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## Spots and Leopards: The Capacity of Systems to Change; First Impression

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# **SPOTS AND LEOPARDS**

**The Capacity of Systems to Change; First Impression**

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## SPOTS AND LEOPARDS

David Vogel's book, *National Styles of Regulation*,<sup>1</sup> crystallized admirably an observation that many of us had noted but whose implications we had had not explored as extensively. Regulations differs form one country to another, and these differences are not explicable by the value that countries place on the policy goal or on the effectiveness with which those countries pursue those goals. Different countries might pursue a similar regulatory goal and achieve similar results yet have different styles of regulation. Vogel's book is one of the most important published on regulation in the late twentieth century and is a fine example of the contribution that historical institutionalism can make to understanding public policy. We should note some possible problems and objections (most of which Vogel anticipated) before continuing, however.

The first issue problem we should concerns the degree to which there are indeed *national* styles of regulation. As Vogel was well aware, it has been argued that there are considerable differences in regulatory styles between different policy areas within the same country. British environmental regulators draw a sharp distinction between the comprehensive permitting system which they operate and the occupational safety and health system which imposes a general obligation of employers to provide as far as is practicable a safe and healthy workplace. Even within the field of environmental regulation, British practices differ. Water companies, which are generally regarded as high achievers in terms of their overall environmental practices, have been prosecuted with regularity in recent years for failing to meet required standards. James Q. Wilson has argued from American experience that differences in regulatory politics (and, we may say, style) differ according to how concentrated or diffused are the costs and benefits of the regulations.<sup>2</sup> Those familiar with regulatory politics in the United States since the Second World War will be familiar with the change in concern that occurred in the 1970s. Prior to that era, political scientists and commentators tended to worry about under regulation due to capture, iron triangles or similar pressures. After the 1970s, concern was more likely to be expressed about whether regulation was too severe, inflexible and insensitive to competing policy goals such as economic growth or employment.<sup>3</sup> Moran suggests that the British regulatory style is also changing: "Whatever the origins of the British regulatory style, Power's book amply demonstrates that it is passing away."<sup>4</sup> The environmental regulatory system that Hawkins described as conforming to the cooperative and collaborative British style of regulation was replaced

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<sup>1</sup> David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca; Cornell University Press, 1986).

<sup>2</sup> James Q. Wilson, "the Politics of Regulation" in James Q. Wilson (ed.) *The Politics of Regulation* (New York: Basic Books, 1980).

<sup>3</sup> See, for example, Eugene Bardach and Robert Kagan, *Going By the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982); Pietro Nivola *Comparative Disadvantages? Social Regulations and the Global Economy* (Washington DC: Brookings Institution, 1997).

<sup>4</sup> Michael Moran, "Review Article: Understanding the Regulatory State" *BJPoLS* 32 (2002) 391-413 at 407. The book Moran cites is Michael Power, *The Audit Explosion* (London: Demos, 1994).

in the 1990s with an ostensibly more legalistic system based on permitting pollution discharges.<sup>5</sup>

Those who have used the concept of a national style of regulation have not been blind to the possibility of change. Vogel, for example, has provided interesting explanations of why regulatory style shifted in the United States; we should be concerned, however, by the possibility that if a national style of regulation has changed once, it can change again. We should also be alert to the possibility that apparent changes in national styles of regulation do not in practice affect all policy areas equally. Even after the adversarial turn in American regulation in general, one heard few accounts of conflict over the numerous and complex regulations governing financial institutions or agricultural programs.

One final concern about the concept of *national* styles of regulation might be whether or not empirical work to date has truly distinguished between national styles of regulation or merely between regulatory practices in the United States on the one hand and other advanced industrialized democracies on the other. Most comparative studies of regulation such as my own<sup>6</sup> and Kelman's<sup>7</sup> suggested that the United States was exceptional in its regulatory style rather than there being important contrasts between clusters of countries. As we all know, Esping Andersen suggested that there were three worlds of welfare capitalism;<sup>8</sup> we do not as yet have a clear idea of how many worlds there are of regulatory capitalism.

A second important concern is whether we have an adequate grasp of what we mean by regulatory *style*. We certainly have a sense of what we mean by the term. Regulatory styles differ in terms of whether there is a tendency to rely on enforcement or cooperation, whether flexibility in enforcement is prized or whether there is a greater value placed on treating apparently similar cases identically, whether regulations specify in detail techniques to be used or allow flexibility in achieving an end result. Regulatory styles also differ in how far regulators consult the regulated in developing regulations and whether or not regulators prize value self regulation by industries or are more likely to believe that only government enforcement provides acceptable safeguards. Yet whether or not we could come up with measurements of these differences may be doubted. We do know that the differences between national styles of regulation in these respects are matters of degree, not absolutes. It is probably the case that all regulators show some flexibility, bring prosecutions or enforcement actions in the courts and try to encourage the regulated to monitor and improve their performance themselves. We even have some data on, for example, the prevalence of prosecutions. We have a less clear sense of what presumably matters the most, namely the factory-by-factory, workplace-by-workplace behavior of regulators.

