regulatory policy, in other words – are made within the surround as part of a field, defined by the legal and organisational mandate of the regulatory body. Within this

[8] These ideas have been developed over the years in collaboration with Peter K Manning. See Hawkins 1986; Manning 1986; Manning and Hawkins 1989; 1990.

field are decision frames, which are interpretive and classificatory devices employed by individual decision-makers in particular instances and shaped partly by both surround and by field.

Surround

The surround is the setting in which policy and individual decisions are made. Regulatory bodies are vulnerable to unpredictable events that occur in the surround, and are also actors within a climate of politics and economics that constitute part of the surround. The surround is not immutable, as unexpected events occur or political and economic forces shift, altering the character of the surround for the organisation and its members. Changes in the surround can then prompt changes in the field within which decisions are made. The surround changes and with it the way in which organisational actors define, interpret and classify – that is, frame – the problems which they have to define and then decide about.

Conceptions of compliance shift as the character of the surround alters. This means that compliance should not be regarded as an unvarying condition or simple response by a business, but as something that can be shaped and reshaped in light of features in the surround such as the general economic context in which judgments about compliance have to be made. Compliance is better seen as a process, as a set of shifting ideas, rather than as a state. It exists in the working practices, evaluations, and decisions of enforcement agents. It varies in its definition over time. In health and safety regulation, for example, greater tolerance of rule breaking appears to be shown during times of economic recession, where a further burden in the form of prosecution and penalisation of an already hard pressed firm may have adverse consequences for employment levels.

Regulatory bodies are subject to sudden and dramatic events which occur in the surround. In the UK, for example, there have been in recent decades a number of instances of fires and deaths at football grounds, deaths on the railways, and boats sinking with loss of life. But there have also been disasters abroad, such as those at Seveso, Chernobyl, and Bhopal (Hawkins 2002: 49). These events enter the public and political consciousness easily, even though some may occur abroad, raising anxieties, creating expectations, and imposing demands on public bodies. Such events cause problems for regulatory bureaucracies because the surround is not open to control. Only the regulatory response is open to control as the organisation can nearly react to events as they occur.

The enforcement of the law may adapt in two ways. There may be changes in enforcement policy intended to be conveyed from the centre of the regulatory bureaucracy to its inspectors, or there may be direct and immediate changes in the behaviour of individual law enforcers as inspectors alter their decision-making in response to what they regard as changed public and business expectations. This operates independently of any change in formal policy.

Field

The law enforcement field is shaped by legal and organisational mandates. It contains sets of ideas about the law and how its aims are to be pursued. These may exist at a formal level, as laws, policies, and formal expectations about the organisational mandate, but equally they exist in an informal way in the routine practices and operating assumptions of the occupational culture. Policy is an important constituent of the field.

The nature and contents of the field are therefore open to change, though the decision field remains relatively stable in organisations, anchored by the fixed occupational roles and tasks of the legal bureaucracy and the routine ways in which people make sense of what they encounter (Manning 1992). Salient features shape the content of the decision field and with it framing behaviour. The nature of the field varies according to the location of actors within the organisation. The extent to which law is enforced, furthermore, is a function of the resources available to inspectors' organisations as well as the personal resources that an individual has available in dealing with any particular problem. Similarly, the perceived character and responsiveness of business to regulation is another element in an enforcer's field, as is the frequency with which enforcers encounter difficult problems, and the nature of the risks they must deal with. In occupational health and safety regulation, for instance, inspectors have different levels of expectation depending on the number and type of hazards they face. The more frequently an inspector encounters serious hazards, the more frequently prosecution is regarded as a normal enforcement response. This is one reason why construction inspectors in the UK Health and Safety Executive (HSE) prosecute more frequently than their colleagues who inspect less hazardous workplace sites.

Frame

A decision frame exists within its surround and fields and is shaped by them. The frame speaks to the interpretive and classificatory behaviour involved in decision-making about a particular problem or event and describes how features are defined as relevant and understood (see further Manning 1992; Manning and Hawkins 1990). The frame is a structure of knowledge, experience, values, expectations, and meanings that decision-makers employ in producing a decision outcome. People need to impose meaning and order upon events and problems they experience and the frame provides the rules and principles that guide an understanding of what such events or problems mean.

> 'A frame can be seen as a set of rules for guiding the performance of a task, or a set of ways of organising the ascription of meaning to events, and the other raw material in the field deemed relevant. There can be framing by means of interpretation (making sense of what is presented), classification (what kind of case is this?), or task, which is organisationally determined in settings of greater decision-making heterogeneity' (Hawkins 2002: 52).

Frames are reflexive in the sense that they constitute what is real and selectively identify and interpret the facts that sustain a social reality. Facts as interpreted narrow the potential frame and at the same time the frame provisionally applied may cause some facts to be discarded or disabled, others to be introduced, and yet others to be reinterpreted. Frames instruct a decision-maker how to understand a matter: a problem, an event, a person, a case, and so on. Frames may be influenced by occupational or professional ideology (in criminal justice, for example, probation officers, psychiatrists, and judges tend not to view an offender in the same way). It should be no surprise, then, that frames vary according to organisational location: the field inspector, as a frontline enforcer of the law, tends not to see and understand problems in quite the same way as a more senior official in the organisation. For the health and safety field inspector, events and problems are in the here-and-now and may need to be reacted to immediately. Damage, hurt, pain, blood, tears (or whatever the nature of the immediate problem is) are much more vivid and real for the field inspector. The world is very different for detached senior officials who work in what some field inspectors call 'fitted carpet land'.

