

# BARTERING RATIONALITY IN REGULATION

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Legal powers given to administrative agencies are frequently used as bargaining chips in negotiations between government and business. This paper develops a typology that helps to explain the empirical variety of such bartering. Inquiring into the historical development of bartering, the article shows that what is new is not the practice of but the discourse about bartering. The discourse legitimates bartering with legal powers. This, in turn, will reshape practice, affecting the bargaining positions of the parties, the mode of law-making, the role of third parties and the public, and the potential of the law to induce social change.

## I. INTRODUCTION

There is general agreement that regulatory law as it has come to flourish in the advanced industrial West has discarded the vision of a pure substantive rationality in which laws are vigorously enforced to achieve specific ends, but there is little agreement about the tendencies that now dominate legal regulation. Some treat law as a largely symbolic means of legitimizing decisions reached through informal cooperation between the government and separate, private actors (Arnold, 1935) or as a result of ties that link governmental and private actors (Unger, 1976; Middlemas, 1979). Others purport to see a reflexive or procedural mode of regulation emerging (Teubner, 1983). A third group conceives of law as "metapower," which, by providing normative discourses, integrates potentially disruptive ideas (Ladeur, 1984). Finally, some emphasize the bargaining or negotiation element in regulatory law enforcement (Jowell, 1977; Scholz, 1984).

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In this article I shall build on the last approach, for I see "bartering rationality"<sup>1</sup> coming to dominate the law of modern regulation. This is most obvious where others have pointed to it, in the law enforcement process. The law is often a mere bargaining chip. A potential for full implementation may be "sold" for the target's partial compliance and agreement not to protest the attempted regulation in court. But bartering is not confined to the law enforcement stage. Bartering rationality is gradually being instilled into the program of the law itself. The law either allows substantive regulation to be traded for cooperation in the process of enforcement (thus drawing bartering from the "shadow of law" into the light of legality), or the law breaks substantive regulation down into pieces of rights (e.g., to pollute) that the administrative agency may "sell" (e.g., for the payment of charges) as a market mechanism for limiting disfavored conduct.<sup>2</sup>

In the pages that follow, I examine the relations between administrative agencies and private business to show how bartering rationality has come to affect both the content of regulatory law and the way such law is enforced. My aim is to develop a theory of bartering rationality grounded in recent empirical and theoretical work on administrative regulation.

## II. A TYPOLOGY AND SOME ILLUSTRATIONS

Many trade-offs are possible between regulatory agencies and those that they regulate. A firm may want an agency to pay subsidies, ease access to customers, lower taxes, help create a favorable image, build an infrastructure, provide cheap land, or just not interfere with its interests. The agency may, in turn, want the firm to provide employment, pay taxes, supply valuable goods and services, behave competitively, provide electoral support, not pollute, and the like. One could classify such trade-offs by substantive categories such as financial, material, or political, but this would not help us understand the role of legal powers and obligation in these relationships. More useful categories focus on the legal powers that regulatory

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<sup>1</sup> I prefer "bartering" to "bargaining" because bartering points out that something is being exchanged, whereas bargaining stresses the process of negotiation. My concern is more with the kind of commodities that are exchanged than with the kind of processes that occur.

<sup>2</sup> In order to avoid misunderstandings, let me emphasize that I am talking about the process of implementing *regulatory* law. I am not dealing with bartering between private parties where the law, by allocating rights and duties, gives each party bargaining chips to be used in their negotiations (Mnookin and Kornhauser, 1979: 968).

agencies can manipulate and the different ways that the regulated can obligate themselves. We shall examine these two aspects of the regulatory exchange in turn.

The agency's basic bargaining chip is its ability, either in law or in practice, to refrain from exercising its full authority. First, an agency may be able to regulate in an area but decide not to. I call this *forgoing regulation*. Second, the agency may be empowered or even mandated to take action that will force a firm to cease violating some law or regulation. When an agency refrains from doing so, I call this *forgoing a command*. Third, a firm may need a license to engage in some activity, and the situation may be such that the agency is empowered or even mandated to deny that license. When the agency refrains from doing so, I call this *forgoing the denial of a permit*. Finally, the agency may be able to impede a firm's ability to act by placing procedural barriers in front of permissible action. Alternatively, the agency may be able to short-cut its procedures or even use them to deny an effective voice to those who seek to block the firm's actions. When an agency cooperates with a firm by employing procedures that minimally hamper or even facilitate the firm's actions, I call this *removing procedural obstacles*.<sup>3</sup>

Agencies will ordinarily decide to offer these bargaining chips only in exchange for some sort of recompense.<sup>4</sup> The *quid pro quo* may take the form of efforts by the firm to accomplish the agency's goal, as where a polluter agrees to cease fighting

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<sup>3</sup> Often the law will not clearly specify an agency's power to regulate in a certain situation. However, even the failure to assert questionable power may be a bargaining chip. What the agency is giving up is the possibility that a court will decide that it in fact has the power it pretends to. Obviously, the agency's bargaining position will not be as strong when it is asserting a power it may not have. This is not only because the regulated firm might prevail in the instant case but also because the agency may wish to avoid a court determination. The agency might think that some other case or time will be better suited to the establishment of a favorable precedent, or ambiguous authority may be sufficient to regulate in most instances, and the agency may wish to avoid even a small chance that a court will hold that it has no authority in the matter.

<sup>4</sup> In many situations, of course, an agency's underexploitation of its authority will not be a conscious decision to create a "currency" that can be used in bargaining, but will result from practical limits on what the agency can do. Thus, a pollution control agency may refrain from ordering polluters to stop dumping waste not because it receives something in return but because it does not have enough inspectors to determine who is polluting. Where the underexploitation of authority is unintended and unavoidable and the regulated firm recognizes this, underregulation is unlikely to carry much weight as a bargaining chip. An important reason why agencies intentionally underexploit their authority is that the exercise of authority requires resources and by bartering an agency may spread limited regulatory resources over a wider area (Scholz, 1984).

the agency in court and immediately reduce its emissions by 50 percent if the agency drops its demands for the installation of an expensive scrubber that will reduce emissions by more than 50 percent. When an agency receives this kind of recompense, it is receiving *partial compliance*. The agency may also secure behavior from the firm aimed at goals that complement the agency's primary goals. For example, a zoning board may condition the grant of a variance on a developer's willingness to donate parkland to the city or construct a day care center in a shopping mall. Since such benefits are consistent with the agency's goals but extend beyond what it may require legally, I shall call them *extended benefits*. Both "partial compliance" (henceforth "compliance") and "extended benefits" require the firm to take some action towards achieving an agency goal. Alternatively, the agency may demand some sort of *payment* in return for the regulatory permission or non-action. For example, licenses commonly have fees attached and it has been proposed that certain rights, such as broadcast rights or permission to pollute, be auctioned off. Also, a fine may be accepted in lieu of compliance with a regulatory mandate, as when a developer who has exceeded a zoning board's height restrictions is fined but not required to raze a building. In all these cases, the money demanded of the regulatee may, depending on the law and agency custom, be spent to achieve one of the agency's primary or extended purposes, be devoted to the general costs of running the agency, or be returned to the public coffers.

When an agency barter with a firm, it may demand behavior that it is clearly empowered to require, or it may seek returns that it is arguably not authorized to demand. Indeed, the ability to regulate at the border of its authority may be a reason why an agency prefers bartering to efforts at full legal enforcement.

