REGULATION AND DEREGULATION: GENERAL ISSUES

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In this article Mr Cranston explores the background to and nature of business regulation with a view to evaluating the free market critique. The aims, successes and lacunaes of this regulation are viewed comparatively with regulation in other fields such as the environment and occupational safey. Mr Cranston sets about his task by first studying the emergence of business regulation, secondly, the operation of regulatory agencies and, thirdly, the impact of business regulation.

The resurgence of free market ideology, coupled with economic stagnation, have contributed to a fervour in some quarters for deregulation of business activities. Governments committed in varying degrees to deregulation have taken office in several Western industrial countries although whether public opinion, as measured by the electoral majorities of these governments or by public opinion polls, has moved significantly in the direction of favouring deregulation is another matter.[1] In many cases the free market argument against regulation is simply a matter of faith — a belief in the efficacy of the free market without much, if any, supporting analysis. The more sophisticated free marketeers argue their case on the basis that business regulation is instigated by business itself for its own purposes; that regulatory failure is endemic to regulation; and that business regulation is ineffective.

The burden of this article is to explore the background to and nature of business regulation with a view to evaluating the free market critique. Rather than taking a particular case study the article tries to weave a synthesis, on a comparative basis, from the existing stock of knowledge about business regulation. At the outset, it should be admitted that the article is intended to establish, albeit indirectly, a modest case for business regulation — 'modest' because it recognises that business

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regulation cannot always be supported on public interest grounds and that in some cases deregulation may be desirable. In addition, the paper concedes that just as there are market failures which justify business regulation, so there are 'regulatory failures' which should cause business regulation to be eyed critically. Business regulation has been too readily thought of by reformers as a panacea for particular problems, without a great deal of attention being given to its costs or its effectiveness. But whereas the free marketeers treat regulatory failure as strong, if not conclusive evidence against business regulation, this article considers that the reasons for regulatory failure are sometimes capable of being remedied.

Part I of the article examines the background to business regulation and accepts that sometimes its immediate aims are to advance business interests, or to reassure the community that measures are being taken, without much care as to what their effects are in practice. Part II considers the operation of business regulation and concedes that whatever its original intention it is sometimes defective in practice. Supporters of modest regulation have to come to grips with regulatory failures, including the phenomenon of "capture", that the regulators identify themselves with the interests of the regulated, both to counter the arguments of the free marketeers that it is inevitable, and to draw up recommendations for correcting the defects. Part III turns to the impact of regulation, since the case for deregulation is based heavily on evidence that regulation does not have any effect on business behaviour, and consequently that the supposed beneficiaries are no better off, but that on the contrary business regulation leads to economic inefficiencies. There are some suggestions for regulatory reform in Part IV, along with some concluding remarks.

It should be mentioned at the start that business regulation in this article is taken to mean control by the state through legislation of private (non-government) economic entities.[2] The article accepts the division between economic regulation and social regulation, according to the activity or behaviour being regulated. Economic regulation includes the regulation of market entry and exit, of rate, price and profit structure, and of competition, while social regulation includes regulation to advance consumer and environmental interests and health and safety at work.[3] Social regulation is generally thought to have been of greater relative importance in recent decades, although it is recognised that laws relating to consumer protection, the environment, and health and safety at work have a long history.[4] Not all aspects of economic regulation are of the same significance in each Western industrial country.

1 "An opinion research poll found that, in 1977, 50% felt that regulation was a good way to make business responsive to public needs down from 60% in 1973." R. M. Neustadt, "the Administration's Regulatory Reform Program: An Overview" (1980) 32 *Ad.L.Rev.* 129, 132; *Cf. Responsible Regulation*, An Interim Report by the Economic Council of Canada (1979).

2 B. Mitner, *The Political Economy of Regulation* (1980). S. Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform" (1979) 92 *Hav. L. Rev.*, 549, 560-65; M. H. Bernstein, *Regulating Business by Independent Commission* (1955) *Cf.* P. Nonet and P. Selznick, *Law and Society in Transition* (1978) 108-9.

3 W. Lilley and J. C. Miller, "The New 'Social Regulation'" (1977) 47 *Pub. Interest* 49. W. Klass and L. Weiss, "Framework for Regulation", in Senate Committee on Government Affairs, *The Study of Federal Regulation* (1978).

4 See *e.g.* L. M. Friedman, *A History of American Law* (1973) 161-63, 397-405. The Challenge of Regulatory Reform: A Report to the President from the Domestic Council Review Group on Regulatory Reform (1977) 50-54.

While utilities in North America tend to be privately owned, key sectors in other countries are public enterprises, whose rates, prices and profits are controlled through legal mechanisms different from those applying in ordinary business regulation.[5] Western industrial countries all regulate the market to promote competition, but it is fair to say that until recently none displayed the zeal of the United States in its antitrust policy.[6] A final point to be made in this preliminary paragraph is that both economic and social regulation can involve the use of similar coercive techniques such as prescribing information disclosure (*e.g.*, legislation relating to corporations and securities, and consumer protection laws), controlling the methods of production (*e.g.*, legislation relating to environmental protection and health and safety at work), imposing standards for products and services and conditions of employment (*e.g.*, legislation relating to housing standards, consumer protection, minimum wages and equal opportunities) and requiring prior approval before a business engages in particular industries (*e.g.*, legislation relating to corporations and securities and consumer protection).[7] Self-regulation falls outside the scope of the present discussion although in some Western industrial countries it is an important method of channelling the behaviour of private economic entities.[8]

I. THE EMERGENCE OF BUSINESS REGULATION

There is no necessary coincidence between the intention behind the introduction or modification of particular legislation regulating business and how it operates in practice. Regulatory agencies which were established at the instigation of reformers to impose tight control on business behaviour might be quite ineffective in practice. Nonetheless, regulatory failure can often be explained, at least in part, by the way business regulation originates. While "capture" may be a reasonably accurate description of the origins of some regulatory agencies, the reality with others is far more complex. It may be that the intention underlying business regulation was

5 See *e.g.* R. Drago, "France"; G. Treves, "Italy"; T. C. Daintith, "The United Kingdom" in W. Friedmann (Ed.), *Public and Private Enterprise in Mixed Economies* (1974) 3, 9; 43, 195, 196-98. *Contra*, W. Schulz, "Conditions for Effective Franchise Bidding in the West German Electricity Sector", in B. M. Mitchell and P. R. Kleindorfer (Eds), *Regulated Industries and Public Enterprise* (1980) 57-70.

6 W. Friedman (Ed.) *Anti-Trust Laws: A Comparative Symposium* (1956). There do not seem to be significant differences in the regulation of market entry and exit through techniques such as occupational licensing. C. H. Fulda, "Controls of Entry into Business and Professions — A Comparative Analysis", (1973) 8 *Texas Int. L. J.* 109.

7 T. Lowi, "Decision Making vs Policy Making: Toward an Antidote for Technocracy" (1970) 30 *Pub. Ad. Rev.* 314. R. F. Cranston, "Reform Through Legislation: The Dimensions of Legislative Technique" (1978-79) 73 *N.W.U.L. Rev.* 873. B. Mitner, note 2 *supra*. 398. Economic Council of Canada, note 1 *supra*, 43-44.

8 Se *e.g.*, "the regulation of the securities industry in the United Kingdom, West Germany and Sweden", in B. A. K. Rider and H. L. French, *The Regulation of Insider Trading* (1979) 160-174, 245-46, 258. T. Smith, *The Politics of the Corporate Economy* (1979) 185-187. Committee to Review the Functioning of Financial Institutions, Cmnd. 7937, (1980) 288-318.

vaguely formulated or that the forces behind it were at odds with each other. Often it is fallacious to assume that the forces dominant in formulating business regulation really intended to make any dent on commercial practices. Business regulation may be characterised as symbolic, since from the outset the purpose may simply have been to assauge public opinion or to divert its attention.

None of the 'models' of how business regulation has emerged adequately capture the complexities of the process. What can be called the "public interest" model, in which the state responds to the problems associated with business activity by establishing regulation for its orderly supervision, is too naive, for it assumes that the state responds to ideas and popular concerns, and that there is a consensus or that the state acts as a neutral arbiter reconciling differences.[9] The "pluralist" model is more realistic for it recognises that there is a clash of interests, with the state being a separate interest or a surrogate for one or more other interests. For example, the "pluralist" model argues that reformers might mobilise sufficient political support to achieve business regulation, but on the other hand might have to compromise, or might be defeated in the face of opposition from business and other interests. However, the "pluralist" model is defective in glossing over the asymmetry in power between reformers and business interests and the links between business and the state.[10] In its crude form the "private interest" model is inaccurate in conceiving of all business regulation as being instituted at the behest of business to advance its interests, for it overlooks that reformers are not without some power to effect social change and confuses the functions served by some business regulation with its origins.[11] While each of these models has deficiencies, each also contains important truths about the emergence of business regulation — the "public interest" model, for it suggests that the state, or at least parts of it, can be motivated by a conception of the public interest; the "pluralist" model, for it recognises how different interests can have a hand in the emergence of laws; and the "private interest" model, for it underlines the crucial role that business interests, their surrogates in the state, and business ideology, can play.

In the light of these comments, let us examine in more detail the role of reformers and business interests in the emergence of business regulation.

9 See *e.g.*, R. E. Cushman, *The Independent Regulatory Commissions* (1941). Cf. O. MacDonagh, "The Nineteenth-Century Revolution in Government: A Reappraisal" 1 *Hist. J.* 52.

10 See *e.g.* Fainsod, "Some Reflections on the Nature of the Regulatory Process (1940) 1 *Public Policy* 297, 297-323. O. L. Graham, *Toward a Planned Society* (1976) 65-66, 97, 299-302. B. Mitner, note 2 *supra,* 204-5. T. Lowi, "American Business, Public Policy, Case-Studies and Political Theory" (1964) 16 *World Politics* 677, 695-703. J. R. T. Hughes, *The Governmental Habit* (1977). *Contra* J. Pfeffer, "Administrative Regulation and Licensing: Social Problem or Solution" (1973-74) 21 *Social Problems* 468.