This sort of conflict in framing became apparent in work I carried out on the enforcement of environmental law (Hawkins 1984b) where it was clear that field-level inspectors tended to respond in moral terms to breaches of the law they regarded as serious. They would think of the possibility of formal legal action in cases where it seemed to be deserved (not needed), either because it was a deliberate breaking of the rules, an event with bad consequences, or an incident where someone had negligently or persistently broken rules. For them that moral guilt was usually regarded as an essential condition to create a case in the first place, by defining an event or problem as something about which the inspector ought to take action. This initial decision to act transforms the matter into an organisational case. Once a matter becomes a case for the organisation to work on, serial decision-making comes into play, creating the possibilities of conflicting frames arising. For example, a matter created as an organisational case on moral grounds would not be viewed at senior levels in the same organisation to the same extent through the same moral frame, but in utilitarian, more specifically deterrent, terms. This draws attention to the fact that a matter brought into a legal bureaucracy for possible legal action for one set of reasons may be sustained and eventually disposed of for quite other reasons. The dominant initial decision-making frame may be overtaken or overlaid by another. A serial decision-making system, then, allows the possibility of reframing as information and evaluation moves through an organisation or between organisations. As a matter which has crossed the organisational threshold and become a case for the organisation to deal with moves towards more senior levels in a legal bureaucracy, the more conscious decision-makers will be of issues beyond the immediate environment of the legal bureaucracy. Sometimes this may give rise to a tension because senior officials are receivers of already well formed views on a particular matter and may become not decision-makers so much as ratifiers of decisions made at lower levels by those less sensitive to the organisation's environment. This is particularly noticeable in legal bureaucracies as cases move towards the possibility of formal legal action because the legal frame generally overpowers other forms of frame since legal reality trumps other forms of social reality in the courtroom (Hawkins 2002: ch. 12). Conceptions of purpose also frame matters: the gathering, reporting, and assessing of 'facts' is itself an expression of framing, since frame determines what information is sought, what is seen as relevant and significant, and what it means. Personal proclivities may also lead to the adoption of distinctive frames: some occupational health and safety inspectors use the term 'prosecution-mindedness' to describe a disposition to prosecute among colleagues, as the words of an experienced HSE inspector suggest: 'Prosecution comes naturally to some people. Some people find it very difficult. Some people enjoy taking cases. Some don't' (Hawkins 2002: 54).

Frames vary in their importance and power. In health and safety regulation, blameworthy behaviour, the seriousness of an event, and the seriousness of the risk of harm are consistent features in the first stage of framing decisions about law enforcement. Such frames can lose their importance, however, if a legal frame is applied and legally determined tests incorporated in that frame are imposed on earlier conceptions of seriousness. Such tests are drawn from the law of evidence about the nature and adequacy of relevant information. Transforming an organisational case into a prosecution case is not straightforward, for if it does not satisfy the demands of the legal frame about the adequacy of evidence, the reasonable prospect of conviction, or the public interest in pursuing a prosecution, the matter will almost certainly be dealt with in a different – non-legal – way or even discarded. Owing to the complexity of organisations, different framing behaviour exists at different organisational levels, but the nature of legal framing is to insist on consequential outcomes – the exercise of legal authority. The judgment of a court is the ultimate authoritative imposition of the legal frame.

Frames vary also according to their salience. Theories of corporate compliance and non-compliance form two important and salient frames operating within regulatory bureaucracies and field inspectors may use salient interpretive frames in reaching conclusions about the moral character of an organisation (Hawkins

2002: ch. 11). A workplace held to have broken the safety rules, for example, will be considered in light of the severity of the rule breaking – the damage, actual or potential, the site's known past record of responsiveness or unresponsiveness to advice, and its compliance or otherwise with enforcement efforts. This results in the use of a frame of a 'compliant' or 'non-compliant' employer which is then used in deciding about enforcement moves including prosecution.

Frames are keyed, that is, indicated by cues or signs such as a word, act, or incident, and how such cues or signs are recognised, and what they mean depends on the frame employed. What the particular decision-making frame to be employed is to be is negotiable. When keyed, however, the frame is provisional, and what is keyed may be transformed so that a new frame is brought into play. There is always room for reflection, negotiation, and redefinition. Once something is keyed, it can be transformed or re-keyed and new meaning will appear. This occurs when a field is penetrated by events occurring in the surround, leading to a questioning of the established relationship between the key and frame. To give a couple of occupational health and safety examples, if an employer appears to have failed to maintain the safety of equipment despite an inspector's warnings, a 'negligent employer' frame may be adopted by that inspector when an accident occurs. The adoption of this frame now keyed in this moral way may culminate in a decision to prosecute. Similarly, a matter framed as 'non-serious', and therefore on course for informal enforcement, may be rekeyed as 'serious' by a subsequent event, such as a second accident on the premises.