Bartering may, as I have already noted, be an extra-legal accommodation between an agency and the firms it regulates, or it may be built into the fabric of the law either as a matter of agency discretion or with the terms of permissible bargains closely regulated by statutes. In the usual instance the agency will be bartering over issues of law enforcement, but, again as I have noted, bartering may extend to the question of whether regulations should be issued in the first instance.

Table 1 provides examples of the outcomes that may be expected when agencies and firms engage in the kinds of trade-offs I have specified. These are pure types. Trade-offs that

Table 1. Some Examples of Trade-Offs in Regulatory Bartering

Agency gives	Agency gets		
	Partial Compliance	Extended Benefits	Payments
Removing Procedural Obstacles	"netting" of air pollution when factory expands	industrial siting agreement	industrial siting agreement
Forgoing a Command	consent decree in antitrust administration	offset agreement for old sources of pollution	charge for abuse of natural resources
Forgoing the Denial of a Permit	offset agreement for new sources of pollution	variance agreement in land-use administration	charge for abuse of dwellings
Forgoing Regulation	gentlemen's agreement about throw-away bottles		
Barters Fixed by Legislation			water pollution charge

involve more than one concession for more than one benefit are also possible. In illustrating these types, I shall focus first on discretionary barters in the enforcement process, next on the discretionary withholding of regulation, and finally on barters fixed by legislation. As the table suggests, enforcement process bargaining may be subdivided into the three categories of removing procedural obstacles, forgoing a command, and forgoing the denial of a permit.

#### A. *Removing Procedural Obstacles*

There are many ways in which agencies may act to remove procedural obstacles that threaten to delay, frustrate, or add to the expense of a project. For example, various laws require a public hearing before regulatory decisions (e.g., about zoning, construction permits) may be taken. When a project has major economic or political importance for the locality, a regulatory body may informally promise to ease the way towards master plans, zoning variances, and licensing approval for the private party in return for the private party's promise to invest money

and provide employment. Such arrangements, even if not officially binding, may lead to expedited hearings that the firm can treat as more of a public relations problem than a crucial step in persuading the agency, or to other savings of time and money. For example, in 1976, the British concern Imperial Chemical Industries (ICI) chose a site for a new plant on the North Sea coast near Wilhelmshaven, West Germany. A written planning agreement between the firm, the city of Wilhelmshaven, and the land of Niedersachsen included:

- obligation of ICI: to invest about DM 4 billion and to create about 2000 jobs
- obligation of the city and the state: to build a harbor, a road, and railroad tracks to make the site accessible, to speed up decision-making about applications for the necessary permits for construction and operation of the plant, and to take any measures to remedy the master plan in case it is found illegal for procedural reasons by a court.

Though this agreement avoids legally binding the authorities in the use of their powers (this would have been unlawful according to German zoning law),<sup>5</sup> it probably influenced the subsequent administrative decision-making. The hearing took place, and the zoning plan as well as the construction and operation permit were granted despite public protests over the environmental impact of the project. The overlap with the category I have labeled "forgoing the denial of a permit" is obvious.

The law also allows agencies in certain situations to circumvent public hearings and pursue abbreviated procedures. In German waste disposal law, for example, abbreviated procedures are allowable if the pollution added is low, if consent of the neighborhood can be predicted, or if the applicant firm wants only to expand rather than build an entirely new disposal site.<sup>6</sup> Thus, the agency may cooperate to limit time-consuming public scrutiny of the project in exchange for special efforts to control pollution or the extended benefit of greater industrial development.

The requirement of a license may even be abandoned. For instance, the EPA "netting" regulation provides that no preconstruction license is required for the expansion of a

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<sup>5</sup> The German Federal Administrative Court has held that predetermination of zoning discretion is unlawful if the nature of the project does not require previous collaboration between the zoning authority and the entrepreneur. See Bundesverwaltungsgericht 45, 309, 321.

<sup>6</sup> Abfallbeseitigungsgesetz (Waste Disposal Act) of Jan. 5, 1977, Bundesgesetzblatt I, 41, sec. 7 §2.

factory if the pollution added is offset by retrofitting or closing down old sources of pollution.<sup>7</sup>

### *B. Forgoing a Command*

Police power is commonly exercised through official commands. Agencies may declare conduct illegal, forbid it, order alternative conduct, revoke licenses, and proceed to enforce their orders either through powers vested in them or by invoking the authority of a court.<sup>8</sup> Ideally, the implementation proceeds in two steps. The agency first declares that the conduct violates the law or a license or, in cases of discretion, contradicts agency policy, and then orders the private actor to do or give up something. Should the regulated refuse to comply, the agency enforces the order.

Bartering occurs when the agency in exchange for degrees of compliance or extended benefits either adheres to its substantive goal but waives one or more of these formal powers, or refrains from demanding the full accomplishment of its goal. Bartering of this sort differs from non-enforcement because the agency seeks to achieve at least part of its goal. It differs from legalistic enforcement because the agency's formal powers to order behavior are "used" by not using them.

Examples of such trade-offs abound. In the United States consent decrees formalize trade-offs in a variety of regulatory areas. They are especially common in antitrust cases where the Justice Department or the FTC gains immediate compliance with its essential demands while the firm escapes being officially found to have violated the antitrust laws, with the possibility of private treble damage actions that this would bring.

Bartered agreements rather than unilateral commands are also common in the environmental protection area. For example, in one case I studied, the local authority of Konstanz tried to force three large firms to discharge their sewage into the communal sewer system and pay the standard charges. Although the firms were legally obliged to tap into the system, the local authority never actually enforced its order. Instead the firms were able repeatedly to forestall prosecutory

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<sup>7</sup> See 47 *Federal Register* 15 077, Apr. 7, 1982.

<sup>8</sup> In the United States and the United Kingdom, agencies usually have to seek enforcement of their orders in court. In Germany a distinction is made between criminal and administrative sanctions. Administrative sanctions are widely permissible, but they are often in the nature of the contempt power in the United States. Once the firm complies with the administrative order, the sanction must cease.

measures and to gain concessions on time limits, costs, and amounts of discharge. In return the companies agreed to treat some sewage through the municipal system and withdrew a threat to relocate (Winter, 1975). Richardson *et al.* (1983) and Ackerman *et al.* (1974) report similar regulatory compromises by water authorities in Great Britain and the United States.

The preceding examples involve agencies that engaged in less than full enforcement in exchange for partial or substantial compliance by the regulated firms. An agency may show similar restraint in exchange for extended benefits or payments. Offset agreements are a common example. A pollution control agency may refrain from imposing strict controls on one source of pollution in exchange for an agreement to control or shut down some other source. If pollution from the other source could not be legally limited, the agency may achieve a greater reduction in pollution than it could have received by exercising its powers to the fullest.<sup>9</sup> Similar restraints in exchange for financial payoffs are provided for by the German Ausgleichsabgabe für Natureingriffe (charge for abuse of amenities) found in nature preservation acts of some of the Laender. A developer whose project unavoidably destroys amenities may be asked to provide comparable amenities at another site, but if this is not feasible, he may pay a sum of money instead.<sup>10</sup>

### *C. Forgoing the Denial of a Permit*

This type of bartering is frequent where a private party needs official permission to engage in some potentially lucrative action. The agency acts as if it could deny permission but expresses a willingness to issue the necessary permit in return for specific benefits. The legality of such deals is often fuzzy. Sometimes the agency may have no obvious reason to deny the permit and no apparent authority to condition the permit on the trade-off sought. In other cases it may appear that the agency's mandate is to deny the permit regardless of what the firm promises to do. The agency's authority to secure the return it seeks also varies. Sometimes the applicant's obligation to take the action sought will be independent of the

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<sup>9</sup> Offsets of this sort are frequent in both the United States and West Germany. See Technische Anleitung Luft, Feb. 23, 1983, Gemeinsames Ministerialblatt 94, sec. 2.2.4.1 and 2.2.1.1, and 47 *Federal Register* 15 077, Apr. 7, 1982. For an American-German comparison see Rehbinder and Sprenger (1983).

