

The Role of Compliance in the Rule of Law, Good Governance, and Sustainable Development

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Links among compliance, rule of law, and good governance are essential and indivisible, although not sufficient alone to achieve sustainable development. Compliance with environmental and sustainable development requirements can be improved by understanding and applying the two main theoretical approaches: logic of consequences, and logic of appropriateness. Compliance can be improved more by combining the two approaches. Further work to disaggregate both the State and the firm, and to understand the role of biases, heuristics, and framing in actor's compliance calculations, remains to be done and promises important insights.

'Environment policy is one of the success stories of the European Union – thanks to European Union legislation we have made significant improvements such as cleaner air and safer drinking water. But we still face some real problems.'

Margot Wallström, former EU Commissioner for the Environment

I. Introduction

Over the past thirty years, the European Union (and its predecessors) has established a comprehensive system of environmental protection, the continuing importance of which is reflected in 'Environment 2010: Our Future, Our Choice', the EU's latest environmental action plan.¹ While focusing on such important issues as climate change; natural habitat and wildlife; environment and health issues; and waste management, the plan emphasises the importance of enforcing existing environmental laws and providing information to the public and regulated community regarding the impacts of their behavior.² Addressing these challenges requires the application of a combination of traditional approaches and innovations to improve environmental governance.

This article begins by discussing the relationship among compliance, the rule of law, good governance, and sustainable development. We maintain that compliance is an essential building block for sustainable development. We then discuss two distinct, yet complementary, approaches to improve

compliance with environmental regulation: the 'logic of consequences' rationalist theories emphasising deterrence; and the 'logic of appropriateness' normative theories emphasising compliance promotion and assistance. The article then provides a vision of environmental compliance drawn from both theories.

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1 See Europa, *Overviews of the European Union Activities: Environment*, available at: http://europa.eu/pol/env/overview_en.htm (last visited Sept. 12, 2006).

2 See *ibid.*

II. Compliance, the rule of law, good governance, and sustainable development

Sustainable development requires effective governance. Designing effective governance systems is complex, and made more difficult by the changing nature of our environmental challenges. Threats such as climate change are different from past problems, creating new challenges for how we govern. Many emerging problems are global in scope, reflecting new interdependencies and a scale of human consumption that is too large, relative to the capacity of biological and geophysical systems. We are now transgressing, or will soon transgress, ecosystem limits and our margin of safety is quickly disappearing. The challenges are often highly interdependent; more integrated global markets, for instance, make efforts to reduce poverty in one country more reliant on the trade policies of another. The problems are often non-linear, so that a little more pollution may produce a profound change, like the last step before falling off a cliff. Rapid climate change events are the prime example. And many new problems also occur on different time scales, whereby the problems are evolving rapidly or with major time-lags vis à vis our attempts to fashion effective governance responses. Finally, many of the problems, and the links among them, represent new degrees of complexity and uncertainty, which require new tools, such as complex systems science, to understand, avoid, and mitigate. As such, they present new and complex issues in terms of how we design and implement our responses, including those involving governance

and law. We have raised the stakes and now need new ways of seeing and evaluating problems, as well as new and more sophisticated mechanisms for implementation, compliance, and enforcement.

Viewed broadly, governance is a complex process with many interacting forces. Governments and laws remain central. But because governments are always constrained by budgets, it is important to identify supporting strategies to meet environmental and sustainable development goals. A broader set of social institutions can assist, and can sometimes provide governance at lower cost to governments. The question is not which is better – government or other governance mechanisms – but rather how the forces can work best together to achieve chosen goals. The ‘new institutionalism’ and regime theory, supported by an increasing empirical database to test hypotheses, provide important frameworks, tools, and insights in this endeavor.

To respond to the new and rapidly changing issues, governance systems must become more effective, and must be designed to evolve through structured feedback. In a world of increasing interdependence – among people, societies, and nature – new approaches to governance must be developed at all levels – local, national, regional, and global. Strengthening law can and must play a central role in these efforts to avoid conflict and secure cooperation to address the complex problems of sustainable development. At the same time, compliance with existing laws must be ensured to provide the foundation for the rule of law and good governance. In addition, diagnostic tools must be improved to determine why States, firms, and individuals are complying or not complying with environmental laws. Effort to tailor effective and efficient compliance responses also must be improved, including capacity building efforts where non-compliance is based on lack of capacity. Finally, social norms that complement and underpin the law, including the norm of law abidingness, must be strengthened and activated.