11 G. J. Stigler, "The Theory of Economic Regulation" (1971) 2 *Bell J. Econ. & Man. Sci.* 3. S. Peltzman, "Toward a More General Theory of Regulation" (1976) 19 *J. Law & Econ.* 211. R. A. Posner, "Theories of Economic Regulation" (1974) 5 *Bell J. Econ. & Man. Sci.* 335. In its crude form the "ruling class" model is similarly defective: in one account business regulation is promoted by *big* business to stabilize competition, to protect itself from the petty bourgeoisie, or to "cool out" popular control of market abuses. A. Szymanski, *The Capitalist System and the Politics of Class* (1978) 204-5. Contra W. G. Carson, "The Sociology of Crime and the Emergence of Criminal aw" in P. Rock and M. McIntosh (Eds), *Deviance and Social Control* (1974) 67.

1. The Reformers' Aim

The aims which reformers seek to achieve through business regulation are well-rehearsed: a reduction in fraud, misrepresentation and unfair practices in the market place; better quality goods, services and housing; lower prices; the preservation of wilderness areas; a reduction in pollution and the siting of industry so that it is compatible with residential living; an improvement in health and safety at work; and so on.[12] There are also nationalist objectives among reformers in some Western industrial countries, such as retaining substantial control over economic activity in local hands through restricting foreign investment, and promoting national culture by methods such as content rules for broadcasting.[13] In addition, some reformers object to the undesirable attitudes and behaviour associated with the unregulated market — the acquisitiveness, and the exploitation of and disregard for others.[14] Instead of people being at the mercy of market forces, these reformers want to advance values such as fairness, equality and control by people over their own lives. While it is difficult to identify many regulatory measures as being designed directly to curb such attitudes or behaviour, sometimes they are not far below the surface.[15] Another objection to the unregulated market is that the economic power it facilitates can be used to subvert political democracy both directly through influencing law-makers, and indirectly through corrupting the values of society. A widely accepted interpretation is that the combination of small farmers, organised workers and populist politicians who pressed for antitrust laws in the United States were motivated not only by self-interest, but also by the desire to curb the power of big business and to prevent it imposing its values on American society.[16]

The market failures which reformers identify through their practical effects are reflected in the economic justifications for business regulation, among which are controlling for externalities, correcting for inadequate information, curbing monopoly power, dealing with excessive competition, controlling for moral hazard and rationalising inefficient industry.[17] These economic justifications can be illustrated by brief reference to the first two: controlling for externalities and correcting for inadequate information. The best example of externalities is the polluting factory which, given the current state of the law, does not have to pay the

12 See *e.g.*., D. R. Fusfeld, "Some notes on the Opposition to Regulation" (1980) 2 *J. Post Keynesian Econ.* 364.

13 See *e.g.*., A. F. Lowenfeld, *International Private Investment* (1976) 49-54. H. C. Coing, "Germany"; P. Leleux, "France, Belgium and the EEC" in H. R. Hahlo, J. Gratham Smith and R. W. Wright (Eds.), *Nationalism and the Multinational Enterprise* (1973), 87, 89; 101, 106, 119. D. Flint, "The Control of Foreign Investment in Australia 1976-78" (1979-80) 7-8 *Aust. Bus. L. Rev.* 119.

14 See generally H. J. Laski, *Reflections on the Revolution of our Time* (1943) 331-333, 356-357.

15 An exception is the Foreign Corrupt Practices Act 1977, 15 U.S.C. SS 78m, 78dd-1, 78dd - Z 78ff. See S. O'Neill, "The Foreign Corrupt Practices Act: Problems of Extra-Territorial Application" (1979) 12 *Vand. J. Trans. L.* 689.

16 W. Letwin, *Law and Economic Policy in America* (1966) 96-97. S. Weaver, *Decision to Prosecute: Organization and Public Policy in the Anti-Trust Division* (1977) 22-23. R. H. Bork, *The Antitrust Paradox* (1978) 61-66.

17 Breyer, note 2 *supra*, 553-60. P. Jarrow and R. Noll, "Regulation in Theory and Practice". M.I.T. Working Paper No. 218 (1978) 32-54.

full cost of disposing of its wastes. Instead of that 'cost' being reflected in the price of the product, it is borne either by those living in the area (air pollution) or by recreational users and fishermen (water pollution).[18] Consequently, legal control of pollution actually reduces the misallocation of resources which results because it compels a business to take into account more fully the social costs of its operation. Externalities also exist with hazardous industrial processes (workers bear the cost through ill-health, which is inadequately compensated) and unsafe consumer products (even if the law provides a remedy, consumers frequently fail to pursue it)[19]

Controlling for the inadequate provision of information is to enable consumers and others to make more rational decisions. One reason for regulation in this regard is that advertising is not really concerned with giving the consumer detailed information, while intermediaries who provide information, such as doctors, retailers or consumers' associations, often know too little about products or are not in a position to make information available, at least on a regular, usable basis.[20] It may be that with inexpensive, one-off purchases, a lack of information is not necessarily fatal, for consumers will learn from 'their' mistakes. Of course, those below the poverty line may be so hard-pressed that they are not in a position to waste even a few dollars. In addition, the ill-effects of a product, even a relatively inexpensive one, may be quite catastrophic, as with an unsafe drug.[21] With more complex and expensive products individual customers are not in a good position to make an evaluation or to draw on experience. Similarly, workers may not know fully about the health and safety problems associated with their work, such as the long-term hazards associated with certain manufacturing processes. Even if health and safety problems are obvious, many workers have little choice as to where they will work, and also the economic pressures to keep production going lead them to cut corners.[22]

It is reasonably clear that reformers have never thought that the judicial process could be used to remedy market failures, but perhaps the historical and institutional reasons for this attitude should be outlined. Historically, Jeremy Bentham's views were influential, that "amendment from the Judgement seat is confusion" and that it was far better to have a properly informed Parliament passing legislation with general effect.[23] Bentham believed that the judges were a conservative monopoly, that they lacked adequate information to engage in social reform, and that any reforms they adopted would be partial in effect because of the nature of the judicial

18 A. V. Kneese and C. L. Schuttze, *Pollution, Prices and Public Policy* (1975). A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1970). B. Mitner, note 2 *supra,* 311-20. K. W. Knapp, *The Social Costs of Private Enterprise.*

19 R. N. McKean, "Product Liability: Trends and Implications" (1970) 38 *U. Chi. L. Rev.* 3, 21-22 34-36. J. R. Chelius, "The Control of Industrial Accidents: Economic Theory and Empirical Evidence" (1974) 38 *Law & Contemp. Prob.* 700, 708-9, 714.

20 See *e.g.,* M. Green and B. Moore, "Winter's Discontent: Market Failure and Consumer Welfare", (1973) 82 *Yale L. J.* 903, 907. A. A. Leff "Injury, Ignorance and Spite — the Dynamics of Coercive Collection" (1970) 80 *Yale L. J.* 1,33.

21 See generally, M. Spence, "Consumer Misperceptions, Product Failure and Product Liability" (1974) 44 *Rev.Econ.Studies* 561.

22 R. L. Hale, "Bargaining, Duress, and Economic Liberty" (1943) 43 *Colum.L.Rev.* 603, 626-627.

23 Sir William Holdsworth, *Some Makers of English Law* (1958) 173.

process. Despite more favourable views of the judicial process in the United States, the Progressives and New Dealers shared the Benthamite conception that reform required legislation.[24] With the success of civil rights litigation in the thirties, however, American reformers began to treat the courts as an alternative avenue to reform, and in the business regulation area this has led to some litigation to make regulatory agencies more responsive to the public interest they ostensibly serve.[25] Nevertheless, the Nader organisation, to give one example, sees litigation as ancillary to its purpose, partly because litigation does little to build the political power of ordinary people.[26] Institutionally, as Bentham recognised, the judicial process is limited in what it can achieve. Individuals must be willing and able (*e.g.* financially) to become involved in litigation, which developments such as class actions, more liberal rules on standing, and public interest law firms can only partially overcome.[27] Courts can offer only limited remedies, and there has been widespread criticism on occasions when the courts have been thought to be intruding too far into the administration of social policy.[28] In addition, substantive law doctrines are not always adequate in relation to overcoming market failures on other than a relatively small scale. At least in some Western industrial countries, there is scepticism at the capacity of the judiciary to innovate significantly with substantive law doctrines or to interpret social legislation in a generous manner.[29]

Reformers in the United States have given considerable attention to the form business regulation should take and have tended to favour the independent regulatory agency rather than entrusting the task to the executive. As formulated in Landis' classic statement, the case for the independent regulatory agency was to concentrate and nurture expertise and to free administration from political and judicial pressures.[30] Expertise was said to be vital because intelligent regulation involved the interpretation and application of a wide range of scientific knowledge and social facts. Freedom from political pressure, through a broad mandate, was to enable the regulatory agencies to respond flexibly to current developments, but without the threat of being diverted from a planned course of action by political expediency. Excluding the courts from detailed oversight followed because

24 R. Hofstadter, *The Age of Reform* (1955) 308-9. O. T. Barck and N. M. Blake, *Since 1900* (1947). But not all hold this view: see *e.g.* R. Pound, *The Formative Era of American Law* (1938) 44-45.

25 See *e.g., Federal Communications Commission* v. *National Citizens Committee for Broadcasting* 436 U.S. 775; *Sierra Club* v. *Morton* 405 U.S. 727; *Wilderness Society* v. *Morton* 479 F.2d 842 (1973), 411 U.S. 917; *Nader* v. *Nuclear Regulatory Commission* 513 F.2d 1045 (1975); *Environmental Defense Fund, Inc.* v. *Environmental Protection Agency* 489 F.2d. 1247 (1973). See generally, R. L. Rabin, "Lawyers for Social Change: Perspectives on Public Interest Law" (1976) 28 *Stan. L. Rev.* 207.

26 R. Nader, "Consumerism and Legal Services: The Merging of Movements" (1976) 11 *L. & Soc. Rev.* 247. F. Marks, K. Leswing and B. Fortinsky, *The Lawyer, the Public and Professional Responsibility* (1972) 159-60.

27 See generally. B. Mitner, note 2 *supra,* 28-34. M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *L. & Soc. Rev.* 95.

28 See *e.g.,* N. Glazer, "Should Judges Administer Social Services" (1978) 50 *Public Interest* 64. A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harv. L. Rev.* 1281. D. L. Horowitz, *The Courts and Social Policy* (1977).