Reframing – a change in frame – may lead to the reinterpretation of existing facts or the selection of different facts as relevant evidence and the discarding of others. This process may or may not prompt a different outcome because when frames change, outcomes do not necessarily change. Some frames, however, are more resilient than others and resist change. In health and safety regulation, a matter framed by an inspector as 'a bad case' is much less likely to be reframed by the principal inspector whose job is to approve a field inspector's recommendation for prosecution. Yet frames may also be contested. For example, a field inspector may well frame an event as the result of malicious or negligent rule breaking, while the person representing the regulated business will probably frame things differently, as an accident or an innocent mistake. The negotiations which usually accompany the use of compliance strategy often involve debate between inspector and firm about the choice of the dominant frame by which to interpret the meaning of a problematic event.

Framing is also a classificatory act, prompting particular forms of action. This is where the role of those supplying information, evaluation, or assessment becomes important. Information suppliers themselves frame problems in particular ways which in turn determine how they choose to present the matter – what they focus on, emphasise, or omit – and this frames reality for the ultimate decision-makers. 'Frames penetrate records, and given their durability, spread their effects across time, different hands, and even jurisdiction. This attribute of framing is especially important in organisations, where there is extensive reliance on the [written] record, with its accounts, evaluations, and proposals' (Hawkins 2002: 56). This is another reason why field inspectors and other frontline law enforcers working in serial decision-making systems hold such power: those making initial interpretations of problems frame in certain features they define as relevant, while excluding others deemed unnecessary or irrelevant. Such processual framing is both a powerful screening as well as a persuasive device.

The law acts as a master frame. When the formal law comes into play, legal reframing means aligning the facts of the case with existing legally meaningful principles or rules. In an adversarial legal system many facts, and the way in which facts are to be understood, are normally contested. A contested criminal trial in an adversarial system can be seen as a competition between frames played out according to the rules

of the legal frame. The inspector's legal frame – the prosecution frame – will be tested against a competing frame formally presented to the court by the defendant. This seeks to offer an alternative, more benign, way of understanding (or denying) the alleged breach of the law and is intended to exculpate the defendant. It is the role of those judging the case to determine which competing frame is more persuasive.

The frame, then, prompts decision and action rendered appropriate by it. It provides an explanation of the causes of things and the motivation of human behaviour. This in turn shapes the approach to enforcement adopted by regulatory officials, determining in particular the degree to which they regard their job as negotiating for compliance rather than sanctioning to punish wrongdoing.

ENFORCERS' WORKING THEORIES OF COMPLIANCE

Framing is a prerequisite to decision and to action. One significant frame comes into play when field inspectors encounter a violation which they can link with a particular offender. In settling upon what they intend to be an appropriate response field inspectors shape their enforcement tactics by reference to their theories or assumptions about why rule breakers comply with, or fail to comply with, the law. Working theories of compliance and punishment dictate what forms of enforcement or sanction, if any, are appropriate. The theories of deviance held by enforcers 'explain' non-compliance to them and suggest appropriate enforcement moves.

Individual field inspectors have their own theories of compliance and punishment, as do their senior colleagues, and there may well be a poor fit between them. These ideas and beliefs are relevant not only in understanding the behaviour of enforcers but also policies made by agencies about whether and how law is to be enforced, what sorts of behaviour or individuals are to be targeted, and so on. In this more general sense, these theories are significant in determining the costs imposed on and the benefits gained by business, as well as the corresponding levels of protection offered to those at risk.

Institutionalised belief systems operate in organisations. Various beliefs and assumptions held by enforcers exercise an important influence over their working theories of compliance and non-compliance, and in turn over their monitoring and enforcement behaviour. To categorise an individual or business as, for example, 'remorseful', 'cooperative', or having a 'bad attitude' reflects a series of recognised organisational views and practices, whose meaning can be transmitted either informally (as in 'canteen culture' in the British police: Fielding 1994; Waddington 1999), or, once they are items recorded in the files, across decision-makers and over time. Such beliefs then prescribe appropriate control measures. The 'compliant' and the 'cooperative' are likely to have their rule breaking framed more benignly than those who are not viewed so favourably. Incidents are more likely to be defined as excusable or understandable, and therefore as 'accidents', when they take place on the premises of 'compliant' or 'cooperative' companies.

In a water pollution case I observed, a field inspector took a sample of effluent being discharged into a river from the premises of a major manufacturing company in the UK. He held the sample jar up to the light and observed that the water was very dirty indeed. The inspector said that he would have to go and speak to someone within the firm. He commented that the business was a good one; it was responsible and cooperative because it did everything requested by the regulatory agency, and it would contact the agency whenever it had had a spillage or other problem, so that remedial measures could be put in place

immediately. According to the inspector, the firm in this instance had 'obviously had an accident'. It was clear that the inspector planned to do nothing more than bring the sample of polluted water to the attention of the firm's works chemist and to warn him that it was sub-standard.

In this case the firm was framed as 'good' and 'cooperative', and in this frame such firms do not 'deliberately' or 'negligently' cause water pollution – they have 'accidents'. This favourable explanation of the cause of the pollution is shaped by the framing of the company as 'responsible' and 'cooperative'. Had the firm been framed in a less favourable way, the inspector's response is likely to have been less tolerant and more punitive. By allowing the intrusion of moral framing and using the word 'accident', the law is rendered inappropriate as there are connotations of blameless behaviour. If blameworthy behaviour were thought to be the cause of the problem the dirty water would have been defined as a 'pollution' and a legal response may well have been regarded as appropriate.