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<sup>5</sup> Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Enforcement* (Oxford: Clarendon Press, 1984).

<sup>6</sup> Graham K. Wilson, *The Politics of Safety and Health: Occupational Safety and Health in the United States and Great Britain* (Oxford: Clarendon Press, 1985).

<sup>7</sup> Steven J. Kelman, *Regulating Sweden, Regulating America: A Comparative Study of Occupational Safety and Health Policy* (Cambridge MA: MIT Press, 1981).

<sup>8</sup> Gosta Esping Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990).

The third difficulty we face is in determining whether we are discussing differences in national styles of *regulation* or in national styles of governance. As Vogel notes, contrasts in regulatory styles between the UK and USA, or as Kelman noted, between Sweden and the USA, are congruent with differences in style of policy making more broadly. The British regulatory style that Vogel and I contrasted with the American clearly fits easily with the British *administrative* style described by Browne, the general relationship between interest groups and government departments described by political scientists from Finer onwards<sup>9</sup> and the *policy* style described by Jordan and Richardson.<sup>10</sup> Contrary to the attempts of what be termed the Cornell school of American political scientists to group the UK and USA together as states that maintain an “arms length” relationship from economic interests or actors, all of these perspectives on British policymaking or politics have described a policy style that places an emphasis on consultation, negotiation and cooperation in dealings between economic interests and government. It is at least possible that when we observe differences in regulatory style between nations, we are merely noting an aspect of much more general differences in approaches to governance.

The fourth, final and most important for the purposes of this paper issue that we should note is the question of what explains differences in regulatory styles. Captain Renault’s command in *Casablanca* “Round up the usual suspects!” is in order here. Kelman has suggested that political culture is to blame. Americans are assertive in claiming rights and protecting interests; Swedes are not. Vogel at times attracted to cultural explanations too, noting with some favor Martin Weiner’s work suggesting that English (perhaps even British) industrialists crave a respectability that makes them more likely than American counterparts to accept regulations.<sup>11</sup> Vogel goes on, however, to root this cultural difference in a long history contrasting state/society relations in the two countries. Others have emphasized the importance of institutional structures. Nivola, like most political scientists who have compared regulatory systems, asserts that the American system is dysfunctional and places much of the blame on the importance of the legal system in the United States.<sup>12</sup>

In my earlier work, I argued that the reason why the United States could not achieve more collaborative forms of regulation was because of the logic of the institutional setting.<sup>13</sup> Collaboration occurs within an institutional system that facilitates closure (to use a dreaded word from psycho babble.) Both the regulated and regulators know that a decision will be made, that whether or not they act wisely the regulators will in the end prevail, and they both share a common incentive to engage with each other to

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<sup>9</sup> S.E. Finer, *Anonymous Empire: A Study of the Lobby in Great Britain* (London: Pall Mall Press, 1966.) See also Samuel H. Beer *British politics in the Collectivist Age* (New York Vintage, 1969).

<sup>10</sup> Grant Jordan and Jeremy Richardson, “The British Policy Style or the Logic of Negotiation?” in Jeremy Richardson (ed.), *Policy Styles in Western Europe* (London: Allen and Unwin, 1982).

<sup>11</sup> Martin J. Weiner, *English Culture and the Decline of the Industrial Spirit 1850-1980* (Cambridge; Cambridge University Press, 1982).

<sup>12</sup> Nivola, *Comparative Disadvantages?*

<sup>13</sup> Wilson, *The Politics of Safety and Health*.

insure that the decision reached is the best possible from both of their perspectives. In the United States, however, the existence of numerous competing forums for decision making – the White House, the House of Representatives, the Senates, the numerous Congressional committees and the Courts – means that the regulated are more likely to persist in total opposition to a new regulation and less likely to engage in constructive dialogue with regulators about its content. Finally, regulatory style as we noted above may itself be merely one example of a country’s administrative or policymaking style. That administrative or policymaking style itself has to be explained, of course, but exploring that question would take us far away from the subject of this paper.