29 See *e.g.,* J. A. G. Griffith, *The Politics of the Judiciary* (1977), P. McAuslan, *The Ideologies of Planning Law* (1980). M. Cappelletti, "General Report" in M. Cappelletti and B. Garth (eds) *Access to Justice: Vol. 1. A World Survey* (1978) 118.

30 J. M. Landis, *The Administrative Process* (1974).

reformers feared legalistic approaches, applied by judges without a real appreciation of the context in which regulation occurred.

It is a matter of debate in the United States whether the institutional location of the regulatory function makes a great deal of difference, whether regulation involves all that much expertise, and whether regulation ought to be insulated from political control by the elected representatives.[31] In Western industrial countries other than the United States, where the independent regulatory agency is an exception, little systematic thought has been given to the most effective manner of implementation, and historical and political factors have tended to determine how regulation is administered.[32]

2. *Reformers and Business Regulation*

A diverse group of "reformers" advocate business regulation — "political entrepreneurs" (the Lord Shaftesburies and Ralph Naders of the world), "public interest" groups (*e.g.* consumer and environmental groups), the Labour Movement, and those such as professionals, academics or government employees who are familiar with an area and believe that there is a need for reform. Where a reforming political movement wins power it may implement business regulation as part of its policy: business regulation has been an important plank in the platforms of social democratic governments in Western industrial countries and was a key element in the reforms of the Progressive and New Deal movements in the United States.[33]

In the absence of a government being committed to and capable of effecting change, political entrepreneurs, public interest groups and others might still be able to have business regulation effected through the political process. This might be through traditional channels, such as trade unions lobbying for tighter health and safety legislation.[34] Public interest groups, which are relatively weak financially and numerically, might be able to achieve reform by lobbying, attracting favourable media publicity, instituting test case litigation, and building political support through letter-writing, research reports, political protest and contacts in government.[35] The reformers' task is facilitated if they can exploit a crisis, capitalise

31 R. J. Williams, "Politics and Regulatory Reform: Some Aspects of the American Experience", (1979) 57 *Pub. Ad.* 55. L. N. Cutler and D. R. Johnson, "Regulation and the Political Process" (1975) 84 *Yale L. J.* 1395.

32 There has been some emulation of the independent regulatory commission: Fair Trading Act (U.K.) 1973; Trade Practices Act 1974 (Cth). See *e.g.*, G. R. Baldwin, "A British Independent Regulatory Agency and the "Skytrain" Decision (1978) *Pub. L.* 57, 57. The agencies of the European Economic Community enjoy considerable autonomy. H. Smit and P. E. Herzog, *The Law of the European Economic Community, Vol. 1* (1976) 31-32. Of course in the United States a substantial number of regulatory functions are administered from within the executive. See *e.g.*, S. Weaver, note 16 *supra* (on the Antitrust Division of the Department of Justice). J. Gribetz and F. P. Grad, "Housing Code Enforcement: Sanctions and Remedies" (1966) 66 *Colum. L. Rev.* 1254. Notes, "The Role of the Michigan Attorney-General in Consumer Environmental Protection" (1973-74) *Mich. L. Rev.* 1030.

33 See *e.g.*, R. Hofstadter, note 24 *supra,* 311-12. A. Hopkins, *Crime, Law and Business* (1978) 87-95.

34 J. Page and M. O'Brien, *Bitter Wages* (1973) 165-66, 169-172, 178-79.

35 J. Berry, *Lobbying for the People* (1977) 212-85. Leone, "Public Interest Advocacy and the Regulatory Process" (1972) 400 *Annals* 46. M. Nadel, *The Politics of Consumer Protection* (1971) 139-43, 155-191. See generally R. Cobb, J. Ross and M. H. Ross, "Agenda Building as a Comparative Political Process" (1976) 70 *Am. Pol. Sci. Rev.* 126. P. Hall, H. Land, R. Parker and A. Webb, *Change, Choice and Conflict in Social Policy* (1975) 86-91.

on what is widely thought to be undesirable, or associate regulation with values which are widely shared in the community (*e.g.* health, safety, clean air and possibly social justice).[36] A number of examples are illustrative: in various countries the thalidomide tragedy paved the way for tighter regulation over the marketing of new drugs;[37] the evidence of unethical and dishonest practices in Australia during the mining boom of the late sixties and early seventies, built up a momentum for tougher companies and securities law;[38] and environmentalists made some advances in the seventies in many Western countries by highlighting especially serious threats to the environment.[39]

It is by no means certain that reformers will achieve complete success, for their proposals may be too adverse to business interests. For example, there may be outright opposition from business, although this can range from a concern with minor details to near unanimity in the business community that proposed regulation is antithetical, that it should be vehemently opposed, and that, should it be enacted, efforts will be made to stifle its impact by political moves or through administrative pressure.[40] Consequently, even if regulation when proposed is intended to bite on certain practices, it can be weakened as a result of business opposition. The upshot of business opposition may be that 'reform' can be regarded as symbolic, for its failure may be obvious from the compromises necessary to get the legislation onto the statute book. In practice, the interpenetration of business and law-makers, and the degree to which law-makers are imbued with a business mentality, render it less necessary for the business community to take overt steps to protect its interests. For example, the quest for economic development and the fear that tight regulation will produce a flight of capital has made many governments chary of introducing tough environmental and health and safety laws.[41]

3. *The Role of Business*

The historical record makes it clear that on many occasions businesses have been strong proponents of business regulation, either singly or in combination with reformers.[42] It will be rare for the business community as a whole to support regulation, and there may well be divisions between small and large businesses, between different types of businesses, and between businesses in different sectors of the economy. In a few cases regulation has actually been promoted by particular

36 J. Q. Wilson, "The Politics of Regulation" in J. Q. Wilson (ed.) *The Politics of Regulation* (1980) 357, 370-71. I. Paulus, *The Search for Pure Food* (1974) 27-28.

37 H. Sjostrom and R. Nilsson, *Thalidomide and the Power of the Drug Companies* (1972). H. Teff and C. R. Munro, *Thalidomide the legal aftermath* (1976).

38 Senate Select Committee on Securities and Exchange, "Australian Securities Markets and their Regulation" (1974). T. Sykes, *The Money Miners* (1978).

39 B. R. Weingast, "Congress, Regulation, and the Decline of Nuclear Power" (1980) 28 *Pub. Policy* 231; N. Gunningham, *Pollution, Social Interest and the Law* (1974) 78-79.

40 See *e.g.*, M. E. Parrish, *Securities Regulation and the New Deal* (1970) 129-131.

41 See *e.g.*, W. G. Carson, "The Other Price of Britain's Oil: Regulating Safety on Offshore Oil Installations in the British Sector of the North Sea" (1980) 4 *Contemporary Crises* 239, 244-248, 248-252.

42 See *e.g.*, B. A. Ackerman and W. T. Hassler, "Beyond the New Deal: Coal and the Clean Air Act" (1980) *Yale L. J.* 1466, 1497-1501, (combination of dirty coal interests and environmentalists).

businesses as a means of inhibiting their competitors.[43] Just because businesses support regulation does not necessarily mean that regulation advances only business interests, for there is no logical reason why regulation cannot simultaneously serve both business and other interests. If business supports regulation, however, it is a matter for close inquiry whether it can also benefit other interests, and whether modifications can ever be made in the regulatory scheme to achieve such benefits.

Business may actively support regulation because they anticipate that regulation will facilitate economic activity, will rationalise an industry and stabilise competition wihin it, or will attract government support (including financial support). In the nineteenth century many businesses supported companies legislation because its main function was to afford the protection of limited liability, although the *quid pro quo* was greater public accountability through requirements such as public registration and the keeping of a register of shareholders.[44] A study of the Factory Acts in Britain reveals that more substantial manufacturers supported limited state interference in the affairs of industry, partly because improving the welfare of workers improved productivity, but also because regulation gave them a competitive advantage over their smaller trade rivals for whom it was relatively more expensive to comply with the new standards.[45] Economic regulation in the United States has often been represented as a victory for established sections of the business community in their efforts to attain conditions of stability in periods of economic or technological change, when newly established businesses were entering the market and often competing successfully [46] Business support for regulation in circumstances such as these produces an obvious cleavage between the free enterprise ideology most businesses espouse and how they actually behave in practice.[47]

In addition to supporting business regulation which advances their immediate interests, businesses may support, or at least not oppose, regulation which damages their immediate but promotes their long-term interests. One situation is where business regulation will curb the behaviour of 'marginal' businesses, which are lowering the reputation of an industry as a whole, for reputable businesses may hope that this will forestall more far-reaching regulation or adverse publicity. For example, larger manufacturers and retailers have tended not to oppose much modern consumer protection legislation, partly because some of it is generally directed at 'fly-by-night' traders, and partly because a good deal of the remainder

43 E. M. Epstein, *The Corporation in American Politics* (1969). A. Stone, *Economic Regulation and the Public Interest* (1977).

44 E. Dodd, *American Business Corporations until 1860* (1954). L. C. B. Gower, J. B. Cronin, A. J. Easson, Lord Wedderburn of Charlton (eds.), *Gower's Principles of Modern Company Law* (4th Ed. 1979).

45 W. G. Carson, "Symbolic and Instrumental Dimensions of Early Factory Legislation: A Case Study in the Social Origins of Criminal Law, in R. Hood (ed.), *Crime, Criminology and Public Policy* (1974) 107. J. J. McManus, "The Emergence and Non-Emergence of Legislation" (1978) 5 *Brit. J. L. & Soc.* 185.

46 See *e.g.*, G. Kolko, *The Triumph of Conservatism* (1963). G. W. Hilton, "The Consistency of the Interstate Commerce Act" (1966) 9 *J. Law & Econ.* 87. T. K. McGraw, "Regulation in America: A Review Article" (1975) 49 *Bus. History Rev.* 159.