How compliance is to be defined and what compliance amounts to is a matter for the judgment of individual enforcement agents using an enforcement frame. One of the consequences of the structure of inspectorates and of the low visibility settings in which law enforcers operate is that field inspectors are effectively free to employ their personal working theories of rule breaking. In *Environment and Enforcement*, I argued that these theories are expressed in the form of working categories and typifications embodying impressions of 'typical' rule breakers and 'typical' kinds of problem which inspectors encounter in dealing with the regulation of environmental pollution. For example, it was clear that polluters '… are identified by characteristics such as occupation, size, demeanour, and responsiveness. In contributing to a judgment whether a discharger can be held 'responsible' for causing pollution . . .' the characterisation settled upon is important (Hawkins 1984b: 110). Indeed, the enforcement frame is an amalgam of structural characteristics connected with attributes such as the size or wealth of business (taken as indicators of the capacity of business to comply), and characterisations of the nature of the business, the particular company, or the precise individuals routinely encountered within a company. Then there are inspectors' experiences of responses by firms to regulatory efforts. The low visibility settings in which field inspectors operate mean that negotiations are private matters to be settled between them and representatives of regulated firms. This gives scope for a wide variety of enforcement responses, and could in some cases provide opportunities for corrupt behaviour (although over a long period of fieldwork I never observed any).

I spoke to a large sample of factory inspectors about why they thought companies complied or failed to comply with health and safety regulation. Their working theories fell into four broad categories centred upon the ideas of principled compliance, the legal threat, self-interest, and custom. The theories are not excessively law-centred, and instead draw attention to sources of compliance that exist partly or wholly independently of the formal mechanisms of law and regulation. These forms of framing behaviour are extremely important in shaping the enforcement tactics adopted by field inspectors in any case. They are not immutable, but can shift in the course of negotiation between enforcer and business as well as in the passage of the matter through a serial decision-making system of organisational handling if the inspector makes a case of it. A change in the framing of a business which occurs in the course of negotiation may change the theory of rule breaking adopted by the enforcer which 'explains' the behaviour of the business. Sometimes the behaviour of a business may lead to a reframing of apparent rule breaking behaviour as 'accidental' or 'understandable'. Employing these particular categories makes formal law enforcement more difficult to contemplate. Of course, reframing in an opposite direction, towards formal enforcement, is equally possible if less benign features are present.

Though regulators typically categorise regulated businesses as compliant or non-compliant, this binary classification does not reflect the complexity of actual experience. Regulated firms do not always respond to the requirements of regulation in similar ways. A 'good' or 'bad' company is not necessarily good or bad for all purposes. Some firms may have a powerful material reason to comply and even to comply to stricter standards than are actually demanded by the law or the inspector. In occupational health and safety regulation, for example, employers wish to avoid adverse publicity, to keep insurance costs down, or to avoid loss of output arising from accidents, and to avoid trouble with trade unions (Genn 1993). These incentives all operate largely independently of the law and while firms, like regulatory agencies, have policies about compliance, whether it is deemed to exist will depend heavily on the effectiveness of their internal communication and sanctioning systems. Regulated business may adopt policies of compliance in principle but the practice of compliance or non-compliance in the actual workplace is what counts. As a pollution inspector once told me, a firm may have a policy of 'We comply with the law, come what may', but it is the person driving the forklift truck on the factory floor whose behaviour is crucial. Thus in a business which is regarded as compliant, there may be pockets of non-compliance. Levels of compliance may also vary over time: inspectors often find that firms comply initially, but it is much more difficult to maintain such compliance on a continuing basis. For some HSE inspectors non-compliance was almost a natural state of affairs, especially in certain industries, leading them to expect to encounter regulatory violations during site visits.

Principled compliance

The most pervasive belief held by inspectors as to why businesses comply was a moral one. Some are believed to comply on principle, either because it is right to comply, or out of concern for their employees. These are expressive ideas. Perhaps this is not surprising because people often act in response to normative constraints, on the basis of moral dictates, on some conception of what they think is right. There are two aspects to this. Some people think they should comply as a matter of principle because it is the right thing to do. Others believe it is right to comply because a law requires compliance and it is right to observe the law, an idea recognising the legitimacy of the law. Compliance is demanded whether or not you agree with that law. An important practical act for the regulatory inspector in such circumstances is to transform what are believed to be the fundamentally good intentions of such employers into practice.

In environmental regulation most firms discharging water to watercourses were regarded as *socially responsible*: businesses which complied as a matter of principle, obeying the law because it was the law, because it was right to obey the law, or because the business was unwilling to risk prosecution, conviction, and punishment. Such businesses tended to be large and profitable, typically being described as 'essentially law-abiding' or 'public spirited' (Hawkins 1984b: 110). However, few businesses were regarded as of unimpeachable virtue. Many, if not most, were thought to be reluctantly law-abiding and in need of encouragement towards compliance. Indeed, many law enforcers expected a measure of resistance to their enforcement efforts: it is

> 'portrayed as almost a ritual response to an enforcement agent. For dischargers to "try it on" or "try to pull a fast one" is entirely normal behaviour. Disclaimers, evasiveness, and delay are common moves in the enforcement game. Dischargers are expected to "drag their heels", and businesses are regarded as slow to spend money whatever the nature of the business' (Hawkins 1984b: 111).