The term good governance includes openness, participation, accountability, predictability, and transparency. Good governance depends, in turn, on the rule of law, which is generally characterised as referring to States where conduct is governed by a set of rules that are applied predictably, efficiently, and fairly by independent institutions to all members of society, including those who govern.³ But law is more than just a ‘set of rules’. It is, accord-

3 The European Commission describes the rule of law as having the following characteristics:

- A legislature that enacts laws that respect the constitution and human rights;
- An independent judiciary;
- Effective, independent, and accessible legal services; A legal system guaranteeing equality before the law;
- A prison system respecting the human person;
- A police force at the service of the law;
- An effective executive that is capable of enforcing the law and establishing the social and economic conditions necessary for life in society, and that is itself subject to the law; and A military that operates under civilian control within the limits of the constitution.

See European Commission, Draft Handbook on Promoting Good Governance in EC Development and Co-operation 57 [hereinafter Draft Handbook] (forthcoming) available at: http://ec.europa.eu/comm/europeaid/projects/eidhr/themes-governance_en.htm.

ing to Hernando De Soto, the 'hidden architecture of sustainable development'.⁴ In this spirit, Phillip Allott describes how law allows society to choose its future:

Law is made in the past, to be applied in the present, in order to make society take a particular form in the future. Law carries society's idea of its own future from the past into the future....

For example, a law on environmental management...conditions the behavior of those who may be planning a new industrial project...the behavior of those who want to react, [and] those who have power to permit, prohibit, or modify the proposal....

That is the way law works. It enacts in a particular form the common interest of society as a whole. It then disaggregates that common interest by relating it to the actual detailed behavior of particular society members. And the result is that, in taking their individual self-interested decisions, individual society members, if they act in conformity with the law, also and inevitably serve the common interest of society... So, in conforming to the law, we are society's agents in making a future for society which is within the range of possibilities which society has chosen... For those who suffer, in body or in spirit, from the imperfection of the human world as it is, the best way to make a better world is the way of law.⁵

The eminent jurist Lon Fuller described eight essential elements of the rule of law:

- that law be general in its application; that it be public;
- that it operate prospectively;
- that it have reasonable clarity;
- that it be internally consistent;
- that it be practicable to comply with,
- that is, that there be a genuine congruence between the ought of law and the can;
- that it be relatively stable; and
- that there exist a congruency between the word of law and its enforcement.⁶

Compliance is an indivisible part of the rule of law and is defined as a 'state of conformity or identity between an actor's behavior and specified rule'.⁷ A regulated actor, whether a State, firm, or individual, is 'in compliance' when they are acting in accordance with the law (or regulations), regardless of the motivations, or other circumstances, that may have led to that conformity. These obligations can be substantive (e.g., limit emissions of a pollutant)

and/or procedural (e.g., perform an EIA). Non-compliance occurs when a regulated actor fails to meet one or more of these obligations. Without compliance, the rule of law has no meaning.⁸

The importance of compliance, rule of law, and good governance is nowhere more important than in the field of environment and sustainable development. Former UNEP Executive Director Klaus Toepfer stresses this point:

We all have a duty to do whatever we can to restore respect for the rule of law, which is the foundation for a fair and sustainable society... Sustainable development cannot be achieved unless laws governing society, the economy, and our relationship with the Earth connect with our deepest values and are put into practice internationally and domestically. Law must be enforced and complied with by all of society, and all of society must share this obligation.⁹

These and other affirmations by the international community support the indivisible nature of compliance, the rule of law, and good governance; they also support the central role these concepts play in sustainable development.¹⁰ The presence of all

4 See de Soto, *Making Sustainable Development Work: Governance, Finance, and Public-Private Cooperation*, Remarks at the Meridian International Center, Washington, DC, October 18, 2001.

5 See Allott, 'The True Function of Law in the International Community', 5 *Ind. J. Global Legal Stud.*, 1998, p.391 (399-400, 413).

