

Book Review

Review of Achieving Regulatory Excellence,
Cary Coglianese (Ed.), Brookings Institution Press,
2017, 322 pp. \$35.00 ISBN: 978-0-8157-2842-9
By E. Donald Elliott¹

A “rich and insightful collection of essays from the world’s leading experts provides regulators with much-needed guidance to meet some of the most pressing challenges of our time,” gushes David Kessler, former Commissioner of the U.S. Food and Drug Administration, on the dust jacket. One wonders if he read the same book that I did. Regulators who turn to *Achieving Regulatory Excellence* to find “guidance to meet the most pressing challenges of our time” will go away disappointed. On the other hand, the book could be an excellent teaching tool in undergraduate or graduate courses to stimulate discussion of what are valid measures of regulatory success and thus what the underlying goals of regulation should be.

There is very little agreement among the experts contributing to *Achieving Regulatory Excellence* as to what makes for “regulatory excellence,” or how to measure or achieve it. Rather, there are many different views of the cathedral² as each of 20 authors identifies one or two different aspects of regulatory behavior that he or she particularly admires and then illustrates them with an anecdote or two. For example, John Braithwaite, a former member of the Australian Trade Practices Committee and now a professor at the Australian National University, maintains that we should “evaluate by the best stories of transformation the regulator can offer up.”³ Wendy Wagner, a law professor at the University of Texas, opines that regulatory excellence is about whether “the regulator is ever vigilant in locating and accounting for all affected interests,”⁴ and “engag[ing] the public in the journey.”⁵ She also counsels “keep[ing] your eyes on the stars and your feet on the ground,”⁶

an evocative if elusive aphorism she borrows from Theodore Roosevelt. My Yale colleague Dan Esty, a former EPA policy official and Commissioner of the Connecticut Department Energy and Environment, says it is all about “vision” and “execution.”⁷ Robert Baldwin, on the other hand, insists that the “hallmark” of regulatory excellence is “lucidity—a clarity of approach in delivering on the essential tasks of regulation.”⁸ David Vogel, professor emeritus of business and political science at Berkeley, on the other hand, believes that “[a] critical characteristic of an excellent regulator is the ability to engage in policy learning.”⁹ Not surprisingly, John Graham and Paul Noe, former OIRA officials, insist regulators must “move beyond process excellence” to actually “enhance[e] societal well-being”¹⁰ as measured by techniques such as benefit–cost analysis.

In his introductory chapter, editor Cary Coglianese attempts to impose a modicum of analytic coherence on his 20 co-authors’ divergent conceptions of regulatory excellence, but he ultimately concludes that the disparate chapters show “three faces of regulatory excellence,” based on “traits” of regulators, their “actions,” and “outcomes.”¹¹ Perhaps one of Professor Coglianese’s most interesting ideas is that “regulators are like parents” because the success of both depends on actions by others.¹² Interestingly, none of the 20 contributing authors (with the possible exception of Graham and Noe¹³) seem to think that regulatory excellence consists of achieving the goals that the legislature has set at a minimum of social cost.¹⁴

regulatory processes and decisions is to ensure that the public is deriving the maximum net benefit” (p. 39), an interesting idea that, unfortunately, she does not develop.

⁷P. 133.

⁸P. 115.

⁹P. 207.

¹⁰P. 72.

¹¹P. 10.

¹²Pp. 8–10.

¹³Graham and Noe argue that the talisman for regulatory excellence should be “outcomes . . . that influence well-being, where well-being is understood to be determined by the overall welfare of citizens, as well as the distribution of that welfare.” P. 73. However, enhancing the overall welfare of citizens may or may not match the goals that the legislature has prescribed for regulation. See generally George Stigler, *The Theory of Economic Regulation*, 2 *Bell Journal of Economics* 3 (1971).

¹Professor (adjunct) of Law, Yale Law School; Senior of Counsel, Covington & Burling LLP.

²Compare Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harvard Law Review* 1089 (1972).

³P. 27.

⁴P. 40.

⁵P. 43.

⁶P. 37. In fairness to Professor Wagner, she does also acknowledge in passing in a single sentence that “the lodestar or all

Despite their differences in focus, most of the essays suffer from a common flaw: few if any of them mount a systematic account of why the particular aspect of regulatory behavior that they laud should be regarded as more important than any other; said differently, most of the chapters are oblivious to the concept of opportunity cost, the basic corollary derived from scarcity that regulators who spend their time and resources doing one thing are not doing something else that might create more benefit.¹⁵

Perhaps the worst offender for failing to compare the relative costs and benefits of the roads not taken is Professor Braithwaite. In the first chapter after the introduction, Professor Braithwaite tells two stories to illustrate his thesis that we should judge regulators “by the best stories of transformation the regulator can offer up.”¹⁶ He offers up two such stories from his experience as a former member of the Australian Trade Practices Committee (ATPC), an agency with a mission roughly comparable to that of the Federal Trade Commission (FTC) in the United States.

His first “story of transformation,” involves the then-chair of the ATPC, a former tobacco company executive who goes back to the private sector to become chairman of the board of “Australia’s largest tobacco company” after leaving government service.¹⁷ He negotiates a compensatory advertisement with the tobacco industry for its past misleading smoking advertisements that included the statement that second-hand tobacco smoke “was not proven to be a danger to health.”¹⁸ This conclusion was so contrary to the state of the science at the time that it was successfully challenged in federal court by the Australian Federation of Consumer Organizations, with a federal judge holding that “the advertisement approved by the regulator [was] in breach of its own statute because the evidence was clear that passive smoking *was* a danger to health.”¹⁹

Exactly how this story of regulatory capture and the revolving door (at least as Braithwaite tells it) is

an illustration of regulatory excellence is not clear. Braithwaite argues it illustrates “the strengths of the regulatory culture and the regulatory community in which the commission was embedded.”²⁰ Well maybe. But Braithwaite himself concedes that if the litigation had failed, it “would have bankrupted the consumer movement through an order to pay the tobacco’s industry’s costs.”²¹ Wouldn’t greater regulatory excellence consist of a regulatory culture, or internal checks and balances, so that the agency would not have made the wrong decision in the first place, necessitating the Australian consumer movement to stake its very existence on the abilities of a federal judge to second guess the agency’s assessment of the science?