<sup>10</sup> Naturschutzgesetz (Nature Preservation Act) of Baden-Württemberg, Oct. 21, 1975, Gesetzblatt 654, sec. 11 §5.



permit process, and the agency's authority to demand such action will be clear. On other occasions the return will be something that the agency could not compel the firm to do if it did not have a special source of leverage over it.

This type of bartering is perhaps most common in zoning and building law when a developer must have land rezoned or needs a variance to use land for a particular purpose. In such situations developers often offer and zoning boards often demand substantial payoffs in return for the required permission. Common payoffs include actions that are not legally required, such as the donation of land for a school or park, and commitments to refrain from actions that might otherwise be taken, such as a promise not to build above ten stories if land is rezoned to allow for buildings up to fifteen stories high.

The examples illustrate bartering for what I call extended benefits, but this often overlaps with bartering for payments. The latter may further be exemplified by the "Zweckentfremdungsabgabe" (charge for altering the use of residential houses). German state regulation prohibits turning residential houses into office space unless a permit is obtained. The practice is to issue the permit if the proprietor makes a financial contribution to the housing subsidies fund of the local authority (Winter and Unger, 1984).

Offset agreements in licensing new pollution sources provide examples of payoffs of the kind I labeled partial compliance. In Germany, a company that has applied for a new unit may be freed from using the best technical means (but not from abiding by the air quality standards) in exchange for improving old units that may belong to it or to other companies.<sup>11</sup> The rationale for this so-called "Gutschrift" (bonus) is to stimulate improvements of old units and to avoid withdrawal of investment in highly polluted areas, and thus to gain extended benefits for the agency. In fact, however, the Gutschrift may have destructive side effects on the enforcement of improvement regulation. Proprietors of old units may plead the economic infeasibility of improvement

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<sup>11</sup> In a non-attainment area where air quality standards are not met, the company may even be freed from meeting the standard in exchange again for improving old units (Technische Anleitung Luft, sec. 2.2.1.1b). American offset agreements are more restrictive than German ones, for no credit is given for pollution abatement that should have been accomplished in the past (42 U.S.C. § 7503 (1) Supp. I 1977; 47 *Federal Register* 15 077, Apr. 7, 1982; Currie, 1979: 197).

without new investments for which compensatory regulatory leniency could be offered.

#### *D. Forgoing Regulation*

Bartering may occur not only over the implementation of pre-existing rules or law, which I call forgoing commands, but also over the enactment of administrative rules and regulations in the first instance. An agency may, for example, agree not to enact a rule that is within its power if regulated parties agree to act as requested. From this barter the agency gains immediate compliance with its policy preferences and avoids a potentially costly and time-consuming rule-making hearing. The regulatees, on the other hand, avoid having an unwelcome policy institutionalized in a rule that might limit further bartering, hamper future attempts to change the policy, and provide a basis for more intrusive regulation than that which the agency currently seeks. In addition, the regulatees may avoid an embarrassing struggle against the rule and may get the agency to demand less than it would in a rule-making proceeding. This form of bartering is often somewhat misleadingly called a "gentlemen's agreement" (in Germany: *Selbstbeschränkungsabkommen*—self-restricting agreement).

A good example of such a "gentlemen's agreement" is a 1977 agreement about throw-away bottles and tin containers that the beverage producers and dealers, along with the packaging and steel industries, made with the German Minister of the Interior. In return for the Minister's agreement not to promulgate a rule requiring bottle deposits, the beverage industry agreed not to introduce large plastic bottles or enlarge the then current percentage of non-returnable bottles and cans; the packaging industry promised to increase the amount of recycled glass from non-returnable bottles, and the steel industry promised to buy more tin-can waste at market conditions. Within four years recycling of glass from throw-away bottles had risen by 50 percent, but after one year of stagnation the market share of throw-away bottles went up again, and within two years large plastic bottles appeared on the market (Bohne, 1982b).

#### *E. Standardizing Bartering by Law*

Bartering as I have thus far described it is an activity conducted largely at the discretion of the agency. The law provides the agency with resources with which to bargain, but it officially contemplates full enforcement rather than

regulation by bartering. Indeed, in some of the examples I have cited, the agency's willingness to barter is in apparent violation of its legal mandate, and in other instances the agency uses bartering to secure behavior that it has no authority to demand. Bartering rationality is not, however, confined to the sphere of administrative discretion. Laws may specifically provide for trade-offs that condition the legality of an action on the receipt of specified returns. Such laws incorporate a set of permissible barterers at their core and so are very much in the spirit of the agency actions we have been discussing. Yet, ironically, they don't promote actual bartering. By precisely specifying the permissible trade-off, they leave nothing to haggle over.

Laws incorporating such trade-offs have been espoused by economists who believe efficiency will be promoted if a price can be placed on certain activities that as a matter of public policy would otherwise either be left costless or forbidden. It has been argued that this approach is particularly well adapted to environmental law and that the state would be wise to accept payments in return for the relaxation of otherwise binding pollution control regulations.

Laws that follow this suggested pattern exist, although they are not common. One is the German statute passed in 1976 that introduced the *Abwasserabgabe* (water pollution charge).<sup>12</sup> The statute provides that whoever discharges fluid waste into public waters has to pay a fee. The statute does not, however, follow the suggestions of the economists in that limits on the amount of waste a firm can discharge remain. Instead, the charges are intended to provide an incentive to a firm to pollute less than they might under their license (Bohne and Hartkopf, 1982), and it serves as an additional sanction if the pollution exceeds the permitted level. However, the German statute as enacted does not seem to be well suited to its goals. The required payment at the time the statute was introduced was set at DM 6 (\$2.50) for each waste unit below the permitted amount and DM 12 (\$5) for each waste unit above it, when the cost of removing about 90 percent of one waste unit was about DM 80 (\$35).<sup>13</sup> The low fee resulted from the lobbying efforts of the industry during the legislative process.

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<sup>12</sup> *Abwasserabgabengesetz* (Effluent Charge Law), Sept. 13, 1976, *Bundesgesetzblatt I*, 2721, sec. 1.

<sup>13</sup> See the materials of the first draft of the statute in *Bundestagsdrucksache 7/2272*, June 18, 1974: 23.

Another example of a barter built into law is the German Garagenablösungsvertrag (relief payment for private parking lots). The state building acts require that adequate parking facilities accompany each new housing unit that is constructed. However, variances may be granted upon the payment of a certain sum if compliance with the regulation poses special difficulties.<sup>14</sup> This statute does not allow pure bartering since there are regulatory limits on the conditions under which money may be traded for the relaxation of legal constraints. Yet in practice the existence of charges may induce agencies to grant variances from the parking provision requirement more freely than they would if nothing were received in return. Thus, for a subset of cases where providing parking is difficult but feasible and paying charges is a less expensive alternative, the statute may allow the kind of choice by both parties that is the essence of the barter.