6 See Radin, 'Reconsidering the Rule of Law', 69 *B.U. L. Rev.*, 1989, p. 784-85, 78) citing Fuller, *The Morality of Law*, 1969. Radin suggests that Fuller's elements consist of two basic principles: 'first, there must be rules; second, those rules must be capable of being followed.' She adds two additional elements: 'it is clear that there must be a ninth and tenth requirement: (9) addressees of rules must be rational choosers; (10) addressees must be suitably motivated, perhaps by penal sanctions, perhaps by opportunities for reward.' *Ibid.*

7 See Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation', 32 *Case W. Res. J. Int'l L.* 2000, p. 387 (391).

8 See e.g., Spigelman, Chief Justice of the Supreme Court of New South Wales, Address at the ICAC-Interpol Conference, Hong Kong, Jan. 22, 2003 (declaring that 'without a substantial level of enforcement, the rule of law is simply devoid of meaningful content'); see generally, Petersmann, 'How to Promote the International Rule of Law?', 1 *J. Int'l Econ. L.* 25, 1998.

9 See Toepfer, 'Preface, Making Law Work: Environmental Compliance & Sustainable Development', Vol. 1, at 19, in Zaelke, et al. (eds.), 2005.

10 See, e.g., *Johannesburg Principles on the Role of Law and Sustainable Development* (2002), available at: http://www.inece.org/wssd_principles.html (affirming 'that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law' and that 'there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and persons who play a critical role at national level in the process of implementation, development and enforcement of environmental law'). The Principles were adopted at the Global Judges Symposium held in Johannesburg, South Africa, on 18-20 August 2002, an event co-sponsored by INECE, the International Network for Environmental Compliance & Enforcement.

three does not in itself ensure that a society is governed properly nor does it guarantee sustainable development. However, their absence severely limit its possibilities. Without the rule of law and compliance to promote social stability and legal certainty, firms are less willing to make the investments that form the basis of market economy development.¹¹ Furthermore, lack of compliance with the rule of law encourages high rates of corruption, with further devastating consequences on the confidence of economic actors. This lack of investment, in turn, can slow economic growth and deprive governments of resources needed to invest in education, social safety nets, and sound environmental management, all of which are critical for sustainable development.¹² The absence of a strong foundation of the rule of law can also negatively affect per capita income, infant mortality, and literacy.¹³

Put simply, sustainable development requires good governance in order to address the complex, interconnected, and often non-linear nature of environmental problems. The rule of law is essential to good governance. Without the rule of law, a lack of certainty and fairness will ultimately undermine the quality of governance. Finally, the rule of law relies on compliance. If there is no compliance, then the rule of law is an empty shell. There are numerous strategies for improving both implementation and compliance, generally divided into two approaches – rationalist deterrence; and normative compliance promotion and assistance.

III. The logic of consequences: rationalist deterrence

Rationalist theories follow the logic of consequences and assume the regulated community consists of rational actors who calculate the cost and benefits of complying or not complying with the law and behave in their own self interest. Non-compliance occurs when these actors believe that the benefits of compliance are outweighed by the costs. Deterrence based approaches attempt to 'raise' the cost of non-compliance by imposing sanctions. Early deterrence theory, pioneered by economist Gary Becker in the 1960s, argued that potential offenders respond to both the probability of detection and the severity of punishment if detected and convicted.¹⁴ This model has been refined over the ensuing decades and modern deterrence theory requires that the regulated actor believes that 1) there is a high likelihood that non-compliance will be detected; 2) a swift and predictable response to violation will follow detection; and 3) the response will include an appropriate sanction.¹⁵

Deterrence does not require the presence of all three, but rather only that the regulated actor perceives them to be present. Obviously, if an actor is sanctioned, this will change their perception. Often, the experience alone will deter them from future non-compliance; this is known as specific deterrence. But no government has sufficient resources to sanction every actor that fails to comply. Fortunately, individual sanctions also can deter other potential violators by sending a message that they too may experience the same adverse consequences for non-compliance; this is known as general deterrence. The multiplier, or leverage effect, of general deterrence makes it a powerful tool for achieving widespread compliance, and it is important that enforcement actions are widely publicised to maximise the benefit of general deterrence. Regulated actors in the same region, or industry, must know that their peers' non-compliance is being detected and addressed.¹⁶