By this point the reader may be wondering whether or not I see any value in retaining the concept of national styles of regulation. I do. The consistency of the finding that there is a systematic difference between the regulatory style of the United States and of the European countries with which it has been compared is an impressive example of reliability in qualitative research; in few other areas have so many different authors working independently generated such similar results. While it is true that we still have too few studies comparing pairs or groups of countries that do not include the United States (for example, Japan and Spain, Korea and France,) the early indications of the emergence of a distinctive style of regulation in the European Union suggests that the argument that institutions create distinctive regulatory style will receive further support. Finally, I have been impressed by the ability of national styles of regulation to withstand major legal (though probably not institutional) changes. For example, interviews with officials in the UK convince me that the enormous legal changes that have occurred since Hawkins’s research in the early 1980s do not invalidate his description of Britain’s regulatory system. The emphasis on cooperation and aversion to legal action withstood the creation of an entirely different and ostensibly more legalistic system.

### **The Desire for Change**

Nearly all the factors that have been said to explain regulatory style are deep seated and either impossible or difficult to change. If regulatory style is the product of a path dependent historical process, then it is presumably impossible to change. If we say that British regulatory style, for example, is caused by the patterns of interaction between social classes and the state, then a regulatory style that does not fit this historical trajectory is presumably impossible to implant. This raises a familiar problem in historical institutionalism which Sven Steinmo<sup>14</sup> has pithily described; we tend to explain why things must be the way they are until they change. Political cultures do change, of course. English culture has been described by contemporaries in terms of a tendency to religious fanaticism (during the seventeenth century,) a preoccupation with commerce for a “nation of shopkeepers” (Napoleon of course in the early nineteenth century) and anti commercial (Weiner in the late twentieth century.) If regulatory style is a product of the broader culture, it too may change. Indeed Vogel and others have used cultural change in late twentieth century America as an explanation for the rise of an adversarial regulatory style. Yet we must assume that cultural change is slow and difficult if not impossible to

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<sup>14</sup> Sven Steinmo in Sven Steinmo, Kathleen Thelen and Frank Longstreth (eds), *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992).

bring about deliberately. Much the same can be said of bureaucratic styles and cultures. Most studies have suggested that bureaucratic styles are also very persistent, surviving even revolutions. Finally, if political institutions create a logic that in turn shapes regulatory style, then the prospects for change are again limited. Political institutions are intended to be resistant to change. While there are examples of dramatic institutional change (the creation of the French Fifth Republic, the recent wave of democratization,) they are rare events.

### **Factors Promoting Change**

Social scientists differ on whether globalization is occurring. By and large, people in the real world do not. The increased intensity of competition experienced by many companies is commonly associated with the increases in world trade and capital flows that are at the core of the concept of globalization. Governments are constrained in their ability to help corporations based in their country by their prior actions in creating a framework of rules through first GATT and now the WTO intended to promote more open markets and a more level playing field. Governments have not, however, abandoned their attempts to foster the competitive success of their corporations but have been obliged to pursue this goal by more indirect means such as fostering training, research and by working to remove barriers to competitive success.

Among the most common targets of pro-competitiveness policies are tax and regulatory systems that place corporations at a competitive disadvantage. Policies aimed at improving competitiveness are not always successful but they are more or less ubiquitous. The United States has long had task forces on regulatory relief (generally chaired by the Vice President.) Nivola's well-known book *Competitive Disadvantage* codified the argument that the American regulatory system continues to place American corporations at a competitive disadvantage that can no longer be tolerated in the face of globalization. The Blair government in Britain has created a special unit in the Cabinet Office that is supposed to lessen the impact of regulations on business. All Cabinet ministers are charged with reducing the impact of regulations in their sphere of responsibility on the competitiveness of British industry. With rather less conviction, the European Union proclaims its eagerness to avoid excessive red tape and costly over-regulation. Even in the heartland of Rhenish capitalism, German governments have accepted at least in principle the possibility that regulations might be relaxed to the point where shops can be open on Saturday afternoons.

This is not to imply that the dreaded but rarely observed "race to the bottom" in regulatory standards is actually occurring. It is to say, however, that whether or not governments are able to achieve change, the quest for more competitiveness through more effective regulation is widespread. The hunt is on for approaches to regulation that will allow governments to have their competitive cake and eat their regulatory treats in the form of enhanced environmental protection. Those familiar with the OECD web sites will know that almost all countries are engaged in some form of experimentation aimed at achieving less costly but more effective regulation. Very often, these attempts at change involve attempts to depart radically from the regulatory style associated with that country.