47 Adam Smith touched on this phenomenon in his famous dictum that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, *The Wealth of Nations* (1937) 128.

does not impinge greatly on their business practices which match, or are in advance of, the standards laid down in legislation.[48] A second situation is where business realises that it is politically inopportune to be seen opposing regulation outright, and so accepts its inevitability, but pushes for amendments to reduce its effectiveness.[49]

II. THE OPERATION OF REGULATORY AGENCIES

There is clear evidence of regulatory agencies failing to function in the manner expected — failing, for example, to take action against important violations of the law. The implicit assumption of this Part is that it is too simplistic to assume that such regulatory failures are endemic to regulation, for they are always incapable of remedy. Important among these causes of regulatory failure are the forces in the emergence of business regulation, for we saw in Part I that regulation may be designed to benefit business rather than to render a public benefit, or as a symbolic gesture to convince the public that a "problem" is being dealt with by government. In this Part various other explanations for regulatory failure are outlined: firstly, regulation may fail because the legislative provisions establishing it are ambiguous, conflicting, or simply not commensurate with its ostensible goals; secondly, the enforcement of regulation by the agencies charged with the task may be inadequate for reasons such as a shortage of financial or human resources; and thirdly, the effectiveness of a regulatory agency may be subverted by pressures from the environment in which it operates.

1. The Design of Regulatory Legislation

Regulation is only as strong as its legislative mandate however well-endowed with resources and dedicated to legislative purpose a regulatory agency might be, or however compliant those being regulated.[50] The consequences of the defective design of legislation are that the regulatory agency cannot adequately enforce it, the businesses whose behaviour it ostensibly regulates avoid its effects, and those who are supposed to benefit do not do so. Many instances of "regulatory failure" are in fact a failure to achieve a legislative mandate which, despite popular perceptions, a regulatory agency was never given.[51] Not only might the substantive legislative provisions be inadequate for the task which a regulatory agency is supposed to perform, but legislation might be defective in a more technical sense. Business might be able readily to avoid liability for breaches of regulatory law committed by

48 A. Stone, note 43 *supra,* 22, 95, 160-61, 223. R. Cranston, *Regulation Business* (1979) 150-153. Such examples belie the "new class" model of social regulation — that social regulation is the product of an unrepresentative new class, wanting to undermine the values served by corporate capitalism. See *e.g.,* P. H. Weaver, "Regulation, Social Policy, and Class Conflict" (1978) 50 *Pub. Interest* 45, 56-58. *Contra* B. Bruce-Briggs, *The New Class?* (1979).

49 See *e.g.,* L. Benson, *Merchants, Farmers and Railroads* (1955) 234, 245.

50 "And wisdom in the formulation of standards, in the grant of powers, is the first step toward realization of those hopes now so definitely held of the administrative process." J. Landis, note 30 *supra,* 88.

51 P. Nonet and P. Selznick, note 2 *supra,* 113n.

employees in the course of their employment.[52] In terms of legislative technique, broad, criminal prohibitions are not always as effective as other techniques such as statutory standards, requiring information disclosure, or prior approval (for example, through licensing).[53] With sanctions there is the dilemma that if they are too weak businesses might treat them as an acceptable business cost.[54] Moreover, sanctions might generally be imposed only after considerable delay and might not be coupled with any remedy for those disadvantaged by the breach.

Defects in the design of legislation can occur because political conflicts, when it is enacted, are reflected in its provisions, or because of a deliberate decision by the legislature to have a regulatory agency resolve a matter, as where there are difficulties in being more explicit without the benefit of experience, or the legislature itself does not wish to offend those regulated. Moreover, those drafting the legislation might not foresee particular problems, which might be attributable to the difficulty with all legislation of capturing the future, especially if those regulated can employ substantial legal and other talent to maximize avoidance.[55] Finally, ambiguities and gaps might simply be because not enough attention is given to drafting, or be a product of drafting difficulties, accentuated in some countries by the constitutional problems associated with a federal system.[56]

At another level legislative design is shaped by the legal culture. One aspect is the tradition in which legislation is drafted, which partly reflects the relationship between the legislature and the courts. In some jurisdictions legislation must be very precisely drawn, despite the increased possibility of error this leads to, for the courts favour a literal rather than a purposive approach to interpretation.[57] Another aspect is that just as institutions develop a momentum so too does legislative design, for once a particular approach is adopted there are incentives for it to be continued. Despite its defects, an approach may be continued because of lethargy, a reluctance to think out new legal approaches, or of familiarity with the existing approach by its administrators, those whose behaviour is controlled, and possibly its beneficiaries. On the other hand more fundamental issues may be at stake, for a change in legislative design may go to the matters of substance, as where it would produce more extensive regulation.

There has been considerable criticism of the wide discretion entrusted to some regulatory agencies, for example, the broad legislative standards they enforce and their wide rule-making power.[58] A criticism is that this wide discretion renders regulatory agencies more exposed to undesirable influence from the regulated, one reason being that regulators and regulated come into contact over where the

52 See generally, S. M. Kriesberg, "Decision Making Models and the Control of Corporate Crime" (1976) 85 *Yale L. J.* 1091; Developments in the Law — Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions (1979) 92 *Harv. L. R.* 1227, 1246-58.

53 Note 7 *supra.*

54 Comment, Increasing Community Control over Corporate Crime — A Problem in the Law of Sanctions (1961) 71 *Yale L. J.* 280, 286-87.

55 H. L. A. Hart, *The Concept of Law* (1961) 121-132.

56 Economic Council of Canada, note 1 *supra,* 23.

57 W. Twining and D. Miers, *How to do Thing With Rules* (1976) 206-08.

58 *E.g.,* H. Friendly, *The Federal Administration Agencies* (1962) 163-73. See also, J. A. Henderson, R. N. Pearson, "Implementing Federal Environmental Policies: The Limits of Aspirational Commands" (1978) 78 *Colum. L. Rev.* 1429, 1448-1450.

boundaries will be drawn up in practice.[59] Wide discretion can be criticized as violating the legal ideals of certainty, for those to whom a legislative command is addressed might not know what is expected of them, and of formal equality, because a standard applied to one of the regulated might not be applied to others in similar circumstances.[60] Moreover, democratic theory demands that primacy should be given to legislative purpose, so consequently legislation stands condemned inasmuch as it permits regulatory agencies to substitute different goals from those contemplated by the legislature.[61]

Apart from these qualifications, however, it is difficult to formulate general rules about how wide the discretion should be which regulatory agencies administer. In some cases regulatory agencies need comparatively wide discretion, as where the situations being regulated are relatively unlike. The nature of the regulatory task may preclude precisely stating a standard because the only practical way to develop it is from experience or after detailed investigation. Where legislatures short-circuit this process and prescribe a specific standard, the regulatory agency may not be able to adopt more creative or feasible methods of achieving legislative policy.[62] However, there can be no definite rule of prudence that legislation ought always, for example, to adopt performance standards instead of specifying how regulated businesses should behave. In particular cases the legislature might be able to decide that a specific standard is the most effective means of reaching the desired goal, or it might decide that certainty and enforceability outweight any advantages that performance standards theoretically have in achieving legislative purpose.[63]

Another instance where relatively wide discretion may be desirable in legislation is if the context of regulation demands that standards be moulded to the particular circumstances: specific rules would deprive the regulatory agency of flexibility to assess all the relevant factors and would consequently reduce the chance of the agency achieving its legislative purpose. Some legislation expressly prevents regulatory agencies from taking economic factors into account in the settling and enforcement of standards; in other cases the courts have held that on an interpretation of the legislation regulators must not do so but should simply apply the statutory standards.[64] The exclusion of economic factors from consideration cannot be condemned, however, since the legislature might simply be deciding to make one particular value paramount, such as health or clean air.

59 T. J. Lowi, The End of Liberalism (1969) 153. Fuller put the point more broadly when he suggested that a case of regulatory agencies tending to identify with the regulated "may lie in a desire to escape from the frustration of trying to act as a judge in a situation affording no standard of decision. To escape from a moral vacuum one has to identify oneself with something, and the most obvious object of identification lies in the regulated industry." L. L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harv. L. Rev.* 353, 375.

60 R. Kagan, Regulatory Justice (1978).

61 *E.g.*, J. Jowell, *Law and Bureaucracy* (1975) 22-24.

62 Performance standards for air or water pollution, for example, fix the maximum concentration of a pollutant allowance from a given source, whereas a specification standard would require the polluter to incorporate particular apparatus to control pollution.

63 Compare, *e.g.*, 21 U.S.C. S348 (c) (3) (A) (1976) (The Delaney Clause) with 15 U.S.C. S57 (1976).

64 *Otterburn Mill Ltd.* v. *Bulman* (1975) *Phosphate Co-operative of Australia Ltd.* v. *Environment Protection Authority* (1978) 18 A.L.R. 210. *Contra, Reserve Mining Company Ltd.* v. *Environmental Protection Agency* 514 F.2d 492 (8th Cir. 1975.).

The criteria of certainty, equality before the law and achieving legislative purpose establish outer limits to discretion, but cannot determine in many instances how wide the discretion which is entrusted to regulatory agencies should be. What can be said is that the manner in which regulatory agencies exercise their discretion should be systematised and open to public scrutiny, subject to the limitation that this should not unduly inhibit their effectiveness. In some cases it may be possible to embody the manner in which discretion is being exercised in statutory form, without threatening its flexibility, for example, by specifying the criteria which the regulatory agency ought to take into account.[65] Generally speaking, however, legislatures have no great interest in structuring the discretion of regulatory agencies: the political pressures to do so are comparatively weak, and there is little kudos for legislators if they take the initiative themselves.[66]

Wide rule-making power in the field of business regulation is a crucial issue in the United States, where it is sometimes in the hands of independent regulatory agencies, but is not as important in other Western industrial countries, where formal rule-making power lies with the executive and might also be subject to legislative scrutiny.[67] In an effort to make the rule-making process in the United States more public and more accountable, the process has been judicialised: proposed rules are notified and it is then difficult to modify them; ex parte contacts are limited; a hearing is conducted in accordance with adversary principles; and appeal can be taken to the courts.[68] There is an obvious tension between fairness and efficiency when rule-making is judicialised in this manner. On the one hand judicialisation gives an air of fairness to the process, for interested groups have an opportunity to present their views about proposed rules. It seems that public interest groups prefer the judicialisation of rule-making compared with informal procedures because it provides them with a forum they would otherwise not have, leads to greater publicity for the issues, and builds up a record for appeal to the courts.[69] However, there is criticism of judicialisation, at least where it is excessive, on the grounds that it builds in inflexibility and delay, generates division rather than compromise, and does not always seem appropriate to exploring all possible courses of action, or assessing certain types of technical evidence.[70] Although rule-making has not been judicialised in other Western industrial countries, interested parties are usually consulted by government or government agencies about proposed rules — although there is generally no obligation for this to occur — and the rules are not infrequently

65 See generally, K. Davis, Discretionary Justice: A Preliminary Inquiry (1969); V. G. Rosenblum, "On Davis on Confining, Structuring, and Checking Administrative Discretion" (1972) 37 *Law & Contemp. Prob.* 49; J. S. Wright, Beyond Discretionary Justice (1972), 81 *Yale L. J.* 575; F. H. Thornforde, "Controlling Administrative Sanctions" (1976) 74 *Mich. L. Rev.* 709.