Appropriate sanctions are critical for establishing the credible threat needed to compel compliance. Sanctions range from formal administrative orders, formal notices of non-compliance, and administrative consent orders, to fines, property seizures, facility closures, and imprisonment.¹⁷ In common law countries, a 'Porter Remedy' – where violating firms are forced to re evaluate their technologies and processes – may also be imposed as a

11 According to studies undertaken for the World Bank among global investors, the predictability of judicial enforcement is the most robust predictor of economic growth. See Spigelman, supra note 8; Carothers, 'The Rule of Law Revival', 77 *Foreign Affairs*, 1998, p. 95 (95-97).

12 See OECD, Policy Brief, Working Together Towards Sustainable Development: The OECD Experience 5-6, 2002; see also Draft Handbook, supra note 3, at 5.

13 See Licht/Goldschmidt/Schwartz, *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 2004.

14 See e.g., Becker, 'Crime and Punishment: An Economic Approach', 76 *J. Pol. Econ.* 1968, p. 169.

15 See Cohen, 'Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement', 30 *Env'tl. L. Rep.* 2000, p. 10245.

16 See Silberman, 'Does Environmental Deterrence Work? Evidence and Experience Say Yes, But We Need to Understand How and Why', 30 *Env'tl. L. Rep.* 2000, p. 10523.

17 While corporations cannot be incarcerated, they can be put on probation, during which the company is subjected to close judicial scrutiny. See e.g., Firestone, 'Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice', 27 *Harv. Env'tl. L. Rev.*, 2003, p. 105. And of course their individual officers, directors, and employees can be put in jail.

sanction.¹⁸ Moreover, legislators and regulators may choose from numerous kinds of monetary penalties, including fines specified per day or per violation; punitive damages, including treble damages for violation of a government order; reimbursement for government clean-up expenses; and barring the violating firms from government loans, guarantees, contracts, or financial assistance.¹⁹

When imposing monetary sanctions, regulators must keep several things in mind.²⁰ First, while theory and practice suggest high fines are more effective than low fines, the laws and the political context under which they operate constrain agencies from raising fines as they wish. Second, excessively high fines – where most violators could not afford to pay them – run the risk of undermining their deterrent effect. Thus, an appropriate fine is one that is sufficient to recoup any economic benefits of non-compliance the violators may otherwise realise, plus some form of gravity component to ensure proper deterrence.²¹

In addition to traditional sanctions, such as fines and imprisonment, information disclosure also can deter non-compliance.²² This ‘third wave’ (command-and-control and market-based being the first

and second) of environmental regulation works by providing data on an individual or firm’s environmental performance to the public.²³ The data may deal with their compliance with a particular law or it may simply describe behavior that, while not regulated, is still considered harmful to the environment. This information can leverage social and market forces to put pressure on individuals and firms.²⁴ They may also create the social stigma that penalises those labeled a ‘polluter’. In this way, information also can have powerful normative consequences. For example, consumers may choose not to patronise businesses with poor environmental records. A poll in 1999 found that 51 % of Americans reported ‘punishing’ a firm for bad social performance in the previous year.²⁵ Investors may shy away from companies for fear of future liabilities related to the firm’s environmental performance.²⁶ In addition, firms may find they can no longer attract the ‘best and brightest’ new recruits to their workforce.

Information also can be a powerful tool activating social norms within community associations, NGOs, unions and other groups to take direct action against firms with poor environmental performance.²⁷ They can use the disclosed information to

18 See Zaelke et al., ‘Compliance and Competitiveness: The Porter Hypothesis’, in Zaelke et al. (eds.), *2 Making Law Work: Environmental Compliance & Sustainable Development*, VOL. II, 2005, p. 433. Professor Porter’s hypothesis, now confirmed through an accumulating body of empirical research, recognises that strict environmental legal standards, when implemented flexibly, for example through market-based mechanisms, produce ‘innovation offsets’ that may equal or even exceed the cost of compliance. The strict standards force the firm to focus on its underlying processes, which in turn leads to the ‘innovation offsets’. A judge’s order can serve the same function.