An important consequence of the use of the category of the socially responsible is that people employed by such businesses were generally regarded as helpful and responsive to the agency's enforcement activities. In other words, they were viewed as disposed towards compliant behaviour. One notable result of this framing process is that when rule breaking occurs it is not usually defined as the result of deliberate or negligent violation of the law, but as an 'accident'. When accidents occur in environmental regulation – in contrast to occupational health and safety regulation – it is hard to blame, and in the absence of blame law enforcers find it difficult to invoke the criminal law.

Another framing category involves those thought to be '*unfortunate*'. In the world of environmental regulation these are businesses which find it difficult to comply completely with enforcement demands owing to technical inability or physical or economic incapacity. It is acknowledged by enforcers that some businesses do not possess the physical resources in the form of available land and appropriate topography to permit effective water pollution control. Financial incapacity is generally recognised also as a genuine reason for non-compliance. It is important to note here that moral inferences as to the willingness (or otherwise) of the rule breaker to comply are not drawn, leading, in the common sense world of the law enforcer, to a framing of the rule breaker as essentially blameless, again closing off almost entirely the possibility of formal legal action.

Instrumental compliance

A second theory of compliance held by field inspectors is that some employers comply for instrumental reasons. Some comply because they have an economic interest in complying, others because they fear they will be penalised if they do not comply and are caught. On this view, then, compliance takes place because there is a law which may be enforced. While principled compliance occurs because compliance is right, instrumental compliance occurs as the result of an external compulsion – the penalty of prosecution and sanction in conjunction with the subjective calculation of the risk of being caught. This economistic view suggests that non-compliance will occur when the costs of compliance are outweighed by the benefits of non-compliance. It is important to note, however, that inspectors believe that the deterrent effect of the law here resides less in the legal sanction and more in the act of prosecution itself. The behaviour of regulatory agencies suggests a general belief that it is not the legal sanction itself that deters but costs to reputation arising from the stigmatising effects of contact with the formal legal process.

Self-interest

Some businesses are believed to comply as a matter of self-interest. This happens in occupational health and safety when employers must exercise special care to preserve their business from harm either to itself or to its employees. Self-interest is frequently claimed to be a strong incentive for compliance in the chemicals industry, in which the risk of a dramatic accident could destroy a capital investment of enormous value. This encourages a view among regulators and the regulated that the interests of production and safety in certain areas of industrial life are complementary. Indeed, there are some firms which comply in excess of legal requirements (Gunningham et al. 2003).

Custom

A final source of compliance arises as a result of custom. Compliance is sometimes achieved, it is believed, because forms of health and safety regulation are now well established and familiar, and compliance is now regarded as the normal response to a series of commonly recognised demands in the law. Compliance occurs because the law is in place and known, and not therefore regarded as imposing new and unexpected demands upon employers. One inspector put it this way: 'In this country, because we've had health and safety legislation since 1833 . . . we've grown up with it. It's part and parcel of our lives, our running of business. It's not something new. So in the main, the larger companies take that on board' (Hawkins 2002: 258 -59).

ENFORCERS WORKING THEORIES OF NON-COMPLIANCE

Equally, law enforcers have their theories about why regulated individuals and businesses break rules. Different theories may well dictate different responses. While HSE inspectors emphasise moral constraint as driving much compliant behaviour, they tend to frame non-compliance more in instrumental and organisational terms. Theories of non-compliance also vary according to different types of business. Because business varies in its knowledge and its access to information about legal obligations, as well as in its wealth and technical capacity to comply, incentives to comply vary. Other business features important in inspectors' framing include its behaviour, responses to enforcement, and the personal characteristics of those individuals in each firm with whom they deal. The reputation of a particular firm or individual is based not simply on inspectors' dealings with them but also on wider stereotypes embedded in types of business or industry. This amounts to a social construction of business character, a form of knowledge which helps 'explain' why firms behave in the way they do. The complexity of some businesses makes this process complicated since there may be several values and aims residing at different points in the organisation and pressures and constraints may act on people in different parts of the business in different ways. Thus senior members of a firm may express a commitment to compliance in principle, but the existence of good formal organisational policies and rules about compliance will not necessarily be enough for inspectors who will be more concerned with how effectively they are likely to be enforced in practice. In health and safety regulation, life can be very different on the shop floor, where organisational control may be attenuated, especially if employees have incentives leading them to cut corners and defeat safety mechanisms or working practices to meet production targets. The more complex an organisation the more an inspector must rely upon the firm's internal control system as a means of securing compliance. Thus it is possible for a firm to have variety of policies supporting compliance with regulation in principle, yet a workforce that is somewhat ignorant of its obligations or unwilling to recognise them. In this way weak organisational control can frustrate good policy.