66 See, E. G. Krasnow and H. M. Shoosan, "Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission" (1973) 10 *Harv. J. Legis.* 297, 325-26; O. A. Hartley, "Inspectorates in British Central" (1972) 50 *Pub. Admin.* 447, 456, 463.

67 See K. C. Wheare, *Legislatures* (2nd ed. 1968) 111-12, 148-49; B. Schwartz and H. Wade, *Legal Control of Government* (1972) 90-100.

68 G. Robinson, E. Gellhorn and H. Bruff, *The Administrative Process* (2nd ed. 1980) 30-32, 127-28, 180-82, 419-431.

69 G. Robinson, "The Federal Communications Commission: An Essay on Regulatory Watchdogs" (1978) 64 *Vir. L. Rev.* 169, 231.

70 A. Shonfield, *Modern Capitalism* (1965), 321.

modified in the light of their representations.[71] The advantages are greater flexibility and the recognition that rule-making is part of the political process, but the disadvantages are that only established interests groups tend to be consulted as a matter of course.

2. The Structure of Regulatory Agencies

The structure of regulatory agencies can contribute to regulatory failure, inasmuch as this leads to the pursuit of trivial cases, the promulgation of weak standards, or laxness in the enforcement of the law. Key factors in the structure of regulatory agencies which lead to regulatory failure include:

(i) The Manner in which Regulatory Agencies obtain their Cases:

Regulatory agencies must strike a balance between being reactive (obtaining their cases through complaints) and being proactive (taking the initiative themselves to obtain cases).[72] Complaints are a particularly important source in drawing an agency's attention to problems, especially when it lacks the resources to engage in widespread detection work itself. Some problems are such that without complaints a regulatory agency would be hard-pressed to know about them, even if it engaged in systematic inspection. However, some regulatory agencies do not obtain a representative sample of complaints because they do not publicize their existence or disseminate information about their work, while others positively discourage complaints, possibly through fear that their slender resources will be over-stretched.[73]

While complaints are important for regulatory agencies, it is fatal for them not to engage in proactive work. Firstly, problems may be complex or diffused over time, so that not many people complain.[74] Secondly, those in general who have most cause for complaint complain least, with the result that enforcement agencies may be unconsciously biased, because they respond unduly to particular sections of the population. For example, even if poor people are knowledgeable about the regulatory agencies charged with overseeing particular problems, they might lack the confidence or contacts to initiate and carry through with complaints.[75] In addition, those such as poorer tenants and low paid workers may be reluctant to complain to regulatory agencies because of their vulnerable position, for they might easily lose their housing or their job through vindictiveness. Finally, over-reliance on complaints can lead regulatory agencies to handle trivial matters without any thought as to how these fall into the overall strategy mapped by legislative purpose.[76]

71 See *e.g.*, J. J. Richardson and A. G. Jordan, *Governing Under Pressure* (1979).

72 On reactive and proactive modes, see D. J. Black, "The Mobilization of Law", (1973) 2 *J. Leg. Studies* 125; A. Reiss, *The Police and the Public* (1971).

73 R. Cranston, note 48 *supra*, 60-61. See generally, P. Asch, "The Determinants and Effects of Anti-trust Activity" (1975) 18 *J. Law & Econ.* 575.

74 See generally, H. Edelhertz, *The Nature, Impact and Prosecution of White Collar Crime* (1973); P. Finn and A. Hoffman, *Prosecution of Economic Crime* (1976); L. Mayhew, *Law and Equal Opportunity* (1968).

75 See E. H. Steele, "Fraud, Dispute, and the Consumer: Responding to Consumer Complaints" (1975) 123 *U. Penn. L. Rev.* 1107, 1123-27; R. Cranston, note 48 *supra*, 61-63; R. Arens and Pennock & J. W. Chapman (eds), *Due Process* (1977) 126.

76 See, American Bar Association, The Federal Trade Commission (1969) 2; A. Stone, note 43 *supra*, 183-184; R. A. Posner, "The Federal Trade Commission" (1969) 37 *U. Chi. L. Rev.* 47, 71.

Many regulatory agencies have a patchy record in proactive work. Inadequate resources are an obvious explanation, but within this constraint a crucial factor is that regulatory agencies often seem to lack an aggressive attitude in monitoring their field of regulation and in securing compliance with the law. Moreover, many do not seem to have established a sense of priorities in which limited resources are used in the most efficient manner. Information needs to be accumulated to set priorities depending on factors such as how seriously people view particular problems, the harm these cause, the vulnerability of those involved, and whether regulatory action is likely to have any impact. Complaints have an obvious role here in identifying patterns in relation to particular practices, institutions or laws.[77] Bureaucratic structuring can ensure that an emphasis on proactive work is incorporated into the routine work of an agency. For example, agency officials can be required to give reasons why they do not recommend further legal proceedings when a breach of the law is detected, although a danger with this is that officials will overlook breaches so that they are never recorded in the first place.[78] Another possibility is to establish specialist units within regulatory agencies which concentrate expertise and induce officials to demonstrate their activity in that aspect of the work.

(ii) Bureaucratic Features:

The historical development of a regulatory agency can influence its behaviour: for example, a regulatory agency which began as small, and poorly endowed, might have had to adopt a restrictive view of its powers and that view, with modifications, continues to shape its consciousness.[79] A regulatory agency might use precedent or certain physical or accounting measures as a basis for decision-making, but this inhibits its effectiveness by causing it to pursue certain types of cases (*e.g.*, trivial cases) to the exclusion of others.[80] There might be different regulatory agencies covering the same field, with little co-ordination between them because of jurisdictional divisions or bureaucratic jealousies. Ease of enforcement might induce a regulatory agency to favour a particular policy, such as to require design standards over performance standards, even if this leads to unnecessary rigidity. If lawyers predominate in an agency that might incline it to pursue a litigation strategy, regardless of effectiveness.[81] Of necessity, regulatory agencies have links with the regulated — to obtain information, to advise the regulated about compliance with standards, and to enforce the law — and as a result of these contacts and through other channels such as the trade press become unduly sympathetic to the industry view-point.[82]

77 See S. Weaver, note 16 *supra*; R. A. Katzman, "The Federal Trade Commission" in The Politics of Regulation, note 36, *supra*, 152, 165.

78 On the discretion of field officers, see, A. Downs, *Inside Bureaucracy* (1967) 134; J. Bordua and A. J. Reiss Jr., "Command, control, and Charisma: Reflections on Police Bureaucracy" (1966) 72 *A. J. Soc.* 68, 70.

79 J. Gardiner, *Traffic and the Police* (1969) 111, 153.

80 M. Lipsky, *Street-Level Bureaucracy* (1980) 51; Kelman, "Regulation by the numbers — The Consumer Product Safety Commission" (1974) *Pub. Interest*, No. 36, 83; S. Breyer, note 2 *supra*, 569-70.

81 B. Behrman, "Civil Aeronautics Board", in *The Politics of Regulation*, note 36 *supra*, 75, 117.

82 See B. Mitner, note 2 *supra*, 212-13; S. Breyer, note 2 *supra*, 572; K. Deutsch, *Politics and Government* (1970) 56;

The relative paucity of human and financial resources available to a regulatory agency, in relation to the magnitude of the regulatory task, are further factors in the implementation of any statutory mandate.[83] In discussing how responsibility for 100,000 establishments was transferred at the one time from local authorities to the factory inspectorate, Marx noted that "care was taken at the same time not to add more than eight assistants to their already undermanned staff".[84] The fewer the resources available to a regulatory agency, the more its decisions must be reached with inadequate information, unless the agency relies on those it regulates for information, whereupon it is more susceptible to unacceptable influence. Law enforcement capacity is dependent on adequate resources, especially to investigate complex wrongdoing and then to pursue it through the courts. Limited resources lead many regulatory agencies to pursue the less complex (and less significant) cases, while some virtually abandon law enforcement and instead concentrate on seeking a voluntary cessation of wrongdoing and perhaps also restitution for its victims.

(iii) The Background and Attitudes of Regulators:

Regulatory failure is also a product of the background, attitudes and behaviour of the officials of regulatory agencies. The background of regulators is a central feature of the "capture theory" — that regulatory agencies are "captured" by those they are supposed to regulate — for it is said that regulators have served in the relevant industry, will be indoctrinated with its views, and that those who intend to join it later temper their actions so as not to jeopardize their careers.[85] An empirical study in the United States found that the appointment of former employees of a regulated industry to a regulatory agency increased the likelihood of decisions favourable to the regulated industry, such as whether to impose a sanction for violation of regulatory standards or whether to allow a greater concentration within the industry.[86] While the revolving door phenomenon is an important cause of regulatory failure, it should not be over-emphasized. First, the phenomenon is not uniform across regulatory agencies — agencies responsible for social regulation might be staffed by officials with far fewer links with the regulated[87] — and does not affect all officials equally (*e.g.*, political appointees v. career public servants). Secondly, any measure of the extent of the revolving door phenomenon depends on the definition of prior or subsequent employment and whether it includes

83 See *e.g.* W. M. Evan, "Law as an Instrument of Social Change", in A. Gouldner and S. Miller (eds), *Applied Sociology* (1965) 285-89; G. S. Becker and G. J. Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers" (1974) 3 *J. Leg. Studies* 1; For specific examples see, M. A. Rothstein, "OSHA After Ten Years: A Review and Some Proposed Reforms" (1981) 34 *Vand. L. Rev.* 71; R. Hamilton, "Rulemaking on a Record by the Food and Drug Administration (1972) 50 *Texas L. Rev.* 1132.