19 See Maastricht European Institute for Transnational Legal Research, *Final Report: Criminal Penalties in EU Member States’ Environmental Law*, 2002; Huglo, Lepage and Partners Counsel, *Criminal Penalties in EU Member States’ Environmental Law*, 2003.

20 Several studies indicate that most enforcement agencies levy fines against less than 5 % of the firms that receive a Notice of Violation. When fines are assessed, they tend to be small. See Harrington, ‘Enforcement Leverage when Penalties are Restricted’, 37 *J. Pub. Econ.* 1988, p. 29, 29-30; see also USEPA, *A Pilot for Performance Analysis of Selected Components of the National Enforcement and Compliance Assurance Program*, 2003.

21 See USEPA, *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Agreements*, Memorandum from Herman, Assistant Administrator, July 20, 1993, at 5.

22 See Zaelke et al., ‘Information Regulation’, in Zaelke et al. (eds.), *Making Law Work: Environmental Compliance & Sustainable Development*, Vol. II, 2005, at 13.

23 Traditionally, information disclosure laws addressed data under the control of government agencies. The trailblazer in this respect was the US Freedom of Information Act of 1966 (FOIA). FOIA guarantees public access to information held by the government, subject to some exceptions such as national security. Since its

adoption, the public’s right to government held information has gained near universal acceptances both as an environmental right and as a human right. See *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, entered into force Oct. 30, 2001; and Chapter 18, *Human Rights and Environment*, in Hunter/Salzman/Zaelke, *International Environmental Law & Policy*, 3rd ed. forthcoming, 2006 (discussing human right to access to information). More recently, laws have been passed giving the public access to information held by private parties. See US *Toxics Release Inventory* established by the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001, 1986; *European Pollutant Emission Register* (EPER 2000).

24 See Killmer, *Designing Mandatory Disclosure to Promote Synergies Between Public and Private Enforcement*, 1 *Proceedings of the Seventh International Conference on Environmental Compliance and Enforcement*, INECE 2005.

25 See O’Rourke, ‘Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring’, 31 *The Poly Studies J.* 2003, p. 1 (5).

26 See Killmer, *supra* note 24.

27 NGOs and local community groups are increasingly involved at all stages of enforcement, including activities such as citizen monitoring and inspections; public comment on official actions; and citizen suits brought before the courts. See Casey-Lelkowitz et al., *The Evolving Role of Citizens in Environmental Enforcement*, 1 *Proceedings of the Fourth International Conference on Environmental Compliance and Enforcement*, 1996. In addition, certain industries (such as banking and insurance) may be indirectly involved in enforcement by requiring evidence of compliance with environmental requirements before issuance of a loan or insurance policy. Competitors also often help identify non-compliance, although this is not yet as robust as it is in the antitrust field, which relies on the motivation of injured competitors as a central strategy for detecting and prosecuting non-compliance.

pursue polluters in court through tort suits and citizen enforcement actions, to organise boycotts, and to galvanise support for stricter standards and higher penalties. Information regulation has been used successfully in both developed and developing countries,²⁸ but while it can play an important role in environmental protection, it is not a replacement for classical deterrence strategies. Information requirements are best viewed as a supplement to traditional monitoring and enforcement:

From a policy making perspective, our analysis thus offers two important results. First, the presence of clear and strong standards accompanied with a significant and credible penalty system does send appropriate signals to the regulated community, which then responds with a lowering of pollution emissions. Second, the public disclosure of environmental performance does create additional and strong incentives for pollution control. These results do suggest that both traditional enforcement activities and information belong to the regulator's arsenal.²⁹

Information also is critical to the success of normative approaches discussed in the next section.

IV. The logic of appropriateness: normative approaches to compliance assistance

Normative theories of compliance follow the logic of appropriateness, viewing regulated entities as good faith actors that want to obey the law but sometimes cannot. They posit that compliance occurs (or does not occur) largely because of the actors' 'commitment' (determined by social norms) and 'capacity' (knowledge of the rules, and financial and technological ability to comply). Accordingly, normative theories call for a more cooperative

approach to assuring compliance, with the full range of compliance promotion and assistance strategies.