It would be wrong to imply, however, that competitive pressures from globalization are the only source of pressure to move from legalistic to more

collaborative forms of regulation. As Moran has described, there has been a widespread intellectual shift away from “command and control” modes of regulation.<sup>15</sup> This intellectual shift against command and control has many components that are completely unrelated to globalization. Scholars such as Ayres, Grabosky and Braithwaite have suggested that self-regulation must be a key component of any regulatory system.<sup>16</sup> Others, such as Kettl, have suggested that whereas “command and control” had its uses in achieving major improvements in the past, the policy technique has reached its limits. Further progress depends on the adoption of more flexible and cooperative approaches.<sup>17</sup> A final and less frequently articulated consideration is political. Business has realized that not even Republican Administrations will repeal major existing regulations and may even add new ones. Environmental interest groups are not about to fade away and may grow stronger. Environmental groups, however, realize that they are not likely to achieve a new wave of regulations comparable to those of the 1970s; the political situation is not at all propitious. Both business and environmentalists have reasons to experiment with new approaches.

## **Two Attempts to Change**

### *The United States*

In the United States, there have been attempts to achieve more effective but less costly regulation at the federal level. By and large, these attempts such as Project XCEL have had very limited success. The balance of political forces that produced the American regulatory style has proved too powerful for significant change to occur at the federal level. That has not prevented interesting experimentation in the states, however. New Jersey, for example, a state that perhaps unfairly most Americans think should put the slogan “the Pollution State” rather than “The Garden State” on its license plates, has committed to achieving a reduction of green house gas emissions consistent with the Kyoto accord. New Jersey has also committed to achieving these reductions through a Covenant system modeled on practice in the Netherlands. As will be well known in this group, the Covenant system is based on the idea of agreements between corporations and governments to achieve regulatory goals within a fixed time period while allowing corporations almost total discretion over the methods used to achieve these goals. Rabe is engaged in a fascinating study of why and how a significant number of American states in the face of both globalization and competition between states for domestic investment have made similar commitments to implementing international agreements such as Kyoto that have been repudiated by the federal authorities. What happens when governments, defying the wisdom of political science, set about regulatory reforms that go against the grain of the regulatory style of the country in question?

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<sup>15</sup> Moran, “Review Article: Understanding the Regulatory State.”

<sup>16</sup> Peter Grabosky and John Braithwaite, *Of Matters Gentle: Enforcement Strategies of Australian Business* (Melbourne: Oxford University Press, 1986); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992).

<sup>17</sup> Donald F. Kettl, *Environmental Governance: A Report on the Next Generation of Environmental Policy* (Washington, DC: Brookings Institution, 2002).



One particularly interesting example in the United States is the attempt by the State of Wisconsin to create a new environmental regulatory system known as Green Tier.<sup>18</sup> This initiative is a conscious borrowing of what are understood to be the prevailing practices in Germany (especially Bavaria) and the Netherlands. Teams of government officials and business executives from Wisconsin have made frequent visits to these countries to study their regulatory systems so that they could model Green Tier on them. The Green Tier system that resulted from these studies combined the environmental management systems (especially ISO 140001 and the German EMAS system) with a neocorporatist approach. Corporations would be recognized and rewarded for superior environmental performance. It was hoped that corporations that were accepted into Green Tier (Tier 1) and then made further progress within it (to Tier 2) would find that recognition they received for “beyond compliance” environmental performance would yield commercial benefits. Customers, high level staff and investors might all be attracted to corporations with a proven, superior environmental record. Corporations within Green Tier, particularly those that had advanced to the second tier, would also be given regulatory relief in the form of less frequent inspections and more understanding treatment in the event of infractions of regulations being discovered. The Green Tier Council that would supervise the scheme would be composed of government officials and representatives of previously antagonistic interests, business and environmentalists. Over time, the Green Tier Council would create the levels of mutual trust and cooperation associated with European styles of regulation.

The British government has also been engaged in attempts at alternative approaches to regulation that, while not as radically in conflict with the British national style of regulation as is Green Tier with the American none the less are clear departures from normal approaches. The British experiments seem again to borrow from continental European approaches, perhaps most directly from German private sector governance. The general British strategy has been to mobilize private sector actors to provide pressure that will raise environmental performance without the addition of new government regulations. The “third way” appeal of such a strategy to the Blair government, subject to much criticism from the Confederation of British industry (CBI) for allowing excessive regulation, is obvious. The government has urged large companies to adopt EMS approaches but has also mobilized private sector actors to add to its own pressure. Large insurance companies such as CGNU have accepted the government’s arguments that the failure by corporations to manage risk (including environmental risk) adequately threatens their profits. CGNU has promised to shares it holds against the adoption on any corporate annual accounts that do not contain an adequate environmental risk management plan. The Institute of Chartered Accountants has been lobbied similarly with officials from the Department of Trade and Industry arguing that accountants cannot vouch for the financial health of a company if there is no way of knowing whether or not it has prepared adequately to avoid a costly environmental catastrophe. Large accountancy firms such as KPMG were also brought into this campaign The Chairman of

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<sup>18</sup> For a more detailed paper by me on this subject see Graham K Wilson “Importing Cooperation,” paper presented to the Midwest Political Science Association, Chicago, Illinois, April 2002, available on [www.lafollette.wisc.edu/facstaff](http://www.lafollette.wisc.edu/facstaff) under my name.

the Stock Market for similar was persuaded for similar reasons to write to companies that wished to be listed on the London Stock Exchange saying that he expected that they would provide adequate annual statements of their strategy for managing risk, including environmental risk.