84 K. Marx, *Capital* (1957) Vol. I, 494.

85 See *e.g.*, M. Bernstein, note 2 *supra*, 184-85; M. Edelman, *The Symbolic Uses of Politics* (1964); L. Kohlmeier, *The Regulators* (1969). The major contacts may be with representatives of the regulated (*e.g.* law firms) rather than the regulated themselves. B. Cole and M. Oettinger, *Reluctant Regulators* (1978) 33-34.

86 W. T. Gormley "A Test of the Revolving Door Hypothesis at the FCC" (1979) 23 *Am. J. Pol. Sci.* 665.

87 This is a standard criticism: V. Thompson, *Without Sympathy or Enthusiasm* (1975) 66; J. Q. Wilson, "The Dead Hand of Regulation", (1971) *Pub. Interest*, No. 25, 39.

employment in enterprises working to further industry interests such as law firms or consulting firms. Thirdly, the phenomenon is not as prominent in countries where government service is relatively prestigious and the concept of a career public service is taken seriously, although there may be other avenues of "capture" in these jurisdictions such as government-industry committees.[88] Fourthly, behaviour attributable to factors such as the party political background of regulatory officials might be just as striking as that based on prior employment in the regulated industry.[89] Finally, the prior employment of regulatory officials might not affect their behaviour and their behaviour might not affect their future careers: for example, a short period in a regulatory agency might be an accepted route for a lawyer to acquire experience, while industry interests might prefer to recruit 'tough' regulatory officials, for this is taken as an indication of their ability.[90]

The behaviour of regulatory officials, in particular of senior officials, sometimes reflects an unduly narrow view of their role. This is partly forced on them by factors such as the political context or by a shortage of resources, but partly it derives from other factors such as an excessive concern for their own security or from a reluctance to create conflict with the businesses they are supposed to regulate.[91] Among the causes of the latter are the blandishments to which regulators are subjected from the regulated; the constant exposure of regulators to the view-point of the regulated; and the philosophy, shared by key sections of the community, that business is basically law-abiding, or at least as law-abiding as possible in the circumstances, with only a small minority of 'bad apples', and that consequently it will comply with regulatory standards automatically or if it is not doing so needs only to be informed of or reminded about its obligations.[92]

3. The Environment of Regulatory Agencies

Clearly regulatory agencies do not operate in a vacuum, but are subject to constant pressure from a number of sources. Three elements of the regulatory environment are identified: the political pressures, the influence of the courts, and the role played by the regulated and those supposedly benefited by regulation.

88 T. B. Smith, "Advisory Committees in the Public Policy Process" (1977) 43.

89 Note 87 *supra*, 675-76.

90 See Milton and Shelton, "A Model of Regulatory Agency Behaviour", *Public Choice*, No. 20 (1974).

91 R. K. Merton, *Social Theory and Social Structure* (1957) 249; P. I. Quirk. "The Food and Drug Administration", in *The Politics of Regulation* note 36 *supra*, 191, 204-05; L. J. Jaffe, "James Landis and the Administrative Process" (1964) 78 *Harv. L. Rev.* 319.

Ehrlich made the point in a general way:

"The significance of the statutes of a state cannot be understood until one knows the agencies whose function it is to put them into effect. Everything depends upon their educational and cultural endowment, honesty, skill and industry." E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936) 366.

92 On the perception by agencies that business is law-abiding: R. Cranston, note 48 *supra*, 32-39, 122; D. L. Snider, "Corporate Crime in Canada: A Preliminary Report" (1978) 20 *Can. J. Criminology* 142, 161; R. Kriegler, *Working for the Company* (1980) 65.

(i) Political Pressures:

Political pressures are not always, or even mainly, formal, since regulatory agencies can be influenced by the general political climate of a society as reflected, for example, in the mass media. Environmental protection agencies were established, or strengthened, during the sixties and seventies when the political climate seemed generally to favour environmental protection, but they have had to operate during a decade when many Western industrial countries have experienced an energy crisis, and have consequently been under pressure to sacrifice environmental protection in the interests of cheap energy.[93] Economic prospects, in particular the creation of unemployment and its political repercussions, are at the back of how some regulatory agencies approach their task, in influencing them to adopt a promotional attitude to a regulated industry if it is under economic threat, or to be lenient in enforcing regulatory standards against it if full compliance is beyond its economic capacity.[94]

There are instances of more formal political pressure, where the specific decisions of a regulatory agency have been aborted, or where regulatory agencies have had their legislative powers or resources curbed.[95] Attempts have also been made to affect the behaviour of regulatory agencies by appointing persons having a particular political persuasion to key positions within them.[96] Political interference with the behaviour of regulatory agencies is sometimes exercised in more subtle and hidden ways. No doubt regulators also defer to what they anticipate or believe to be the attitudes of their political masters. Generally speaking, however, those holding political power do not have a great interest in the mundane details of regulation, but only express general support or disapproval, unless there is a dramatic event, there are representations from the regulated industry, or the concerns (or at least the perceived concerns) of their constituents demand it. The keener interest which those in political circles have demonstrated in the details of regulation in more recent times follows because regulation has been linked to larger economic issues.

(ii) The Judicial Process:

The courts are another aspect of the context within which regulatory agencies work and are a further source of regulatory failure. The rules of evidence and procedure normally used by courts were developed when they handled relatively straightforward crimes, which could be readily comprehended by a judge and jury or a bench of lay magistrates, and are not always conducive to a speedy disposition of complex regulatory matters.[97] Organisational pressures and time constraints are other factors which militate against courts always giving proper consideration in proceedings involving regulation. Unlike regulators, judges will generally not build

93 R. Tobin, *The Social Gamble* (1979).

94 See *e.g.*, S. P. Huntington, "The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest" (1952) 61 *Yale L. J.* 467.

95 J. Q. Wilson, note 36 *supra*, 388.

96 See J. Graham and V. Kramer, Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission, 1949-1974, Senate Committee on Commerce, 94th Cong. 2nd Sess. (Comm. Print 1976).

97 H. Mannheim, *Criminal Justice and Social Reconstruction* (1946) 166-67.

up any expertise in particular areas of regulation because of the diversity of their work and the nature of their professional lives and training. Assuming that legal proceedings are not aborted, years might elapse before all appeals are exhausted and a matter is finalised by the courts.[98] The regulated can take advantage of these delays if they wish to avoid or minimize the effects of regulation, although delay will work to their detriment if they desire to obtain regulatory approval for a course of action.

Apart from whether courts are suitable in a structural sense to handle regulatory matters, the attitude of the judges to regulation has also been a source of concern. It is said that the courts unduly restrict the powers of regulatory agencies, are too favourable to the regulated, and overlook the interests of beneficiaries in judicial review, while they do not treat non-compliance with regulatory standards seriously enough in enforcing the law.[99] These defects might be attributed partly to the common background which judges share with the regulated, partly to legal education which emphasizes procedural concerns at the expense of the substance of public policy, and partly to the professional life of judges before their appointment to the bench which is spent representing mainly the regulated and possibly the regulators rather than the beneficiaries of regulation. Without detailed studies it is difficult to make blanket statements about the attitude and behaviour of judges or about how these are determined. Just as there are decisions in which the courts have stifled regulatory agencies, so there are decisions giving a generous interpretation to regulatory powers.[100] Decisions which overlook the interests of beneficiaries stand alongside those where, for example, the courts have ordered regulatory agencies to speed-up rule-making to the advantage of beneficiaries. Similarly, the evidence on law enforcement is not clear-cut, for courts have both supported and undermined the activities of regulatory agencies, and have imposed both inordinately small and quite substantial sanctions for breaches of regulatory standards.[101]

Finally, it should be noted that lawyers frequently give too great an emphasis to the impact of the courts on the regulatory process: in most cases pressures from the political environment and from the regulated are far more important.

(iii) The Regulated and the Beneficiaries of Regulation:

Mention has already been made of the revolving door phenomenon and of other links between regulatory agencies and the regulated.[102] Coupled with other factors, such as the favourable conception held of business by important sections of the population, these links can cause regulatory agencies to accommodate to the

98 D. P. Rothschild, B. C. Throne, "Criminal Consumer Fraud: A Victim-Oriented Analysis" (1976) 74 *Mich. L. Rev.* 661, 683.

99 See *e.g.*, G. R. Baldwin, "A British Independent Regulatory Agency and the 'Skytrain' Decision" (1978) *Pub. L.* 57.

100 Compare the decision of Taylor C. J. in *R.* v. *McMahon* (1976) 2 A.C.L.R. 543 with that of the Court of Criminal Appeal in *R. v. M & Ors* (1979) 4 A.C.L.R. 610.

101 Compare for example the relatively high fines imposed for breaches of the Trade Practices Act 1974 (Cth) with the relatively low fines imposed by state magistrates' courts for breaches of health and safety at work legislation. See generally S. A. Yoder, "Criminal Sanctions for Corporate Illegality" (1978) 69 *J. Crim. L.* 40.

102 See text accompanying notes 82 and 86 *supra*.

regulated, a situation which in extreme cases can be described as capture. Accommodation might be reflected in weak regulatory standards or in a lenient enforcement of the law.

Political mechanisms, which favour well-organised interests, are an important factor in the influence which the regulated have in relation to regulatory agencies, and in the frequent absence of countervailing forces. The reformers who advocated regulation often lose interest once regulation is achieved because they are satisfied with the symbolic passage of legislation or because they assume that the legislative mandate will be automatically implemented.[103] Potential beneficiaries of regulation are generally not organised, for those such as consumers and users of the environment have diffuse interests and little individual incentive to combine, although their stake might be high in the aggregate.[104] An exception is the trade union, for workers have the incentive to act collectively in relation to issues such as the regulation of health and safety at work.[105] Regulatory agencies themselves can do much to stimulate beneficiaries to organise and to oversee regulatory activity by encouragement, financial grants, training, and so on.[106]

If the potential beneficiaries of regulation are generally not organised, part of the gap is filled by political entrepreneurs and public interest groups who monitor the activities of regulatory agencies, adopt an advocacy role in public forums, and advance the cause of regulatory reform.[107] However, political entrepreneurs and public interest groups generally have limited resources and an uncertain future.