### III. HISTORY OF THE PRACTICE

Contrary to many authors (including myself in an earlier publication—Winter, 1978) who write as if bargaining and negotiation are newly discovered techniques of administrative regulation, I believe that a willingness to barter has long characterized regulatory relationships. It has existed along with strategies of sheer evasion or compliance on the side of the regulated and inaction or strict enforcement by the administrative agency.

For example, Sieber (1731), in one of the first empirical works on public law enforcement, shows that in medieval Germany guilds in the Reichsstädte (municipalities directly subordinated to the Kaiser) resisted the Kaiser's efforts to regulate the conduct of their members, claiming old rights of autonomy. The author reports that the guilds were induced to waive some of their rights in exchange for some weakening of regulatory requirements (1731: 126). Other examples refer to nineteenth-century liberalist factory legislation. Thus, Marx's classical analysis of English working hour regulation (1962: 294-320) shows that legislation limiting the working hours of children led employers to invent the so-called system of relays (shift work), which can be regarded as a compromise between full enforcement of and non-compliance with the law. Resort to bartering as a regulatory law enforcement is also suggested

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<sup>14</sup> See, e.g., Niedersächsische Bauordnung, July 23, 1973, Niedersächsisches Gesetz-und Verordnungsblatt 259, sec. 47.

by a study of German factory inspectors enforcing the Trade Bill of 1878 in Baden (Treiber, 1983),<sup>15</sup> a study of early English regulation of occupational safety (Bartrip and Fenn, 1980),<sup>16</sup> and an old English report about air pollution (Royal Commission on Noxious Vapours, 1878).<sup>17</sup> References to the early phases of interventionism include an instance of industry siting in Oldenburg, Germany, in 1906 (Winter, 1982: 33), variances under the Preussisches Fluchtliniengesetz (Prussian Zoning Act) of 1895 (Schulze, 1964: 134), and the practice of prosecuting violations of the antitrust legislation in the twenties (Kronstein, 1962).

Bartering rationality in rule-making may also be traced back for more than a century. An early example of a gentlemen's agreement that forestalled legislation is found in the history of steam boiler safety legislation in Britain. The Manchester Steam Users' Association was founded in 1854 to deter interventionist legislation, and in the short run it was able to do so by providing private inspection and insurance against liability (Bartrip, 1978: 85-92).

Laws that provide for trade-offs seem to be a more recent phenomenon, although there are some older examples, such as the 1939 German law which was interpreted to provide that a house-owner could be freed from the obligation to build a garage by contributing to a fund for the construction of public

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<sup>15</sup> After enforcement of the act in Baden had apparently been frustrated by widespread employer evasion, the factory inspectors appeared to achieve some compliance by entering into "amicable consultation" with those they regulated before issuing direct orders (Treiber, 1983: 24).

<sup>16</sup> The authors quote a factory inspector describing his role in 1860: "The popular view of the duties of an inspector is doubtless that he is an officer whose chief function is to enforce the law by prosecuting those who are found to have neglected a strict compliance with its provisions; but this is an erroneous as well as limited view of his duties. . . . His first and chief duty is to explain what the law requires; to point out how its various provisions can be carried out; to show that real difficulties do not exist; to reconcile apparent incongruities in the phraseology of the Acts. . ." (1980: 98).

<sup>17</sup> Having investigated the enforcement of the Alkali Acts of 1863 and 1874, the commission concluded as follows: "The reasons in favour of the cautious and gradual enforcement of the law, rather than the application of immediate and rigorous pressure, have been set forth by Dr. Angus Smith in his opening evidence. It is impossible to deny that there is force in his reasoning and that advantages have accrued from the course he has pursued. In the opinion however of many of the witnesses this policy, at first expedient, has been unnecessarily prolonged; and we believe that allowances should have been made for the shortcomings of manufacturers honestly striving to render due obedience to the law, more frequent instances of security exercised towards those known to have been animated by a different spirit would have been advantageous to the public, and desirable in the interests of the manufacturers themselves" (Royal Commission on Noxious Vapours, 1878: 28).

parking lots.<sup>18</sup> These older laws, however, were designed to deal with exceptional circumstances where the prescribed activity was difficult to accomplish. The modern version, at least as it is found in proposals for pollution charges and the like, treats the charge as a routine alternative to regulatory compliance, with the choice at the regulated's discretion. However, modern statutes, as we have seen, usually do not go as far as many proponents suggest and allow cash trade-offs only in circumstances like that of the *Abwasserabgabengesetz* mentioned earlier, which requires that some minimal degree of compliance has been achieved.

#### IV. THE HISTORY OF THE PUBLIC DISCOURSE

If bartering rationality in regulatory law enforcement is an old phenomenon, the public discourse that surrounds it appears new. Every generation that has confronted the difficulties of regulatory law enforcement and the reality of bartering has inescapably confronted the problem of how to think and speak about what was going on. It is only today that we appear ready to recognize partial enforcement and bartering for what they are and to defend their legitimacy.

The early discourse justifying regulation reflected the larger problem of justifying the amassing of public power that accompanied the rise of the modern bourgeois state. The answer to the problem was that the new power centers could be trusted because they were both bound by and committed to the "rule of law." While the "rule of law" has different political and ideological backgrounds in England, Germany, and the United States,<sup>19</sup> it was generally seen to imply elements of due process and equality of application. In Germany,

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<sup>18</sup> Reichsgaragenordnung, Nov. 19, 1939, Reichsgesetzblatt I, 219.

<sup>19</sup> The period of liberalism faced the problem of how the rising bourgeoisie could gain control over the absolutist sovereign and his bureaucracy (which more and more became a power of its own). In England the problem had been solved already by the late seventeenth century, whereas Germany took at least 150 years more. German absolutism developed more slowly and reached the riper and more stable form of "aufgeklärter Absolutismus" (enlightened absolutism), in which the Prince felt himself bound to his own rules, whereas "royal absolutism" in England "was gone before its theory [namely, Bodin and Hobbes] could be successfully uttered" (Ward, 1928: 21). The state in German liberalism was the monarch as bound by legislation, a "constitutional" sovereign. In England the state was bourgeois self-government through Parliament (Unger, 1976: 181). In the United States, on the other hand, the establishment of sovereignty developed simultaneously with the democratic creed. Thus, no absolutism could emerge. Sovereignty of the state, which indeed had to be created in order to conceal the clashing social factions, was conceived only in terms of parliamentary and judicial control.

administrative courts were created to guarantee the lawfulness of regulatory action. This was necessary—as one of the most influential German legal philosophers of the time tells us—because of the constant proclivity of administration to circumvent the law.

Between these two areas [of lawful and unlawful activity] there is a third area of administrative behavior which though formally being within the scope of the law through partiality (*iniquitas*) twists around the proper goal of the regulation to the one's advantage and to the other's detriment. It is in this area where the Prussian administrative courts have to face their major task, and here they ought to act as a countervailing organism against corruption of civil servants by parties (Gneist, 1879: 212).