The one statutory aspect of this policy so far has been to require the managers of pension funds to announce each year whether or not they take social factors such as a corporation's environmental record into account each year in making investments. Pension fund managers are fully entitled to announce each year that they do not take social factors into account in making their decisions, but in practice this requirement has had a major impact in encouraging socially (including environmentally) conscious investment. Indeed, there is evidence that British policy here has had a spillover effect, encouraging similar developments in the European Union. Socially responsible investing (SRI) has been growing rapidly and Britain now has 60 SRI funds worth about \$5.6 b and moves are under way to spread the requirement to other EU countries. In the mean time, the possibilities for further growth in SRI in Britain are significant. The Association of British Insurers (ABI) has decided that its members also must comply with the policy of announcing whether they take social factors into account in investment decisions even if not required to do so by law. As ABI members control about a quarter of the stock in UK companies, this could be a major step forward.<sup>19</sup>

An approach that combines statutory and voluntary components has is the policy of allowing negotiated reductions in taxation in return for increased levels of environmental performance. When the Chancellor of the Exchequer, Gordon Brown, introduced an increase in energy taxes on industry justified as an environmental measure, he accompanied the increase with a plan under which industrial sectors could negotiate a reduction in the tax in exchange for agreeing a plan with the Treasury to reduce environmentally damaging practices especially the emission of green house gasses.

How have these attempts to go against the grain of national styles of regulation fared?

### *Wisconsin*

So far the attempts to adopt a novel form of environmental regulation modeled on approaches used in the Netherlands and in Germany has not succeeded. Green Tier has been stuck in the legislative process for nine months and while it may emerge soon, the difficulties it has faced are hardly a propitious start. Why have these problems occurred?

At first, it looked as though creating Green Tier would be easy sailing. Some businesses as well as the top officials of the DNR realized that more collaborative approaches to regulation had the potential to solve many of their problems by the early 1990s. The Wisconsin Paper Council approached the DNR in the early 1990s with a deal that rested on many of the points that we have encountered already. Environmental concerns, the Paper Council recognized, were not going to disappear. The Paper Council approached the DNR with an offer; the industry would promise to make progress on reducing discharges of a limited number of the pollutants of most concern to the DNR in return for a DNR promise not to burden the industry with additional regulations covering other problems. The agreement was generally successful and notable reductions in all but

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<sup>19</sup> Alex Skorecki, "European Move on Ethical Investing" *Financial Times* 11/27/01.

one of the problem discharges were achieved; the one problem that was not resolved was in part unsolvable because its elimination would have limited progress on other pollutants. Yet paper companies feared that further improvements could undermine their ability to compete nationally and internationally and looked for compensating cost savings in return for further progress. Green Tier also has a precursor in an experimental program in which up to ten corporations could enter into agreements with the DNR to improve their performance “beyond compliance” in return for greater flexibility from the DNR in the imposition of regulations. However, this program had made little progress and at least one major corporation had withdrawn from negotiations to enter it in frustration over the delays. Green Tier offered the chance for a fresh start.

Why, then, has it been difficult for Wisconsin to adopt regulatory change?

The first and fundamental problem that confronted attempts to reform regulation was the deep level of distrust that exists between business, environmental groups and the DNR. In Wisconsin as in the country more generally, there was a tendency by all these groups to distrust the motives of the others. Environmentalists believed that business executives were simply trying to avoid obligations to protect the environment. Business executives felt that environmentalists were more interested in competing with each other for members by taking extreme positions than in making sound policy that balanced environmental concerns with other objectives such as economic growth. Both business and the environmentalists believed that the DNR was really sympathetic to their opponents. Business groups were inclined to see DNR officials as wedded to an anti business approach to environmental policy; environmental groups, conscious of the links between business groups and Republicans, believed that DNR policy was designed to allow business to overcome the environmental policies that they had won with difficulty in the past. A lawyer who was brought into the policymaking process as a neutral facilitator was struck by the lack of trust between all parties involved; environmentalists and business not only distrusted each other but also distrusted the DNR in addition. In general, she thought, the tensions between the DNR and the environmentalists were the greatest. An executive from the paper industry doubted the sincerity of environmental groups arguing that moves towards cooperation or compromise by them took away their ability to use “scare tactics” to raise money. A utility executive questioned whether environmental groups had any special standing; everyone wants to protect the environment he argued, not just environmental groups who had no right to claim to speak for the public or the public interest as a whole. Even after the numerous meetings to develop Green tier (discussed later) one business lobbyist said, “Do I trust Caryl Terrell (of the Sierra Club” anymore [than before?] Bluntly, no.” A senior DNR official argued that the most serious problem in achieving Green Tier was the “real need to build a degree of trust that does not exist and will not exist until we learn to exercise a degree of civility...in the process.”