Social norms are understood rules for accepted and expected behavior. They stimulate informal obligations that can control individual behavior in the absence of law, and in addition to law. Norms can be simple (e.g. a person should not lie) or more nuanced (e.g. an able bodied person should give up their seat on the bus to an disabled person). Some norms find widespread acceptance across different societies (e.g. individuals should respect their elders) while others are more culture specific (e.g. in some Arab societies, a person should not expose their left hand during meals). They can also be substantive (e.g. law compliance, human health protection, environmental protection, personal autonomy) or procedural (fair process, good faith, reciprocity, conformity).

In addition to having independent force, norms help shape the form and substance of law. Conversely, law also can activate and strengthen existing norms, as well as creating new norms. According to norm activation theory, two factors are necessary to 'activate' an existing norm.³⁰ First, the individual must be aware of the relationship between their actions and a negative consequence in the community. Second, the individual must believe that their actions are responsible for those consequences. These two factors activate norms and an individual feels obligated to comply and feels guilt if she does not.

One of the most important norms, for the purposes of this discussion, is the compliance norm. This is the belief that legitimate law that is developed and implemented fairly should be followed.³¹ The compliance norm relies on an actor's capacity to monitor and control its own behavior independent of formal sanctions and is grounded in the belief that obeying legitimate law is one of the obligations of being a member of society. Procedural justice is important for the compliance norm, and is developed by ensuring broad representation in law-making and law implementation, including by those addressed by the law; this ensures that the as the resulting law is impartial and ethical.³² The compliance norm is activated when an actor 1) knows of the legal standard, 2) is aware of the activities that the standard governs, and 3) believes that they have the authority or responsibility to conform their behavior.³³

28 See e.g., Dasgupta, et al., 'Pollution and Capital Markets in Developing Countries', 42 J. Envtl. Econ. & Mgmt. 2001, p. 301.

29 See Foulton et al., 'Incentives for Pollution Control: Regulation or Information?', 44 J. Envtl. Econ. & Mgmt. 2002, p. 159.

30 See e.g., Vandenberg, 'Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance', 22 Stan. Envtl. L.J. 2003, p. 55.

31 See e.g., Malloy, 'Regulation, Compliance and the Firm', 76 Temp. L. Rev. 2003, p. 451.

32 See id. See also Tyler, *Why People Obey the Law*, 1990, p. 163.

33 See Malloy, *supra* note 31, at 468.

In addition to the compliance norm, Michael Vandenberg identifies other norms that are important to environmental compliance:

- 1) The Human Health Protection norm states that an individual should not cause harm to human health and follows the golden rule that you 'do unto others as you would have them do unto you'.
- 2) The Environmental Protection norm suggests that an individual should not harm the environment.
- 3) The Autonomy norm provides that an individual should be left alone unless events otherwise suggest that the individual had done or will do something morally blameworthy.
- 4) The Fair Process norm states that an individual should not be treated arbitrarily or denied an opportunity to defend her behavior.
- 5) The Reciprocity norm follows the behavioral assessment that individuals will often cooperate more if the individual believes that others are cooperating or will cooperate.
- 6) The Conformity norm states that an individual should act as other do.³⁴

In addition to activating existing norms, it also is possible to use law to help create new norms to meet our environmental challenges. Robert Ellickson discusses how actors act as 'Change Agents' and supply norms to their community.³⁵ He identifies three categories of Change Agents: Self-Motivated Leaders, Norm Entrepreneurs, and Opinions Leaders. Self-Motivated Leaders seek to change a norm because they possess special endowments that allow them to receive an unusually high level of net tangible benefits if a norm is adopted. Norm Entrepreneurs are specialists who possess a high level of technical knowledge of norms within their specialty, and are able to campaign to change particular norms. An example for the U.S. is Martin Luther King. Opinion Leaders are generalists who possess a high level of social intelligence and their opinions are given deference by group members. They evaluate the incentives of other Change Agents and decide on which causes to endorse. An example from the U.S. is Jimmy Carter.