Equality of enforcement was also regarded as a requirement of fair economic competition. Thus, in an 1878 English report on air pollution the manufacturers are quoted as urging that:

Compulsory condensation of muriatic acid gas could only be attained with due consideration for the just interests of the manufacturers, by a special enactment. . . . They also recommended the appointment of inspectors, with large powers, and that such inspectors should be wholly independent of local controls, and removed as far as possible from local influence. . . . The manufacturers favour central as opposed to local inspection because they think that the two objects of efficiency and uniformity of standard are best secured by that arrangement (Royal Commission on Noxious Vapours, 1878: 28).<sup>20</sup>

This concern for efficiency and equality probably did not prevent these manufacturers from bartering when they were under regulatory scrutiny, but their legalistic creed was not mere hypocrisy. It is important in its own right for the vision it suggests of the administrative process.

The vast increase in administrative intervention beginning after the Second World War did not fundamentally change this regulatory ideal. The administrative agency was still expected to be faithful to the law and to strive for full enforcement. This was thought to be the legislative will, and the agency was regarded as an instrument of the legislature. Professor Stewart's description of the traditional model of administrative law applies as well to West Germany and Great Britain:

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<sup>20</sup> Marx (1962: 98, 15) quotes the very similar requests of English manufacturers regarding the regulation of working hours and occupational health.

The traditional model of administrative law thus conceives of the agency as a mere transmission belt for implementing legislative directives in particular cases. It legitimates intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions are commanded by a legitimate source of authority—the legislature (1975: 1675-76).

This notion was captured in legal doctrines that required that the delegation of powers to administrators be confined and directed by law and in the role that courts played in checking discretion by reference to standards of reasonableness, good faith, due process, and the like (Wade, 1982: 346-409).

However, even while this traditional model of administrative legality and full enforcement most flourished, another growing intellectual tradition in legal scholarship questioned the possibility or even the desirability of such an idea. Legal realists, although distressed by the “gap” problem, were coming to see that it was inevitable. Others went even further, arguing that law is not meant to be fully enforced and that there are good reasons for underenforcement.

Law for these authors was largely symbolic and essential for social integration. Thurman Arnold (1935) most forcefully argued along this line and is worth quoting at some length:

Publicly recognized government is unable to act efficiently in practical affairs and at the same time conform to the ideal that laws should be enforced without partiality and regardless of consequences . . . [A] fixed belief in the ideal of law enforcement hinders and delays the activities of public bodies, more than any other popular illusion. . . . Our only recourse is the creation of a *sub rosa* organization which we call a political machine. The comparatively greater importance which political machines have in the United States than in England is an illustration of our greater emphasis on the creed of law enforcement (168-69).<sup>21</sup>

Arnold concludes:

The observations in the foregoing chapters present a troubling paradox. Social institutions require faiths and dreams to give them morale. They need to escape from these faiths and dreams in order to progress. The hierarchy of governing institutions must pretend to symmetry, moral beauty, and logic in order to

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<sup>21</sup> See also M. Edelman (1974), who refines the arguments by distinguishing four styles of speaking that range from pure instrumental to pure symbolic significance. For a similar argument from an organization theory perspective see J.W. Meyer and B. Rowan (1977).



maintain their prestige and power. To actually govern, they must constantly violate those principles in hidden and covert ways (229).

In other words, scholars must recognize the unreality of the administrative ideal, but for law to fulfill its symbolic function the legal system must still adhere to the creed of full enforcement—if only as a disguise.<sup>22</sup>

What is new about the discourse of today is that even the remaining veil is about to be lifted. This new discourse has roots going back to Bentham (1948). His doctrine is one of the foundation stones for the contemporary discourse that openly elevates social utility over the formal enforcement of regulatory law. Bentham rejects “formal” contract theories of legitimizing law:

But allow . . . it is the promise itself that creates the obligation, and nothing else. The fallacy of this argument it is easy to perceive. For what is it then that the promise depends on for its validity? . . . Now this *other* principle that still recurs upon us, what other can it be than the principle of UTILITY. The principle which furnishes us with the *reason* which alone depends not upon any higher reason, but which is itself the sole and all-sufficient reason for every point of practice whatsoever (1948: 56).

This attitude is updated by modern theorists of administrative processes, especially those who take an economic or game theory approach to problems of regulation. The administrative process is explicitly seen as an effort to maximize utility, and this is regarded as legitimate.

Game theory describes how and—what is more important—recommends that agencies sacrifice legal requirements for full enforcement in order to more certainly achieve some compliance. According to Scholz (1984), cooperation is the rational way out of the “regulatory dilemma.” This dilemma arises because an agency’s attempts to achieve full enforcement through deterrence-oriented strategies make evasion a rational strategy for the regulated firms—which substantially reduces the returns<sup>23</sup> the agency

<sup>22</sup> There is a striking parallel to this in Machiavelli’s thought. According to Machiavelli the aspiring absolutist prince ought “not to hold a promise if this is to his disadvantage.” In order to found his rule on general consent, however, he ought “never to speak otherwise about his deeds than in terms of mildness, honesty, fidelity, politeness, and piety” (Machiavelli, 1956: § 113). The king should not bind himself by his own rules, but the general public should be induced to believe that he did.

<sup>23</sup> Returns are defined as the total benefits achieved minus the costs of obtaining them.

can expect. Conversely, a firm's attempt to avoid the costs of regulation through evasion leads to punitive, deterrence-oriented regulatory strategies that substantially increase costs to the firm. Thus, it is rational for both firm and agency to sacrifice part of their goals and cooperate in a regime of less than full enforcement.

When the enforcement agency is willing to be flexible and the firm voluntarily complies, firms can, as noted earlier, reduce compliance costs and the risk of sanctions while both firm and agency avoid expensive litigation. Thus, the expected rewards for both agency and firm . . . from mutual cooperation exceed the punishment . . . that an evading firm and deterring agency can expect to receive when they confront each other in legalistic battles (Scholz, 1984: 185-86).

The economic analysis strikes a similar chord:

More offenses that cost more to avoid (in terms of direct expenditures and forgone production) than the harm they impose should ideally not be deterred because compliance would impose greater costs on society. This efficiency criterion implies that a rational enforcement strategy will not seek to induce full compliance nor even maximum feasible compliance with the law, but cost-justified compliance (Veljanovski, 1984: 173).

Sociological analysis sounds a similar note. For example, Kagan finds "the attempt to control regulatory enforcement primarily by external legal requirements" "deeply troublesome, insofar as it induces in both inspectors and the regulated an attitude of legal defensiveness, a concern for adequate documentation rather than substantive achievement, and a degree of rule-bound rigidity" (1984: 58). The solution, according to Kagan, is to professionalize inspectors. Besides greater technical expertise, inspectors should be given

intensive or systematic training in the equivalent of "police-community relations," that is, in interpersonal relations with complainants and businessmen; in the economics of the regulated industry; in the organizational dynamics, strengths and weaknesses of different kinds of business firms, in standards for exercising discretion, in cultivating allies, such as technical experts, within regulated firms . . . ; or in alternatives to enforcement (Kagan, 1984: 59).

This type of training envisages a regulator who seeks to solve problems rather than to enforce the law, and not just because full enforcement is often not cost effective. Even if full enforcement could be costlessly achieved, it is not necessarily seen as a good.

“Getting compliance” does not assume that compliance per se is necessarily a societal good. It is a question for objective analysis whether obedience to a regulation either promotes environmental quality or achieves environmental quality at an acceptable cost (DiMento, 1984: I-15).