The distrust between environmentalists and business spilled over into the political system more generally. Liberal Democrats were likely to see arguments for innovation in environmental regulations as arguments for abandoning the protection of the environment; conservative Republicans believed that proposals to reform regulation were a distraction from the real goal of repealing excessive regulations.

The second problem in securing reform was that although both business and environmentalists were well organized, they did not have clearly established peak

associations that could bargain with each other. The environmentalists were on the face of it the least cohesive. Only two environmental organizations groups – the Sierra Club and Citizens for A Better Environment – were involved extensively in discussions about Green Tier. Some groups that would have seemed to be obvious potential participants such as the Environmental Defense Fund and the Nature Conservancy were not. As it happened, however, environmental groups were able to handle prevent potential rivalries and resentments emerging through informal means. Chronically short of resources, environmental groups not involved seemed to have agreed informally that the two groups involved could in effect represent the environmental movement more generally. One environmentalist involved argued, “We have a regular means of communicating with other groups dealing with other(s) [environmental] organizations. We trust each other enough that we don’t all need to go to every meeting.” Ironically the problem seemed to be greater for business in spite of the greater resources it enjoys as a pressure group. As we shall see below, major differences emerged between the peak association for business in Wisconsin, Wisconsin Manufacturers and Commerce (WMC) on the one hand and both trade associations and individual corporations on the other. One major electricity utility, WEPCO, resigned from WMC in part over these differences; the business people involved in Green Tier came close to publicly rebuking WMC for its tactics.

A third problem was that the attempts to achieve a closed policy process in which the environmentalists and business would bargain with each other kept breaking down. One fundamental problem was that Green Tier needed legislation to be established. Changes in environmental policy required legislation. Collaborative regulation could not be introduced by administrative fiat. The need for legislation placed reform in a more precarious position. At the state level as at the federal, there are numerous points at which a bill can fail or be amended -- in committees, in the Assembly, in the Senate or by the Governor’s use of what is not merely a line item but letter veto. Thus the legislative process was incompatible with the goals of creating a closed policy process within which interests could bargain with each other.

The intention of DNR officials in planning the process by which Green Tier was developed was to promote trust between interests involved. The Green Tier Advisory Committee was central to this process. Composed of eighteen people from industry, environmental groups and law, the Committee was intended to create the realization among groups used to thinking of themselves as adversaries that they could instead be partners. The Committee was surprisingly successful in this endeavor. By the end of the process, the members of the committee had united behind the Green Tier proposal described below. Unfortunately, no sooner had the Committee endorsed a plan to be the basis of legislation than the hard won unity was undermined.

The original attempt to enact Green Tier had been based on a plan to include it in the state’s Budget. This was an attractive idea for a number of reasons, the most important of which was that the Budget is the one piece of legislation that the legislature must pass. While attempts to include policy making in the Budget are routinely decried, every group and legislator hopes to avail it if the opportunity the Budget represents. The inclusion of Green Tier in the Budget therefore enhanced its prospects considerably. However, the budget also struck the WMC as a wonderful opportunity to secure the enactment of one of its longstanding legislative favorites, audit immunity. Audit

immunity is the idea that businesses that detect a breach of environmental regulations themselves and who report the breach to regulatory authorities should be exempt from penalties or proceedings. The Green Tier Advisory Committee had not discussed audit immunity was not discussed by the Green Tier Committee, however. It was highly unlikely to approve the form of audit immunity favored by WMC because environmental groups were strongly opposed believing that they would be cut out of the regulatory process by secretive deals between businesses invoking audit immunity and the DNR.