Change Agents are influential because people follow leaders. Information cascades and reputational cascades explain this 'follow-the-leader' phenomenon. Information cascades occur when individuals observe other people's actions and follow that pre-

ceding behavior; they disregard their own information because it is optimal for them to do so. A reputational cascade occurs when a person acts in order to avoid social disapproval even if they do not personally agree with that action. Organisations can be effective Change Agents. Governments as well as NGOs can exploit economies of scale and spread risks. They can shorten lines of communication among members and other Change Agents, as they earn a reputation as a credible source of technical and social information. Governments have a comparative advantage as Change Agents because they can utilise their coercive powers to influence norm making, rewarding private agents that share their agenda and disrupting agents that do not.

Norm activation is particularly important given recent evidence of the contributions of individuals and households to environmental problems. Vandenberg notes that USEPA has estimated that individuals generate 1.6 million tons of household hazardous wastes annually, and that the average home has accumulated up to 100 pounds of hazardous wastes. Some seemingly innocuous behaviors, such as the use of consumer products and the burning of waste materials, may release substantial quantities of pollutants when the totals from individual activities are aggregated.³⁶ Given the number of potential violators, traditional deterrence strategies may be prohibitively expensive in terms of monitoring and enforcement, to use against individuals and households. Intruding into the home also would be political costly. In this context norm activation offers a less costly, and perhaps equally powerful, alternative.

Unfortunately, even if norm activation is successful and the regulated actor feels the normative obligation to comply, they may lack a clear understanding of what is required of them or they may not have the capacity to comply. Many critics of modern environmental regulation argue that they are 1) too numerous, 2) too difficult to understand, 3) too fluid, or ever changing, and 4) too hard to

34 See Vandenberg, *supra* note 30, at 88-112.

35 See Ellickson, 'The Market for Social Norms', 3 *Am. L. & Econ. Rev.* 2001, pp. 1-49.

36 See Vandenberg, 'From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law', 57 *Vand. L. Rev.* 2004, p. 515.

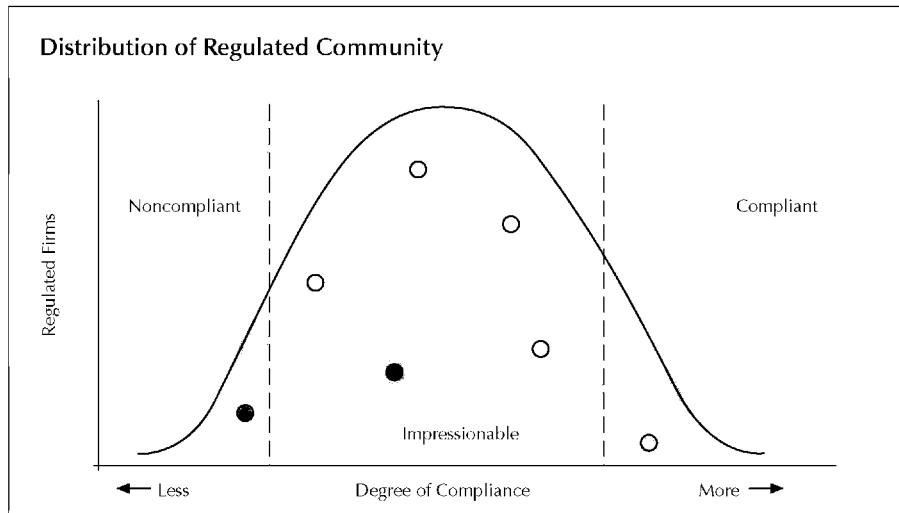


Figure 1

find.³⁷ In response to this ‘complexity critique’, normative theorists argue that agencies should educate the regulated community about the nature of their obligations and how to meet them.³⁸ But even if regulated actors understand the law, they still may not have expertise or resources necessary to comply.³⁹ In this case, agencies may need to offer technical and financial assistance to regulated actors to help them meet their obligations. This compliance assistance is particularly important for small and medium sized enterprises (SMEs)⁴⁰ and industry in the developing world.⁴¹

37 See Burby/Paterson, ‘Improving Compliance with State Environmental Regulations’, 12 *Poly Analysis & Mgmt.* 1993, pp. 753-772.