Self-interested calculation

One familiar frame is the self-interested calculator, that is, the business motivated entirely by profit (the 'amoral calculator' of Kagan and Scholz 1984). It is believed that some firms violate the law in a purposive or malicious way: inspectors regard them as calculating the odds and deliberately choosing not to comply because they wish to avoid the costs of compliance. These firms are not regarded by inspectors in the UK as numerous and are believed to be found more commonly in particular industries. For example,

compliance costs are high in the construction industry and economic pressures act in a particularly direct fashion to produce extreme competitiveness among employers. Some construction firms are believed to calculate the costs of compliance and where appropriate quite deliberately opt for non-compliance. At the same time, the widespread practice of subcontracting blurs lines of communication and responsibility. Yet the construction industry is also subject to relatively simple, well established regulations, and inspectors faced with rule breaking tend to presume that people 'must have known' they were violating the law. In contrast, in general manufacturing, theories often centre upon a general malaise in the firm or a simple failure of hardware as reasons for non-compliance. In *Environment and Enforcement* one category of polluters was comprised of those framed by inspectors as '*malicious*': businesses that quite deliberately broke the law either for reason of economic advantage or in symbolic rejection of the regulatory body's legal authority (Hawkins 1984b). Where 'careless' businesses may be ignorant, or irresponsible, pollution inspectors believe the malicious calculate and behave purposively.

It is frequently assumed that business acts rationally, but more needs to be known about the dynamics of decision-making within business organisations and to what extent illegality is the result of rational calculation. Indeed, it is possible to overestimate the extent to which business actually makes calculations about compliance. In research on illegality in the public sector in Australia, Grabosky (1989) found that there was evidence of careful assessment about compliance and weighing of risks and benefits in only two of 17 cases.

Mismanagement

Field inspectors sometimes encounter firms which they regard as poorly organised and badly managed, while others are just apathetic about the need for compliance. Inspectors think that non-compliance occurs here because employers lack the resources to enable them to comply or a degree of organisational control to attain or maintain compliance is missing. Sometimes such firms or individuals lack knowledge, a condition found frequently among small companies. In my study of water pollution regulation, for example, one group of offenders was comprised of those who broke rules because their behaviour appeared to be '*careless*'. This group included those businesses which found it difficult to adapt to new ways, new laws or new regulations, leading them to behave as they had always behaved, meaning that a change in legal requirements recast them as deviants. Other businesses broke rules owing to sloppy management, incompetence, or inadequate internal control of staff. Such negligence sometimes embodies a predictive element for some enforcers in suggesting an attitude towards compliance that needs correction (Hawkins 1984b: 112).

Culture

According to some inspectors' theories of non-compliance, some businesses simply do not recognise the necessity or legitimacy of complying with regulation. Some firms, it is believed, fail to comply because they are wilfully neglectful or ignorant in not acting to conform. It is not disdain for regulation so much as a rejection of legal authority in general. There is an element here of non-compliance as a symbolic rejection both of legal control and of the legitimacy of agencies charged with the enforcement of the law.

ENFORCERS' WORKING THEORIES OF PUNISHMENT

Enforcers frequently hold a complex idea of compliance. The tension between organisational policy and individual practice may be partly the reason why they can think of a company as fundamentally compliant at the same time that it is in violation of a legal rule. The key point here, however, is that framing ensures the designation 'compliant' (or 'good' or 'cooperative') will affect whether a violation is identified as such, and whether and how it is acted upon. If a law enforcer decides to correct a condition or problem the response will tend to be proactive, instrumental, preventive, and remedial. If the decision is to sanction an existing violation, the response will tend to be reactive, moral, and punitive. The formalities of the legal process may also enter the picture.

In my HSE study, field inspectors, their principals, and their area directors were all asked systematically about their conception of the purposes of prosecution and of punishment. Most did not maintain a single view as to the causes of non-compliance, so it was not surprising that their penal theories contained a mixture of elements (Hawkins 2002: ch. 8). One penal theory held in common, however, underpins others. Few regulatory staff actually used the word 'retribution' in discussing the matter, though a substantial minority did say the purpose of prosecution was to punish the lawbreaker. Their responses suggested clearly that prosecution is itself regarded as a punitive act rather than a means opening the way to an award of legal punishment following conviction in court. Furthermore, most responses to questions on this topic were framed in the moral language of blame and desert, suggesting that prosecution has, especially for front line enforcers, more of a retributive than an instrumental purpose. One consequence of this approach is that there were very few reported instances of inspectors prosecuting a company believed to be blameless. This is an important irony, given that many areas of legal regulation are couched in the UK in strict liability terms, in which a mental element such as intent or negligence or ideas of blame is irrelevant to the law.

Deterrence, however, was regarded as important, although there was no clear commitment to the idea of general deterrence (using punishment to change the behaviour of others who might be similarly tempted) rather than specific deterrence (using punishment to change the behaviour of a particular offender). Indeed, one aspect of punishment also seemed to be important was the use of legal sanctions to underline the credibility of the regulatory agency. This is an aspect of the ambivalence surrounding regulation and the problems it poses for enforcement agencies. The views also appear to be bound up in conceptions of deterrence. Sometimes conceptions of deterrence had a local aspect where enforcers were concerned about a particular problem in a particular area or in a particular industry encouraging them to mount a localised enforcement response.

An important implication for public policy arises from the fact that since many penalties for regulatory breaches are widely regarded as low, both in law and practice, many field inspectors treat the risk of being caught, the threat inherent in law enforcement – rather than in punishment – as a more realistic deterrent for many firms. There is evidence from criminological research more generally to suggest that people may be more realistically deterred by the threat of being caught than by the threat of ultimate punishment once the vagaries of the criminal justice process have been negotiated (e.g. Ross 1977). Deterrence may sometimes be amplified by the existence of an internal sanctioning system which operates in companies. The punishment of an individual rule breaker by a company may prove to be an effective deterrent to others, even in the absence of formal enforcement by the regulatory agency.