The WMC nonetheless used its links to the office of the Republican Governor, Scott McCallum, to have audit immunity grafted onto the Green Tier component of the Budget. The environmentalists on the Green Tier Advisory Committee saw this move as duplicitous. Many business members of the Committee sympathized with this view. The staff of the WMC, however, believed that they had merely behaved as any interest group would; they had seized whatever opportunities the political system offered them. The fact that the Green Tier Advisory Committee had worked to achieve consensus was no barrier to using links to the Governor's Office to achieve a cherished policy goal. Unfortunately for WMC, the profound feeling of betrayal their tactic created in the environmental groups prompted them to use their allies in the legislature to block the entire Green Tier proposal, including Audit Immunity. With difficult enough issues to face in the Budget, legislative leaders agreed to strip the now contentious Green Tier proposal from it. Proponents of Green Tier were faced with the more daunting task of securing its passage as freestanding legislation. What had gone wrong? In brief, the political system had worked as we predicted earlier; interest groups that failed to win what they wanted in one forum (the Green Tier Advisory Committee for WMC) encouraged them to shift to a venue in which they could (the Governor's Office.)

A fourth problem was that in the middle levels of the DNR, there was considerable resistance to change. A large number of officials had established their careers in the period when "command and control" regulations were adopted. This generation had developed the regulations, had implemented them and took pride in their success in protecting the environment. This was all understandable; however it also made it unlikely that these officials would rush to accept innovations in environmental policy.

A fifth problem was the federal government. State environmental regulators generally operate under mandates from the federal government. Significant change in policy must be approved by the federal Environmental Protection Agency (EPA.) Most state officials believe that the EPA is unsympathetic to attempts at reform, a view supported by a number of studies, particularly by the General Accounting Office (GAO.) These studies point to a number of legitimate concerns on the part of the EPA. Will reforms really improve performance? Will new approaches to environmental regulation even produce a demonstrable improvement in environmental protection as the law requires before existing arrangements are abandoned? However, such studies also suggest that EPA officials have a suspicion of reform that goes beyond these concerns and again reflects a culture of support for traditional regulation and antipathy to innovation.

A sixth problem was that there was few outside government who felt that they had a strong stake in Green Tier. Both environmentalists and business executives on the Green Tier Advisory Committee agreed that Green Tier was good public policy. They were even willing to accept a shift away from the current system of regulation with which they were familiar and in which environmentalists felt that they had an important stake.

Neither business nor environmentalists, however, felt that Green Tier offered them a major advantage. Neither business nor environmental groups showed much inclination to fight for Green Tier as opposed to being willing to accept it if it happened. Green Tier is not something we'd go in and lobby for "said one utility lobbyist. "We'll lobby for Green Tier if we are asked" a paper company lobbyist remarked "but it isn't a priority." "Will business spend a lot of capital to get it passed?" a business lobbyist asked and answered his own question: "No." An environmental lobbyist explained participating in the Green Tier process with a marked lack of enthusiasm. "It's a big time commitment to talk about something you don't think is going to happen but you need to be there to make sure your interests are represented." Green Tier might be good public policy but it was not worth fighting for. Part of this difficulty stemmed from the compromise between environmentalists and business that Green Tier represented. Business executives had expressed fears from the first meetings of the Green Tier Council that it did not offer them sufficiently great incentives to participate.<sup>20</sup> Environmentalists, of course, feared that it offered business too much.

Yet it is striking that Green Tier has not died. Why?

First, the top leadership of the DNR provided steady and determined leadership, responding to each set back with new initiatives. Many officials in the DNR had concluded that there was little additional scope for improving the environment through traditional regulation. One high DNR official said that from the early 1990s, the DNR had been aware that the current regulatory system had reached important limits. Regulated firms were naturally focused on prescribed levels of pollution irrespective of whether or not they were the optimal environmental outcome. At the same time, numerous sources of pollution such as mercury, non point source green house gasses or possible means of environmental improvement such as habitat restoration were not covered. The movement towards Green Tier came not out of some sudden and sharp crisis but "out of continuous frustration that we couldn't do more." The DNR leadership stuck with Green Tier because it saw in the program the only real hope for progress. George Meyer while Secretary of DNR summarized these concerns about the established regulatory system; "the regulatory system may have reached the limits of its effectiveness and could benefit from more adaptive approaches."<sup>21</sup>

Second, well politically well-connected business leaders provided enough support for Green Tier to keep it alive. An important element in the business community had concluded that Green Tier did offer a way to solve some of their important problems. For these business executives, Green Tier provides the escape route from a future of more expensive, more frustrating and ever more pointless command and control regulations. An executive from the paper industry argued that traditional command and control regulation had reached the point at which the industry "was spending more and more money for smaller and smaller reductions in pollutants." Another paper company executive believed that the lack of a comprehensive approach under the traditional regulatory approach created intolerable problems for his industry. Different proposals for

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<sup>20</sup> Minutes of the Green Tier Advisory Council July 20, 2000.

<sup>21</sup> George Meyer, *A Green Tier for Greater Environmental Protection* (Madison, WI: DNR, 1999.)

reductions in different pollutants proceeded without regard for each other. “It’s the incrementalism that drives our folks crazy.”