In short, there is a vast and growing body of empirical and theoretical literature that comes to similar conclusions. Cooperation, negotiation, bargaining, bartering are not only the rule in regulatory law enforcement, but given the reality of social life, they are the preferred way of dealing with regulatory problems. The difference from earlier periods lies not in the reality of regulation but in the discourse that describes and justifies it. No longer is the political process that legitimates regulation assumed to require full enforcement either immediately or, even, as a distant goal. The view that in a democratic system of law-making compliance except in cases of extreme hardship or unreasonableness is a per se societal good is not necessarily rejected, but the existence of exceptional circumstances has come to be the starting point for “objective analysis.” Circumstances determine whether compliance is desirable.

This view is not a new one with agency insiders. Administrative practitioners have always treated the law as a flexible point of reference rather than as directive. But the theory was different. In a sense, the theorists have become insiders.

The new theory, it is true, is still predominantly a scholarly one, but it is already entering the political arena. Thus, the then Staatssekretär (head of department) of the German Ministry of the Interior in various public speeches proclaimed the “Kooperationsprinzip” (cooperation principle) for environmental politics and administration (Hartkopf, 1981). Similarly, in the United States and Great Britain the theme that government must cooperate—with the implication that government must give as well as get—is often sounded by politicians.

The new discourse necessarily challenges *legal doctrines* about the binding force of the law. While legal doctrine understandably lags behind both sociological theory and administrative practice in recognizing that agencies may treat the law as essentially bargaining chips, the new perceptions of reality are slowly influencing legal doctrine. Perhaps the most dramatic effect is one I have discussed at some length: the

incorporation of bartering rationality into substantive legal rules. Other effects also exist.

Consider, for example, the law as it relates to the ability of an administrative agency to enter into contracts with the firms it regulates. In German law until about the 1920s the dominant opinion was that the state, as a superior body and so above the parties, could not enter into any contract with private persons except as "Fiskus" on the general private market. "Der Staat paktiert nicht" (The state does not deal), said the leading public law scholar of that time (Mayer, 1895: 262). This meant among other things that administrative agencies could not enter into formal mutually enforceable "compliance agreements" with those they regulated. Gradually, this doctrine changed, first recognizing the validity of administrative contracts if the law explicitly or implicitly allowed them, and then, in the sixties, recognizing their validity provided the law did not disallow them.<sup>24</sup> English and American law, on the other hand, had no general rule prohibiting contracts about administrative tasks, but as in Germany there were legal doctrines that apparently restricted the kinds of agreements that could be made. However, these restrictions do not, as we shall see, in fact hamper administrative bartering or, where they might, they are being gradually relaxed.

One such restriction is the rule that prevents government agencies, by contract, from fettering their discretionary powers. Thus, in Britain a planning authority cannot bind itself by contract either to grant or refuse future planning permission.<sup>25</sup> But this rule poses no real impediment to bartering; for planning authorities may use cautious language in phrasing contracts that avoid binding in the legal sense but are understood as binding and are so treated by the agency.

Another legal restriction on bartering is the rule specifying that agencies cannot waive the observance of a law or regulation (Wade, 1982: 234). Governmental bodies have no general power to dispense with regulations where the law is explicit. Thus, in environmental law pollution offsets were

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<sup>24</sup> Bundesverwaltungsgericht 23, 231; 42, 331; Verwaltungsverfahrensgesetz (Administrative Procedure Act), sec. 54-56.

<sup>25</sup> *Stringer v. Minister of Housing and Local Government*, (1970) 1 W.L.R. 1281, states the rule. The case arises from an agreement with a university to discourage development in the sensitive area of a radio telescope. German courts seem to be less restrictive. A planning agreement is held valid if the subsequent planning permission can be upheld. This is accepted if the matter predetermined by the agreement was "sachlich gerechtfertigt" (justifiable by good reason) (see Bundesverwaltungsgericht 42, 331, 338 in combination with Bundesverwaltungsgericht 45, 309, 321).

deemed unlawful in non-attainment areas even if overall pollution was reduced, for the net result was still more pollution than the level set by law (Bohne, 1982a: 181-83). But when the need for new investment in polluted areas was felt, the American Clean Air Act was amended so as to allow such offsets.<sup>26</sup> The similar German law was not amended, but a lower administrative court read permission for agency authorized offsets into the existing law.<sup>27</sup> Recently, the United States Supreme Court has approved of a broad reading of agency discretion under the American act.<sup>28</sup>

A third apparent restriction on bartering results from rules about enforcement. In the United States, in the United Kingdom, and in Germany agency discretion has always been part of administrative law, but the expectation that agencies would use their discretion to best achieve full enforcement has at times led courts to mandate attempts at enforcement. In Germany, for example, the *Opportunitätsprinzip*, i.e., the principle that the agency has discretion to decide whether to intervene at all ("*Erschliessungsermessen*") and if it intervenes which measures of enforcement to choose ("*Auswahlermessen*"), was read not to apply when the violation of the law has caused or is about to cause serious harm (Schmatz, 1966: 87-117). Under these circumstances the aggrieved person may sue the agency for compensation<sup>29</sup> or for enforcement.<sup>30</sup> In the United States courts have also stepped in to order the enforcement of some laws, and legal developments, such as the relaxation of standing requirements in the late 1960s and early 1970s (since tightened somewhat), as well as statutes providing for public participation in the administrative process or attorneys' fees when certain administrative behavior or non-action is successfully challenged, work to limit agency

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<sup>26</sup> Amendment of 1977. See Clean Air Act, 42 U.S.C. § 7503 (a). Another example of legalizing the relaxation of legal baselines is the NOx waivers for mobile sources (Schoenbaum, 1982: 1029).

<sup>27</sup> *Verwaltungsgericht Berlin*, Nov. 17, 1981, 13 A 18.81, *Umwelt- und Planungsrecht* 1982, 319 (only leading arguments reprinted). As is often the case in Germany when courts interpret strict laws to allow flexibility, the decision was based on the principle of proportionality (*Verhältnismässigkeit*).

<sup>28</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 104 S.Ct. 2778 (1984).

<sup>29</sup> The first and subsequently much discussed decision was that of the *Reichsgericht*, Nov. 15, 1921, 43 *Preussisches Verwaltungsblatt* 394, where a pedestrian who was hurt by a sledge successfully sued the police for not prohibiting sledge running on a road.

<sup>30</sup> The first decision to acknowledge a right of aggrieved persons to enforcement was one of the *Bundesverwaltungsgericht*, Aug. 18, 1960, E. 11, 95, where a neighbor sued the agency to close down a transport business operating unlawfully.

discretion. However, while these developments have helped correct agency misinterpretations of the law and have forced agencies to listen to positions they would otherwise have ignored, they have seldom interfered with bartering as an ongoing part of the regulatory process. In the air pollution area, at least, it has been suggested that the victories these developments have given groups seeking fuller enforcement of the law have been largely symbolic (Melnick, 1983).

Courts have been somewhat more aggressive in limiting administrative barterers when agencies have conditioned the grant of permits on behavior the agency is not authorized by law to seek. For example, an English court invalidated an attempt to condition a permit granted a developer on the promised allocation of housing to families on the Council housing waiting list when the law providing for the allocation of housing from a waiting list applied only to Council housing.<sup>31</sup> An American court acted similarly when it invalidated a contract in which to procure a construction permit a proprietor agreed to dedicate an easement for road construction.<sup>32</sup> Yet judicial decisions reflect only imperfectly on behavior, and as I have already noted, such trade-offs are increasingly common. If no difficulties arise, there will be no lawsuit.