38 See e.g. Gunningham/Sinclair, *Leaders & Laggards: Next-Generation Environmental Regulation*, 2002.

39 See *ibid.*

40 See Leinster, et. al., *Compliance Promotion in the United Kingdom*, 1 Proceedings of the Seventh International Conference on Environmental Compliance and Enforcement, INECE 2005 (citing a survey of SMEs in the United Kingdom that found that these entities were the source of around 70 % of all pollution in the UK, yet the overwhelming majority reported little understanding of, or ability to comply with, environmental regulations).

41 See Ellepola, *Implementation of Industrial Pollution Control Programs in Sri Lanka*, 1 Proceedings of the Fifth International Conference on Environmental Compliance and Enforcement, INECE 1998.

42 See generally Bowles, *Promises to Keep: My Years in Public Life 1941-1969, 1971*.

V. Conclusion: blending rationalist and normative approaches

Both rationalist and normative models provide useful insights into behavior that leads to compliance (and non-compliance). A synthesis of the two approaches presents a more complete picture of enforcement and compliance as it actually occurs, with a richer set of strategies. The proper balance of the two approaches is a compliance assurance program that utilises compliance promotion and norms activation, while maintaining the bedrock foundation of enforcement and deterrence to alter the calculations of the inevitable bad actors who find it in their self-interest not to comply voluntarily. As noted by the eminent jurist H.L.A. Hart, ‘what reason demands is voluntary co-operation in a coercive system.’

Chester Bowles speculates that: ‘20 percent of the regulated population will automatically comply with any regulation, 5 percent will attempt to evade it, and the remaining 75 percent will comply as long as they think the 5 percent will be caught and punished.’⁴² With this in mind, the regulated community can be mapped along a bell curve (see Fig. 1).

An effective regulatory program will vary its approach between rationalist enforcement and nor-

mative promotion and assistance in an effort to push the regulated actor across the curve towards compliance (see Fig. 2).

Compliance Behavior	Regulatory Response
Voluntary Compliance	Publicise good behavior and reward good actor.
Non-compliance due to lack of knowledge or capacity.	Provide missing knowledge and build capacity.
Non-compliance due to lack of commitment.	Strengthen and activate norms.
Refusal to voluntarily comply.	Strengthen and increase enforcement and deterrence.

Fig. 2

Before concluding this article, it is important to note two limitations of these perspectives. First, both still generally treat large firms as unitary actors.⁴³ Yet in reality firms are composed of multiple actors, and the focus on the unitary actor overlooks how the firm's internal environment can affect individual managers' decisions about compliance. This perception can mask strategies that incorporate a broader range of players, both within and outside the regulated entity. Many regulated firms are functionally organised into numerous sub-units, with a wide range of formal and informal patterns of behavior governing the interaction between and among these units. Strategies to improve compliance need to reach beyond the uni-

tary actor to address issues such as their international management systems, principal agent relationships, intra firm informational flows and conflicting corporate goals, each of which is a force influencing compliance behavior.

Second, both approaches fail to consider that individuals and firms are limited in their capacity to consider all the variables in any particular decision.⁴⁴ They have cognitive biases that play a role in their 'rational' and 'normative' decision-making.⁴⁵ Therefore it is important to consider how a particular choice is framed. For example, people choose differently when a choice is framed as the number of lives that will be saved instead of the number of lives that will be lost. People also respond differently to how probabilities of detection, prosecution and punishment are presented. For example, people choose differently when probabilities for each stage in the enforcement chain are presented separately instead of when the overall probability is presented. Further research in both of these areas promises to offer important additional insights for compliance.

43 See Malloy, supra note 31.

44 See e.g. March/Olsen, 'The Institutional Dynamics of International Political Orders', 52 *Intn. Org.* 1998, p. 943.

45 See Casey/Scholz, 'Beyond Deterrence: Behavioral Decision Theory and Tax Compliance', 25 *L. & Soc'y Rev.* 1991, p. 821; Kahneman, *Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice*, Nobel Prize Lecture, Dec. 8, 2002, at 456-457; Sunstein, 'Moral Heuristics', 28 *Behavioral and Brain Sciences* 2005, p. 531.