Green Tier did hold out some prospects for business. Perhaps Green Tier certification would provide business with the commercial advantages its proponents hoped. Perhaps it did promise a more stable, less costly and less frustrating regulatory future for firms that took part.

Third, while Green Tier failed to arouse enthusiastic support, it was also hard to oppose energetically. Green Tier did offer business some redress for its regulatory problems. Green Tier also could not be portrayed by environmentalists as causing immense damage because it was a “beyond compliance” program, adding to but not replacing regulations.

At present, Green Tier is stuck in the legislative process. It could still pass, but it could easily fail again. With so many contentious issues to resolve, the legislature may be tempted to duck the issue again. At the very least, the rocky road to enactment for Green Tier does not augur well for its successful implementation if adopted.

### **The British Experience**

It is harder to get a read on the outcome of the British experiment in part because its indirect nature. A policy approach that mobilizes one set of private sector actors (such as insurance companies) to put greater pressure on another set (such as manufacturing companies) is by its very nature difficult to evaluate. Some forty sectoral agreements have been negotiated providing for reductions in energy tax in return for promises of improved environmental performance. Beyond that, there is considerable disagreement about the effectiveness of government policy. The government argues that over 85% of the largest 350 firms have adopted environmental reporting. A recent skeptical study in the periodical *ENDS Reports* argued that the figure was far lower and scarcely higher than before the government program began. The government in turn contests not only the figures in the ENDS survey but also the implications. Environmental reporting, officials suggest, has increased considerably in quality as well as quantity since the government’s campaign began. The government argues that critics ignore changes from cryptic mentions of corporate policy in annual reports to systematic reporting. Britain does have a relatively high proportion of firms that are ISO 140000 certified. A crucial test of government strategy will be whether they can build on this record through its promotion of reporting. As the saying goes, more research is needed.

Thus the interim verdict on the British experiment must be that its success is, to use the useful old Scottish verdict, “not proven.” Some of the reasons for the lack of unambiguous success will be familiar to students of British political economy. The capacity of British industrial sectors to negotiate agreements with government varies dramatically. In some instances where there is either a strong trade association or a very limited number of large corporations, capacity is high. In other cases, the capacity to negotiate is much lower; there is no effective trade association and there are a large number of firms in the industrial sector. Similarly, while some corporations have embraced the government’s approach enthusiastically (CGNU, Shell), others saw no reason to cooperate just because the government wished them to.

## Conclusion: Leopards Can't Change Spots?

The easiest conclusion to draw at this point is that leopards can't change spots. The Americans may be tempted by neocorporatist solutions to regulatory problems and the British may see much that is attractive in the German and Dutch traditions on self governance. However, it is much easier to admire than to adopt techniques that are in use in other countries. This easy conclusion also suffers from the disadvantages of being very familiar. One of the recurring themes in comparative politics is that while there may be worldwide forces such as globalization, they are modified, blocked and transformed by domestic institutions. On the grounds that it often worth questioning the familiar, I want to conclude by exploring some of the ways in which the attempts of regulatory leopards to change spots may yet have significance.

First, we should note that neither of the two cases I have explored can be described as clear failures. It is in my view probably the case that Green Tier will be adopted and implemented in Wisconsin; the British are making at least modest progress with their attempts at promoting environmental self-regulation. If this projection proves correct, it will be striking that the considerable difficulties identified above will have been overcome. The further research called for above may yet demonstrate a surprising capacity of systems to borrow from each other.

Second, even if the attempts to borrow regulatory techniques from overseas are ultimately not entirely successful, however, there may still be important consequences from trying. Baumgartner and Jones have reminded us that one of the most important steps in policy change is a redefinition of the problem.<sup>22</sup> The attempts to borrow regulatory techniques from other countries have helped established a new approach to policy. The exact framework of Green Tier may or may not be enacted. However, the redefinition of regulatory policy in terms of promoting increased "beyond compliance" behavior in partnership with government and environmental groups will remain. The question of how the British can mobilize private sector forces to achieve higher levels of environmental performance will endure even if the drive to secure higher levels of reporting peters out. Attempting to borrow a policy technique from overseas establishes a redefinition of the policy issue and of appropriate techniques for addressing it. This effect is re-inforced by the dramatically increased importance of the international environment in shaping policy thinking. Officials – even from medium sized states in the USA such as Wisconsin – interact frequently with other officials from around the world. What is regarded as "best practice" has a significant impact on policy thinking. It is possible, therefore, that even if we see limited successes in achieving policy convergence, we may still see determined attempts at policy convergence.

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<sup>22</sup> Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993).