In sum, legal doctrine in the three countries we have been focusing on treats some agency bartering as illegitimate, but recognizes the legality of bargaining in other respects, and, in practice, does not effectively constrain it. As a mode of discourse, however, the law clearly lags behind modern theories of administrative regulation. Yet taking the law literally is not, as modern supporters of administrative flexibility may believe, naive. There is a peculiar dialectic involved: Legal doctrine has to be "contra-factually" (Luhmann, 1972: 43) legalistic in order to make *de facto* informality possible. Without the clear power and duties to interfere with private interests, the administrative agency would not have a position from which to barter effectively. If legal doctrine allowed apparently clear-cut rules to be discarded whenever an agency preferred non-enforcement or bartering, the value of the legal rule as a bargaining chip

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<sup>31</sup> *Royco Homes Ltd. v. Hillingdon Borough Council*, (1974)Q.B. 720 (see Cross, 1981: 150).

<sup>32</sup> *Bringle v. Board of Supervisors*, 351 P. 2d 765 (1969); see also Sato and van Alstyne (1970: 909). German law is less restrictive than the law enunciated in these United States and British cases. Agreements between private parties and agencies that are not specifically authorized by law are allowed provided they are not forbidden by law, relate to the basic goal the agency is empowered to seek, and involve trade-offs that are, generally speaking, "proportional."

would be diminished, for the regulatory process would begin with the assumption that full enforcement was not even a benchmark.<sup>33</sup> It is not clear whether this contradiction between legal doctrine and the reality of regulation will constitute a stable equilibrium or end with the destruction of the legal fiction. The latter appears to be more likely; for the newly articulated awareness of administrative bartering describes a reality that cannot be denied and with the increasing importance of regulation must be accommodated by the law.

## V. CONSEQUENCES

The traditional view of administrative regulation is that it is governed by an instrumental rationality. The law specifies goals and gives administrative agencies the power they need to work toward those goals. The regulated are the targets of the agency's actions whose behavior must be altered to bring about the final state (e.g., a free market or pollution-free air) the legislature envisions. The agency does everything in its power to obtain the legislature's goals, and if the goals are so unrealistic as to be unobtainable, the agency takes whatever steps toward the goals are feasible within the limits of the available resources.

Bartering rationality differs from instrumental rationality. It values equivalence in exchange. The private actor is not an object to be altered through the unilateral exercise of power but is a counterpart whose resources and rights establish a bargaining position from which the actor may be moved by adequate offers.

The law's primary role from this perspective is to allocate bargaining chips to private actors as well as to governmental bodies. Unlike the law of instrumental rationality (which may be unrealistic but is intended to be literally applied), the law of bartering rationality is a fiction. It is designed to empower agencies to work toward certain goals, but it allows agencies to work for ends that are not specified, and it does not expect that specified ends will be fully obtained.

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<sup>33</sup> Legal doctrine purporting to restrict agency options acts as a constraint, and even though it does not prevent bartering, it can restrict the range of permissible barterers or raise the costs the agency incurs if it greatly relaxes the legal standards. In game theory terms this is like "burning bridges," which by restricting the range of possible options can advantage the party whose behavior has been constrained (Axelrod, 1984).

If I am right and bartering rationality has not only come to dominate the regulatory process but is also both coming to dominate theories of administrative regulation and beginning to permeate administrative law, it is important to assess the likely consequences of regulation by bartering and of this new way of discussing and justifying the regulatory process. In addressing this problem, I shall focus not on short-term costs and benefits but on long-term consequences, which are difficult to assess. The discussion is admittedly speculative.

*A. Strategies of Seizing the Battleground*

First, a recognition of the prevalence of bartering rationality in regulation is likely in the long run to have a feedback effect on the legislative process. A legislator who knows that a law is more likely to serve as a starting point for bargaining than to be fully enforced may draft legislation to compensate for this. Thus, the legislature may pass laws that demand greater changes than those that are in fact desired. For example, in setting permissible air pollution standards, the legislature may demand standards of purity that are economically unsound on the theory that such standards will both motivate and empower the air pollution agency to achieve the lowest level of air pollution consistent with a reasonable economic trade-off.

But sometimes, as we have seen, agencies may bargain for more than the law requires. This might argue for diminishing the powers granted an agency or for creating powers ostensibly aimed at purposes that are not those the agency will seek to accomplish. For example, the legislature may require administrative consent for turning dwellings into business space. It may declare the protection of tenants to be the purpose of the law, but it may have in mind the possibility that the power to grant or refuse licenses will be used to limit conversions to certain desirable types of businesses. However, such legislative tactics pose their own problems. They may be difficult to accomplish given the glare of legislative scrutiny, and a legislator cannot be certain that administrative bargaining will not compromise legislative goals or push beyond the legislature's agenda.

Moreover, there is another side to this. Regulated firms, just like the government, will be pressed to overstate their initial positions as a bargaining strategy. It will pay polluters, for example, to augment pollution, to exaggerate abatement costs, and to threaten losses of employment, because these



strategies will tend to make the negotiated fall-back position tolerable.<sup>34</sup>

An apparent alternative is to incorporate the terms of any barter into the legislation, as with the "pollution charge" concept. If a polluter, for example, can choose between abating pollution or paying a charge and the legislature can set the charges to yield an "optimum" level of pollution, one might expect the legislature to be able to realize the goals it sets. But this neglects a third option opened to the polluter: evasion. There must be some way of ensuring that polluters either reduce pollution as promised or pay the appropriate charges. This will require a regulatory agency to ensure that the statutory mandate is enforced, and this in turn is likely to lead to the kind of accommodations between regulator and regulatee that are usually accomplished by bartering.

### *B. Impeding Structural Reform*

A willingness to barter implies that neither side questions the other's fundamental starting point. On the one hand, the agency accepts the existence and the basic structures of the industry. Therefore, a law that prescribes major steps towards consumer protection, pollution abatement, or the like will be unlikely to be enforced so as to lead to the closing down or fundamental reorganization of a branch of industry or of a firm, although this may appear to be the most effective or even the only way to cope with the problem. Moreover, there may be a propensity to accept the status quo as a baseline and to sacrifice improvements in the status quo for restrictions that prevent an expected worsening of the situation. An example of this is the German agreement about throw-away bottles I have mentioned. The compromise arrangement froze the market share of throw-aways rather than moving toward complete abandonment. On the other hand, the refinement and adaptation of the law through adjudication or legislative action may be impeded because the industry, counting on or receiving relief through bargaining, accepts the validity of laws that if tested would not withstand renewed legislative scrutiny, constitutional scrutiny, or a fresh judicial interpretation.

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<sup>34</sup> I wonder how much of the cooperative mood of the "good firms" described in various empirical studies is explainable by an initial "seizing strategy" which makes for attractive bargains rather than by moral or rational inclinations towards cooperation.