Legislators and policymakers probably think in terms of law use as a vehicle for deterrence, while individual field inspectors probably think in terms of the importance of a moral response, that is, in the language of penal theory, retribution. Blame is an important precondition for an inspector even to begin to think of prosecuting an offender for the suspected breach of a law. Framing of moral character is especially pervasive in shaping discretion: moral disreputability tends to prompt more punitive responses by law enforcers. In handling cases, both criminal and civil, much turns on the credibility of the individuals involved, whether as complainants, defendants, or witnesses. Credibility itself is a matter bound up with assessments of moral character, social class, social standing, and so on. However, in a serial decision-making system, moreover one structured as inspectorates are, things become more complicated. Conceptions of morality are among the forces driving enforcement at field level. The meaning of punishment and compliance varies, however, according to institutional structure and location and morality is not necessarily the guiding principle at senior levels in an organisation.

A NOTE ON DETERRENCE[9]

One of the important features of regulatory enforcement is that a legal bureaucracy often seeks to enforce the law against another organisation in the form of a business. The fact that organisational behaviour is intended to be subject to legal control may have given greater purchase to arguments supporting a general deterrent rationale of punishment for regulatory rule breakers. The idea of deterrence in criminology and socio-legal studies is shaped by a model of individual conduct, but corporate deterrence is a different matter, since firms might be regarded as operating in a more calculating and purposive fashion, when compared with individual conduct. This makes the idea of the deterrence of a rational business organisation with its idea of calculated risks taken by informed and rational actors prima facie a more persuasive strategy than when applied to individual rule breaking.

The commonest way in which regulatory officials think about and frame corporate compliance is therefore associated with deterrence theory. This is economistic and instrumental in character, given the organising assumption that firms are rational actors which will comply with legal directives only to the extent that the costs of expected penalties exceed the benefits of non-compliance. On this view the speed, certainty, and severity of the penalty imposed are central to the attainment of a deterrent effect. This all presupposes, of course, that those in regulated business organisations do calculate costs and benefits before they act, that they do know the rules, are able to comply with them, do know that they are enforced, and do know how severe the sanctions are. Research suggests that some firms do calculate and act as classical deterrence theory would presuppose, thereby conforming to the 'amoral calculator' model of Kagan and Scholz (1984). But it also seems to be the case when business motives to comply with (or evade) regulations are researched that matters are again more complex than previously imagined. Indeed, empirical research about enforcement of social and environmental regulation provides a rather mixed set of conclusions about the utility of deterrence in inhibiting behaviour. Some research has shown that the perceived risk of discovery and detection is more important in prompting compliance than the likelihood and severity of sanctions (Braithwaite and Makkai 1991; Burby and Paterson 1993; Gray and Scholz 1991).

[9] I draw from Hawkins 2014 for some of the material in this section.

The scepticism about the effectiveness of general deterrence theory seems to be well founded. For example, according to the managers of the electroplating and chemical companies who were interviewed, the authors of one study came to the conclusion that

> '. . . neither specific nor general deterrence played a major role in shaping corporate environmental behaviour. Specific deterrence (as previous punishment) apparently did have a significant influence on the future compliance of those who were subject to it, but less than a third of respondents mentioned such influences. General deterrence was reported to have had only a very weak influence on the behaviour of electroplaters, and an even weaker one on chemical companies' (Thornton et al. 2005: 312).

Elsewhere the same authors have observed that they were struck by how many of their respondents in small and medium-sized companies

> '. . . did not calculate the likelihood of detection or the severity of punishment in the ways predicted by deterrence theorists. Instead they appeared to use a general rule of thumb: if you violate the regulations, you will eventually get caught, the penalty could put you out of business, and resistance is futile. Sustained inspection and enforcement activity seems to have inculcated a 'culture of compliance'. Consequently, *the regulations themselves*, not the fear of enforcement action, currently have the strongest impact on behavior. Rather than simply providing a threat, regulations and inspections acted as a reminder or guide to enterprises as to what was required of them' (Gunningham et al. 2003: 312, emphasis in original).

Furthermore, the authors found little support

> '. . . for models of business firms as 'amoral calculators' who carefully weigh the certainty and severity of sanctions, as in standard deterrence theory. Regulation 'works' through a complex mixture of pressures, fear, and normative duty. And context affects the causal weight of each element in that mixture … . [S]mall and medium-sized companies were influenced by substantially different considerations than were large companies. Precisely how the various motivational strands play out depends not only on the size and sophistication of regulated companies, but on the enforcement history and the characteristics of the industry sector within which they are located' (Gunningham et al. 2003: 313).

These remarks suggest that much depends on the culture of the firm and its commitment to compliance. While enforcement strategies to enhance a firm's capacity to comply are straightforward and include providing information that enables those regulated to understand what constitutes appropriate behaviour, reducing at the same time the costs (time, money, effort) of complying, strategies to enhance commitment to compliance are more complex. Deciding the appropriate mix of measures necessary to foster the different bases of compliance depends on the regulatory setting.