III. THE IMPACT OF BUSINESS REGULATION

Who gains and who loses as a result of business regulation? Does business regulation have its intended impact on the behaviour of businesses? Does it actually improve the lot of those for whom it is ostensibly designed? Are there unintended and perhaps unexpected side effects such as economic inefficiencies which, if taken into account, seriously detract from its intended impact? There are intractable problems in answering these questions. With some business regulation the positive effects cannot be gainsaid: the reduction in air and water pollution, at least visible pollution, is readily apparent in many areas, although it is said that this is counter-balanced by greater pollution in other areas and that in any event the gains have been achieved at considerable cost.[108] The impact of other business regulation is similarly contentious. There are studies which purport to show that health and safety at work regulation has not brought about a significant or widespread

103 M. Edelman note 86 *supra*, 35-41; *cf.* E. Bardach, *The Implementation Game* (1977) 38.

104 M. Olson, *The Logic of Collective Action* (1965) is the classic statement.

105 J. Q. Wilson, "The Politics of Regulation" in J. W. McKie (ed.), *Social Responsibility and the Business Predicament* (1974) 135, 159.

106 P. Sabatier, "Social Movements and Regulatory Agencies: Toward A More Adequate — and Less Pessimistic — Theory of 'Clientele Capture'" (1975) 6 *Policy Sciences* 301.

107 See *e.g.*, M. Nadel, *The Politics of Consumer Protection* (1971) 176-84, 191-209; D. A. Bronstein, "The AEC Decision-Making Process and the Environment: a Case Study of the Calvert Cliffs Nuclear Power Plant" (1971) 1 *Ecology L. Q.* 689.

108 P. MacAvoy, *The Regulated Industries and the Economy* (1979) 100-101.

reduction in accident rates or improvement in worker health.[109] Critics point out that these studies do not always take into account factors such as the low intensity of enforcement or the difficulty of obtaining adequate data, while their focus on overall activity swamps any effects that specific regulation might have. Thus studies which have concentrated their attention on regulated hazards and specific industries, notably, the very hazardous industries, show that health and safety at work regulation has caused a substantial decline in injuries and illness.[110]

A real difficulty in assessing the impact of business regulation is in isolating the relevant causal factors. Business regulation is one among a number of instruments of social control, and it may be impossible to isolate its impact on business behaviour from that produced in other ways.[111] A business may comply with the terms of regulation because of factors such as inertia, the failure to realise that there are viable alternatives, or political and community pressures. Moreover, there is the problem of identifying effects. For example, business regulation may not have any visible impact because it is not enforced, because the regulated ignore it, because it is technically impossible for the regulated to change their behaviour beyond a certain point, or because its effect is simply to hold the ground against a deterioration in business behaviour. With these qualifications in mind, it is possible to advance some tentative assessments of the impact of business regulation.

1. Social Factors in Regulatory Impact

There are difficulties in achieving an impact through business regulation when a large number of businesses must be convinced to modify their behaviour, without their having any direct economic incentive to do so. Whatever their attitude to regulation, some businesses comply with the law, and in some cases go beyond its requirements because they believe that in general laws should be obeyed, or because they wish to avoid legal proceedings.[112] Membership of professional associations close connections with an area, or a high public profile might make businesses reluctant to damage their reputation by engaging in unlawful or disreputable practices. Nonetheless, some businesses fail to make organisational changes to minimize wrongdoing, some are indifferent to regulatory obligations, and others deliberately flout them, taking the risk that legal proceedings will not be instituted, or if instituted will prove unsuccessful.[113] In legal terminology the latter go beyond avoidance to evasion of the law. They do not see the objection to maximizing profits by using their own property as they please, and regard court proceedings as a normal business hazard, or as a risk attached to their way of doing business. A popular

109 P. E. Sands, "How Effective is Safety Legislation?" (1968) 11 *J.L. & Econ.* 165; R. S. Smith, "The Impact of OSHA Inspections on Manufacturing Injury Rates" (1979) 14 *Journal of Human Resources* 145.

110 B. J. Whiting, "OSHA's Enforcement Policy" (1980) 31 *Lab. L. J.*; M. S. Lewis-Beck & J. R. Alford, "Can Government Regulate Safely? The Coal Mine Example" (1980) 74 *American Political Science Review* 745.

111 See generally J. L. Pressman and A. Wildavsky, *Implementation* (2nd ed. 1979).

112 R. E. Lane, "Why Business Men Violate the Law" (1953) 44 *J. Crim. L. Criminology and Police Science* 151.

113 R. C. Baumhart, "How Ethical are Businessmen?" (1961) 39 No. 4 *Harvard Business Review* 6, 16.

perception, without, it seems, evidence to support it, is that smaller businesses are less likely than larger organisations to comply with regulation, possibly because smaller businesses have more intense feelings that the law is unfair because it unduly burdens them, or because they find it too complex to implement. The Dutch criminologist, Bonger, thought that competition was the crucial factor: the contest between large manufacturing establishments and the small factories and workshops forced the latter "to maintain the competitive struggle by incredibly long hours of labour, by an unlimited exploitation of the labour of women and children, etc., etc."[114] In all cases where businesses fail to comply with regulatory standards but could do so, the direct cause of regulatory failure is obviously not regulation but because business is subverting its intentions.

The organisational nature of the regulated has an obvious effect on the impact of the law. The possibility that at some time in the future, perhaps years hence, a business will be brought before a court because it disregards regulatory standards is not a pressing consideration when ordinary decisions are being made within a business organisation.[115] Businesses which are under pressure to reach their profit goals are quite likely to ignore regulatory standards because they are evaluated mainly in terms of their economic performance.[116] However, the impact of business regulation may vary with the nature of the businesses involved for some organisations implement regulatory standards more effectively because of their sense of social responsibility or because they have the necessary bureaucratic procedures for implementation and feedback.[117] The development of new technology might be an important factor in enabling a business to comply with regulatory standards, or to reach the goal towards which regulation is ostensibly aimed. Lawyers have some role in the impact of business regulation, since they communicate the legal requirements to their clients, and for this reason might be regarded as one of the agencies of social control in the community.[118] But lawyers are not always effective as agents of social control, for their advice may be ignored; their clients may take advice that regulatory standards are uncertain as an invitation to ignore them; and in some cases they may assist the regulated in evading the law.

2. *Economic Implications*

The advocates of substantial deregulation argue that in interfering with market processes, business regulation causes economic inefficiencies, and at the macro-economic level inhibits growth and leads to inflation.[119] The faith that markets will always lead to the efficient result seems largely to overlook that markets are

114 W. A. Bonger, *Criminality and Economic Conditions* (1967) 257. *Contra,* C. H. McCaghy, *Deviant Behaviour* (1976) 215, 227; D. Snider note 94 *supra*, 144. R. Cranston, note 48 *supra*, 138-39, 158.

115 Gross, "Organisations as Criminal Actors" in N. Denzin (ed.) *Studies in Symbolic Interaction* (1977).

116 See generally Braithwaite, "Transnational Corporations and Corruption: Toward Some International Solutions" 7 *Int. J. Soc. L.* 125.

117 R. Cranston Note 7 *supra*, 876.

118 T. Parsons, "Law and Social Control" in W. E. Evan (ed.) *Law and Sociology* (1962) 56, 66-67.

119 Note 114 *supra*, 106; Friendly (1980) *Harvard Law School Bulletin*, 36.

distorted in practice and that the economic world is one of second-best.[120] Despite its drawbacks, business regulation might be no less efficient than what would obtain under an improperly functioning market. There are objections to the type of technical analysis which concludes that business regulation leads to economic inefficiencies. For example, it frequently takes the form of a model built on simple (and often unrealistic) assumptions, from which are drawn conclusions which are then supported by reference to empirical data. Quite apart from the problems associated with this methodology, the empirical evidence used is generally open to conflicting interpretations, and there can be genuine differences over the allowances to be made for the different variables.[121] With regard to the macroeconomic issues there is the problem of separating the effects of business regulation from other causal factors, as well as the difficulty posed by the casual observation of strong economic growth in countries such as Japan, Singapore and Switzerland, all of which have significant business recognition.[122]

At a practical level, the cost of business regulation is a favourite basis from which to attack it. Some estimates of the cost of business regulation are around five per cent of gross domestic product, which includes the primary costs (the cost of operating the regulatory agencies and the compliance cost for industry) and also the costs of opportunities postponed or foregone, of resources misallocated and of technical change inhibited.[123] Clearly there are problems in business estimates being at the base of these calculations: distortion is possible, and businesses might also include costs, such as the cost of credit approvals, subsidy applications, and tax returns, which are hardly regulatory costs. Indeed, businesses might have to incur certain so-called 'compliance costs' irrespective of regulation, for the 'paper work' required may be part of any efficient accounting system. Critics have reduced the five per cent estimate substantially by excluding the costs associated with certain types of regulation (for example, that which clearly benefits business), and by taking into account that many businesses would meet the regulatory standards adopted irrespective of regulation.[124]

Most importantly, attacks on the cost of regulation frequently ignore that it has benefits, which is ironic when the benefits of certain types of regulation flow predominantly to business. At one level this neglect of benefits is because costs are more easily calculable than benefits since businesses can closely scrutinize costs. In so far as the benefits of regulation can be assessed, they seem to exceed the costs. One study calculates that in the areas of air and water pollution, auto safety, and worker safety, the benefits of regulation in the United Stages are five times the costs attributable to all forms of social regulation.[125] Even if business regulation involved

120 J. B. Clark and J. M. Clark, *The Control of Trusts* (revised ed. 1912) is an early statement.

121 Compare S. Peltzman, "The Effects of Automobile Safety Regulation" (1975) 83 *Journal of Political Economy* 677, with L.S. Robertson, "A Critical Analysis of Peltzman's 'The Effects of Automobile Safety Regulation'" 11 *Journal of Economic Issues* 587.

122 See *e.g.*, K. K. Lian, D. E. Allan, M. E. Hiscock and D. Roebuck, *Credit and Security in Singapore* (1973) 33-34, 53, 91-92, 95-97. I am grateful to Glenn Withers and Jonathan Pincus for this point.