### C. *Preserving Inequality*

Bartering rationality in regulation may be expected to preserve or even to promote inequalities among the regulated. This is not surprising for, generally speaking, bargaining power, which translates into an ability to secure relaxed standards, should vary with firm size. Large firms can afford to take agencies to court and can often pressure agencies through legislative influence. Small firms are unlikely to have independent political power and will frequently find that the costs of compliance are less than the costs of pursuing legal remedies (Richardson *et al.*, 1983: 103, 110). In addition, large firms have more to bargain with since they employ many people, pay substantial taxes, and contribute in other visible ways to the well-being of the community. This suggests that trade-offs for granting permits will more often be imposed upon small firms than upon large ones because the large firms will more often be influential enough to get them "for free."

### D. *Concentration on Divisible Goods*

Bartering rationality implies that the agency accepts the divisibility of the good its counterpart is offering. If this good is basically indivisible, the bargain will touch only the divisible periphery. Thus, the regulation of basic choices of a society, for example new technologies, is likely to treat as problematic the amount of acceptable risk rather than the question of whether implementation should be entirely prohibited.

### E. *Stressing Monetizable Goods*

Payments that may be substituted for conforming behavior are in theory the ideal trade-off. In allowing a choice between acting and paying, they guarantee in theory that the law's goal will be reached since if the private actor chooses to pay, the agency will have the funds needed to repair any harm done. However, as my examples have shown, the perfect world in which payments exactly equal the social costs of substantive non-compliance never exists. New functions of payments evolve to replace that of compensation for the social cost attributable to non-compliance. One is to compensate for the additional public expenditures actually attributable to the non-compliance. Another is to allow the public to participate in the profit the firm makes from being freed from demands for compliance. A third is to provide some incentive to comply. And a fourth is largely symbolic. It is to assure the public and

complying competitors that the firm is not being allowed to escape all regulation.

Substituting payments for compliance is well-suited to the logic of bartering rationality (Winter, 1975: 59). Once the demand for a substantive action is conditionally discarded and rights to inflict social costs (e.g., waivers of administrative prohibitions) are sold, the parties tend to lose sight of the real consequences of their action or inaction. Their bartering focuses on the value of the rights and not on the likely real world damage, such as injured consumers or a degraded environment. Selling rights leads to a discourse that even at the moral level focuses on easily measured economic considerations. Should one, for example, grant an administrative dispensation in return for the profit accruing to the firm, the actual expenditure incurred by the agency, or the expenditure avoided by the firm?

Bartering about payments also leads naturally to a concern for the financial capability of the firm. One thousand dollars means different things to different firms, so the general charge may be set at five hundred dollars so as to allow weaker firms to compete. Yet the damage caused by weaker firms may be as great as that caused by stronger ones, and the general charge or negotiated alternatives may, because they are set with ability to pay considerations in mind, bear little relation to either.

#### *F. The Loss of a Critical Public*

Assuming that the public discourse about the desirability of taking a bartering perspective on administrative law enforcement shapes or mirrors the beliefs of the public at large, two consequences may occur. First, the agency's power is likely to diminish since its ability to publicize the illegal behavior of regulated firms will lose its sting if the legal standards against which the incriminating behavior can be measured are not taken seriously by the general public. Instead the public may blame the administrator for having committed the "crime" of unshrewd dealing or applaud the offender's skill in bargaining. Second, the public's attention, like that of the regulator, may be deflected from what is actually at stake. Some may be happy with watching politics as a bargaining game where the shrewdest deservedly prevails but others may lose confidence in problem-solving institutions. As the British Council for Science and Society (1979: 2), speaking of large-scale public inquiries, observed:

When not only professional campaigners, but the headmaster of an ancient public school and a university professor resort to civil disobedience to disrupt a public legal inquiry in order to prevent it from being held at all, something has evidently gone very wrong.

The Council went on to argue:

In this country, most people will readily accept decisions that are adverse to them, provided they have been reached by procedures which are seen to be fair. But the converse is also true: once the belief in fairness is lost, confidence in the procedure applied and in the substantive decision itself is lost too.

*G. Broadening the Gap between the Societal Construction of Reality and Reality*

The physical world has its own time structure. The dying of forests, for instance, may have its origin in the "noxious vapours" of the nineteenth century. Permanent exposure to tiny quantities of pollutants may have a cumulative effect that takes a century to manifest itself in dead trees or degraded soil. Serious difficulties can arise when, as in this hypothetical example, the time structure in which problems develop and the time structure of the societal perception of problems are not congruent. Troubles that could have been prevented at little cost if caught early may be irreversible or exceedingly costly to repair at some later moment.

Bartering rationality, I believe, promotes time structure incongruence for several reasons. First, replacing goal-oriented legislation with bartering rationality reduces the need for close governmental attention to the state of the physical world. Second, while bartering rationality is well-suited to small short-term steps, it is likely to be more time-consuming than instrumental rationality when overall solutions are the goal. Furthermore, when an agency appears to take action, it may quiet popular concern about what is in fact a still-growing physical problem. Finally, compromise outcomes, the characteristic results of bartering rationality, tend to satisfy the parties rather than to stimulate them to proceed according to some larger progressive principle which may be found in the law (Morley, 1923: 256).

## VI. CONCLUSION

The common characteristic of the phenomena I have investigated is what can be called the commodification of legal

powers. The powers to inquire, to entitle, and to command constitute what is intended to be a political endowment and not a marketplace currency. They have grown out of an inseparable mixture of private and public privileges and sovereign force that began as a more or less absolute sovereignty, and was subsequently tamed and bound by legislation. Legality became the foundation of legitimacy. Under this model regulatory powers once legitimized by the law-making procedures of the political process are exercisable without further consideration of affected interests (except insofar as unexpected hardships are properly accommodated by equitable remedies). Commodification destroys the political character of legal power as it transforms political endowments into commodities for bartering. The agency does not exert its powers but trades them. The commodification of legal power also tends to privatize (in the name of the public, to be sure) the authority given the agency. The agency's powers become the source of its rights rather than evidence of its authority, and, as rights, they may be traded for the rights and property of the regulated.

What are the reasons for this development? Some have argued that the ever-growing complexity of social problems and their solutions requires a growing flexibility of governmental methods (Luhmann, 1970: 96). Bartering with legal powers is arguably one such method. While this possibility may tell part of the story, I prefer a more materialistic explanation that focuses on social power. Modern democracy in the three states whose laws we have examined extended political power originally to only the propertied classes. Thus, the legislative process began as a mode of compromising differences within groups that did not disagree fundamentally. In these circumstances full and equal enforcement was a viable goal, and a rhetoric of legitimacy could be built up around these ideals. The broad extension of the franchise did not, at first, have a substantial impact because the newly enfranchised groups were generally too fragmented and disorganized to participate effectively in the legislative process. But things changed with the advent of organized groups of workers, consumers, environmentalists, and the like. The interests of such groups are now well represented in the legislature, and they are able to constitute majorities for legislation that

seriously conflicts with capitalist interests.<sup>35</sup> However, as the example of the strict environmental legislation in the early seventies shows, a defeat suffered in the legislature may be turned into a partial victory in implementation. Norms that cannot be altered openly may be rendered non-binding in practice, thus making the law flexible. Moreover, to proceed this way may disguise the class-linked implications of the choices that are being made. As Richard Abel (1981: 256) said: "Process values appear neutral: informalism does not *obviously* favour any group or category." The newly articulated justifications for bartering rationality may thus tend to legitimate and promote a longstanding disguise for thwarting the popular will.

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<sup>35</sup> Currently, the most important constellation of conflict is probably consumers and environmentalists versus capital and workers. These newly empowered groups are not necessarily allies.

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