An idea associated with deterrence, its obverse, is what the American socio-legal scholar Robert Kagan and his colleagues think of as reassurance (Thornton et al. 2005). People are much less likely to comply willingly if they feel that other competitors are getting away with it – avoiding compliance without discovery (Gunningham et al. 2003). Here the focus shifts from those contemplating law breaking to those who may not intend to break the rules, but who gain reassurance from knowing that those who do break rules

do not evade enforcement. The idea of reassurance can be thought of in both instrumental and expressive ways. There is here not just a fear of competitive disadvantage, but a moral feeling of rightness: rules must not only be perceived to be fair, they must also be perceived to be fairly applied (Burby and Paterson 1993). Kagan and his colleagues have found that their subjects would complain about enforcement being unjust if others were not punished, or were being treated too leniently. In instrumental terms, the reassurance function gives confidence to firms that if they spend money and make efforts to comply - buy equipment, hire staff, and the like - competitors who try to evade enforcement and gain a commercial advantage by not doing these things might not actually succeed. Thus though general deterrence may not be a primary reason for compliance, punishment reassures many regulated businesses that non-compliant competitors do not enjoy an advantage at the expense of those who are prepared to spend substantially in order to comply (Gunningham et al. 2003). One important policy effect of an enforcement approach sensitive to this should be to arrest the decline in general levels of compliance which would occur if firms believed that competitors are not being policed even-handedly.

SOME IMPLICATIONS AND CONCLUSIONS

Regulatory inspectors, and many other law enforcers, adapt their enforcement practices in light of the responses they receive from those against whom they are enforcing the law. More frequent visits to larger or riskier firms allow stable relationships to develop between regulatory official and regulated business. In the UK, a site that is big, complex, risky, or otherwise likely to produce large numbers of legal breaches, may be inspected relatively frequently. Where sites are small and simple, visits from inspectors are rare, sometimes occurring once every few years.

Inspectors' framing behaviour emphasises the moral qualities attributable to a business, with significant implications for enforcement. This framing – the images and the categorisation processes with which they are associated – is very important since different expectations are created in an inspector's mind about the willingness and capacity of a firm to comply. This in turn leads to different standards of enforcement in practice. In occupational health and safety or environmental regulation in the UK, large or wealthy firms are often said to be held to stricter standards of compliance on the grounds that they have more resources to enable them to comply, consequently leading to a view that there is less reason for their failing to do so. Ironically, however, the framing of such firms by individual field inspectors as 'compliant', 'cooperative', or 'responsible' may lead to more favourable – less punitive – responses in the first place. A simple framing of employers as 'good' or 'bad' is frequently derived from the ways in which they have responded to earlier enforcement efforts, as judged by their levels of compliance, and their apparent cooperativeness.

Applying deterrence theory to corporate behaviour raises distinctive research questions. To advance understanding of business behaviour, further thought needs to be given to the relative importance of legal threats, social pressures, and internalised norms under various legal, political, economic, and social conditions. Sanctions work at both formal and informal levels. Formal sanctions are provided in the law, while informal sanctions are employed in inspectors' negotiations, partly in an effort to avoid using the law, leading to the use of forms of bargaining and bluffing (Hawkins 1983). Note that deterrence is treated in the literature as a state, but research into the enforcement of regulation suggests that we need also to understand deterrence as process, which requires in turn answers to a series of more specific questions which explore the practical value of deterrence in more detail. What, for example, is the relative importance of the general

deterrent threats of formal sanctions as prompts to make regulated firms comply, compared with increased rates of inspection or surveillance? How real are instrumental responses to regulation, compared with the other forces that may encourage compliance? Put another way, what links exist between moral or social pressures to comply and the legal threat of punishment? What does deterrence actually mean in a business organisation, and where in the firm is any deterrent threat felt - in the boardroom, at middle management level, by the driver of the forklift truck, somewhere in between, or in all of these places, possibly in different ways? What individual deterrent effect of punishment may inhere in the actual process of inspection, by the use of bargains, bluffs or threats by inspectors? Similarly, deterrence as an enforcement strategy poses various practical problems. First, it requires constant, visible surveillance so that the regulated know that violations are vulnerable to discovery, and the available penalties must include sanctions that regulated firms fear. Second, an overzealous use of deterrent approaches can foster resentment and retaliation among regulated firms, leading to the possibility that they may refuse co-operation or try to apply pressure to attenuate or reduce enforcement. One particular disadvantage of a general deterrent approach is that a penalty perceived as severe (which is implied by definition) and therefore not achieving a good fit with a regulated individual's conception of what is retributively appropriate may create a feeling of injustice among the individual or business, encouraging a corresponding unwillingness to co-operate or comply in future. This may have important implications for enforcement, given the symbiotic relationship characteristic of regulatory enforcement with enforcers heavily dependent upon those they regulate for their impact and effectiveness (see further Thornton et al. 2005).

Developing more effective regulation requires research that can penetrate business organisations to understand their responses to regulation better in an effort to appreciate the relationship between different methods of regulatory implementation and their effects, and the relationship of regulation to the other forces shaping the responses of businesses and individuals. Understanding how the motivations of the regulated and their ability to obey affect the way in which they are defined as compliant or not is critical to the design of intelligent regulation and effective strategies for its enforcement.

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