123 *E.g.*, Weidenbaum and De Fina, *The Cost of Federal Regulation of Economic Activity* (1978).

124 Tabb, "Government Regulations: Two Sides to the Story" (1980) 23 *Challenge* 40; M. Green & N. Waitzman, "Cost, Benefit, and Class" (1980) May-June *Working Papers for a New Society* 39.

125 Tabb *Id.*, 48.

net costs, this would not be a conclusive argument that it should be abandoned, for people might be prepared to incur the costs because of their preferences or values. None of this means that business regulation is costless, or that where the benefits of regulation outweigh the costs the net benefit cannot be increased by regulatory reform.

Despite its limitations, economic analysis has a role in designing the scope and shape of business regulation. It cannot be denied that there are instances where business regulation, or at least the form it takes, is undesirable when its social and economic costs and benefits are weighed in the balance with other factors. Where it is desirable to move towards deregulation, transitional arrangements must be designed, since the distributional consequences of change adversely affect many people and undermine their justifiable expectations.[126]

IV. CONCLUSION

The causes of so-called 'regulatory failure' lie with the forces behind the emergence of business regulation; its actual form 'on the books'; the implementation of regulatory standards by the relevant agencies and by the courts; and the impact of business regulation in its social and economic context. It quickly becomes apparent on examining these four factors why business regulation might be thought to have 'failed'. An examination of the way business regulation emerges might show that it was designed to advance business interests, so that it should not be surprising if it 'fails' to achieve a more general public benefit. Regulatory failure might also derive from the form taken by the legislation: there might be deficiencies with the techniques used; its substantive provisions might not be commensurate with what is generally conceived of as its purpose; and the discretion devolved to the relevant agencies might be so wide that they can subvert the legislative purpose. In addition to the design of regulatory legislation, another major source of regulatory failure might be with the agency responsible for implementing it. The law-makers might be to blame here — at least in the first instance — for giving an agency limited powers, for not providing the agency with sufficient resources, for the appointments they make at the senior level of the agency, or for not supporting the agency because of pressure exerted by the regulated. However, regulatory failure might also be attributed to the context within which regulatory agencies operate, and the way this affects the impact of regulatory legislation, rather than to the agencies themselves. For example, businesses might fail to implement regulatory standards because competitive pressures oblige them to adopt production or marketing schemes in which legal obligations are secondary. Moreover, the benefits of regulation might be such that it cannot be justified, or at least cannot be justified in its existing form, in the light of its costs. Frequently, arguments about regulatory failure based on the economic impact of regulation are often spurious (*e.g.*, concentrating on costs to the exclusion of benefits), neglect other values to which economic ends might be considered subservient, and fail to consider the distributional consequences of alternative courses of action such as deregulation.

126 *Contra* R. S. Goldfarb, "Compensating Victims of Policy Change" (1980) 4 Sept.-Oct. *Regulation* 22.

If, as this paper has suggested, regulatory failure is a function of complex political, economic and social factors, but is not endemic to regulation, what possible lines are there of regulatory reform? On the assumption that legislative purpose is meant to be implemented a number of possible reforms are touched on or suggested by the previous discussion, for example, stronger substantive legal provisions in keeping with legislative purpose; more adequate resources for regulatory agencies; the appointment of senior officials committed to and capable of implementing legislative purpose; controls to minimize conflicts of interest resulting from the 'revolving door'; greater co-ordination among regulatory agencies; and more committed political support for their actions.

A frequently mentioned reform is for there to be greater public participation in and scrutiny of the activities of regulatory agencies. One reason that regulatory agencies are susceptible to the influence of the regulated is because the public is not as organised as the regulated. Participation can take various forms ranging from the public making representations to regulatory agencies, through their assisting to monitor the performance of regulatory agencies, to their taking part in the decision-making process. The Office of Public Advocate is one mechanism for strengthening the public interest point of view before regulatory agencies.[127] Practical difficulties occur if the public is to participate in decision-making. If mass participation is out of the question, how are the representatives of the public to be chosen? At what level should they operate — in existing structures or specially established review councils? Should participation be in relation to major policy making or at the level of daily operations? The experience with participation in public bureaucracies is that the law-makers may not intend it to be genuine but see it as a symbolic gesture to assuage public opinion.[128] In practice it might not be effective because the public's representatives are co-opted.

Greater publicity about the nature, operation and impact of business regulation is another method of regulatory reform. Publicity is said to further public accountability and hence effectiveness. 'Freedom of Information' legislation now operates in several Western industrial countries, but a crucial limitation is that it is confined to the sphere of government activity, whereas it is important for information to be available directly from the regulated.[129] In 1976 the United States Congress enacted the Government in the Sunshine Act, as a result of which regulatory agencies must generally conduct their meetings in public in the absence of compelling reasons to the contrary.[130] The Act seems to have led to an undesirable inflexibility in the conduct of meetings and to have had few, if any, compensatory advantages: apparently few attend the public meetings except for the occaisonal representative from a regulated industry or from the press.[131] A more effective

127 Proposals for a federal Consumer Advocate in the United States have failed. The National Consumer Council, a government-funded body in the U.K., takes up a wide variety of matters from traditional consumer protection to social services.

128 *Cf.* K. I. Michelman, "Formal and Associational Aims in Procedural Due Process" in J. R. Pennock & J. W. Chapman (eds), *Due Process* (1977) 126.

129 Of course a great deal of information about businesses can become available directly.

130 5 U.S.C. S552b (Administrative Procedure Act).

131 T. H. Tucker, "'Sunshine' — The Dubious New God" (1980) *Ad. L. Rev.* 537.

approach might be to oblige regulatory agencies to publish on a regular basis how they operate, in particular, how they exercise their discretion. As well as furthering public accountability this might improve their efficiency, because they would have to direct their collective mind to what they did in practice. Regulatory agencies should not be required to publish how they exercise discretion in all cases, for this might seriously threaten their effectiveness.[132]

The courts are a means by which these goals of participation and publicity can be furthered, although it is sometimes doubtful whether they can contribute a great deal to more effective regulation if they only operate intermittently and lack executive power. Public interest groups might institute prosecutions for breach of regulatory standards; seek judicial review of the activities of regulated agencies; and participate in, and appeal from hearings before regulatory agencies. Restrictions on the right to take such proceedings have been liberalised in a number of jurisdictions, but there are still important obstacles to public interest groups litigating.[133] It is important for participation to be effective, when it is permitted, and finance is crucial in this regard. There are several examples of regulatory agencies being able to finance participation from their own funds,[134] but in doing this there is the separate question of how they should exercise this responsibility. Judicial proceedings by private persons can sometimes supplement the action of regulatory agencies: for example, treble damage suits under United States anti-trust law strengthen the deterrent effect of the law by providing an incentive for the individual victims of unlawful activity to institute legal proceedings.[135] Of course the technique is inappropriate where unlawful activity causes a small amount of harm to each individual as with certain consumer protection and environmental offences.

More recent proposals for regulatory reform have as their main concern the cost of regulation. The proposals include the introduction of more extensive evaluation of proposed and existing regulation so as to analyze benefits, costs and alternative courses of action; the establishment of a Regulatory Council or Ministry of Deregulation to review regulatory programmes; the adoption of a regulatory budget; and the enactment of 'sunset' legislation, to give regulatory agencies a fixed life, subject to extension. While in principle the evaluation of regulatory programmes is commendable, in practice there is the dilemma of either entrusting the task of evaluation to the regulatory agency responsible for a programme, with the consequent risk of distortion, or of entrusting it to a central body, with the chance that it might be completed either superficially or only after considerable delay. The experience of evaluation in practice has been mixed: in some cases it has had clear benefits such as the removal of redundant regulations, but in others it has been obsessed with reducing regulatory costs, whatever the consequences.[136] The

132 The simplest case is the tax office which, through shortage of resources, does not investigate matters involving under a certain dollar value.

133 R. B. Stewart, "The Reformation of American Administrative Law" (1975) 88 *Harv. L. Rev.* 1669.

134 In the United States the Federal Trade Commission can do this.

135 See generally M. Landis, "Statutes and the Sources of Law" (1934) *Harvard Legal Essays* 220.

136 G. D. Brewer, "Termination: Hard Choices — Harder Questions" (1978) 38 *Public Administration Review* 338.

notion of the Regulatory Council or a Ministry of Deregulation would be less objectionable as a method of evaluating proposed regulation and reviewing existing programmes if it did not seem premised in favour of deregulation. The same bias seems inherent in the concept of the regulatory budget although with it the practical difficulties loom larger, primarily, how the ceiling on total costs would be established.[137] 'Sunset' legislation could lead to an agency devoting a considerable portion of its budget, and quite a substantial part of its time, to defending its continuation, given the assumption in favour of termination.[138]

Finally, there needs to be a close assessment of whether there are alternative methods to regulation. A popular suggestion is for a greater reliance on market mechanisms, reserving regulation for occasions when the problems are serious or the benefits substantial.[139] Governments can do a certain amount to foster market solutions by promoting the disclosure of information, strengthening anti-trust enforcement, encouraging technological innovation through the provision of incentives, and selective deregulation. While not denying that in some cases there is a role for the market as an alternative to regulation, other approaches cannot be ignored in public policy making. For instance, in many Western industrial countries government enterprise is not an uncommon avenue of public policy: a government enterprise may be a more effective and efficient instrument than regulation in fostering competition, encouraging private industry to improve the standards of its products and services, and setting the pace for standards for health and safety at work.

137 Wood, Laws & Breen, "Restraining the Regulators: Legal Perspectives on a Regulatory Budget for Federal Agencies" (1980) 18 *Harvard Journal of Legislation* 1; C. C. De Muth, "The Regulatory Budget" (1980) 4 Mar.-Apr. *Regulation* 29.

138 P. de Leon, "A theory of Policy Termination" in J. V. May and A. B. Wildausky (eds), *The Policy Cycle* (1978) 279. *Cf.* R. D. Behn, "The False Dawn of the Sunset Laws" (1977) No. 49 *Public Interest* 103.

139 *E.g.*, C. Schultze, *The Public use of Private Interest* (1977). On deregulation see B. Mitner Note 2 *supra*, 418-35.