But there is an even more basic fallacy underlining Braithwaite’s extolling of this incident as an illustration of regulatory excellence. He argues that the outcome was a success not because of any substantial health benefits from avoiding second-hand smoke²² that resulted from regulatory revisions to the compensatory advertisement, but rather because “risk managers across the globe started to advise restaurants, workplaces, discos and even sport arenas to prohibit smoking for fear of passive smoking suits.”²³ This outcome could instead result from the development of the underlying science and the threat of lawsuits for damages rather than anything that the Australian regulators did regarding compensatory advertising, an obvious alternative explanation that Professor Braithwaite fails to consider or discuss. A similar methodological problem underlies many of the essays. To be coherent, an assessment of regulatory excellence must consider not only what happened but also the null hypothesis of how the state of the world would have been different if the regulator had not acted, or had acted differently.

Professor Braithwaite’s second “story of transformation” is even less persuasive. Again according to Braithwaite, “[i]n the early 1990’s widespread frauds were detected . . . by major insurance companies that were systematically ripping off consumers through misrepresentations about policies that were totally useless.”²⁴ Rather than criminal prosecution

¹⁴For an alternative account of success in regulation that relies on achieving the legislature’s goals cost effectively, compare Peter H. Schuck, *Why Government Fails So Often: And How it Can Do Better* (pp. 39–63) Princeton, NJ: Princeton University Press, 2014.

¹⁵See Frédéric Bastiat (1850) “That Which Is Seen, and That Which Is Not Seen,” in *Economic Sophisms*, translated from the 5th edition of the French by Patrick James Stirling. Princeton, NJ: Van Nostrand, 1964.

¹⁶P. 27.

¹⁷P. 29.

¹⁸P. 30.

¹⁹Ibid. (emphasis in original).

²⁰P. 29.

²¹P. 30.

²²See Centers for Disease Control and Prevention, Health Effects of Secondhand Smoke. Retrieved from https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/health_effects/.

²³P. 30.

²⁴P. 28.

of the malefactors (which Braithwaite claims he favored at the time²⁵), the situation was resolved instead through a “restorative justice process”²⁶ in which the agency “engag[ed] many locally knowledgeable actors in a more conversational process in which Aboriginal victims sat in a circle with the insurers’ top management.”²⁷ This reportedly “enhanced the CEO’ sense of shame,”²⁸ causing them to put in place a series of reforms for the future (such as terminating the practice of “deduct[ing] useless policy premiums from welfare checks”²⁹). One company even “voluntarily compensated two thousand policyholders,”³⁰ although Professor Braithwaite admits on the same page that there were over “300,000 victims.”³¹

No doubt it was emotionally moving to witness contrite insurance CEOs discussing the harm that their companies had caused with their aboriginal victims (at least according to Braithwaite’s account). But Professor Braithwaite’s extolling of this scene as a paragon of regulatory excellence overlooks the basic economic principle that merely requiring a thief to give back part or even all of his ill-gotten gains underdeters future misconduct for the simple reason that not all misdeeds are detected and punished. (In technical terms, the expected value of engaging in a fraud or crime is the expected gain minus the expected remedy or penalty *discounted by the probability of detection and enforcement*.³²) To be sure, non-monetary factors such as shame can be important. But it is not self-evident, and Braithwaite certainly provides no evidence, that this supposedly excellent regulatory strategy was actually more effective than other, more conventional ones such as punishing violators. The conventional view of a regulator’s role is to make sure that crime does not pay. Or as Bruce Buckheit, former director of air enforcement at EPA once put it: “Since the chance of being prosecuted for violating the Clean Air Act is about the same as the chance of being struck by lightning, when it happens,

it ought to feel like you *were* struck by lightning.”³³ In this instance, according to Professor Braithwaite’s own account, only 0.6% of the victims got any of their money back and no one went to jail or paid a fine. Hard to see why this should be regarded as a regulatory success story that we should want to emulate.

At the opposite end of the spectrum are several really excellent and provocative chapters. I am particularly fond of those by Dan Esty, John Graham and Paul Noe, David Vogel, and editor Cary Coglianese’s final chapter on the problems of measurement and metrics for regulatory excellence. In Dan Esty’s chapter, one finds a wise, mature assessment by an experienced and successful regulator, as well as a leading environmental theorist, of what makes for regulatory success. Graham and Noe make a strong case that quantitative assessment of the actual effects of regulation in improving human welfare is more important than various process values (of the sort that many of their co-authors advocate, it might be noted). David Vogel, one of the most creative and original writers in the field, does his usual fine job in emphasizing the role of “policy learning,” which is closely related to what others call “adaptive management” or “incrementalism.” The final chapter by Cary Coglianese on “Measuring Regulatory Excellence” is thoughtful and balanced if ultimately indecisive; it identifies both sides of issues very effectively, and concludes that measurement may play a “key,” albeit “circumscribed,” role in effectuating cultural change in a regulatory organization.³⁴

One of the few conclusions on which there is a surprising consensus among several of the authors is disapproval of quantitative measures of how well regulators are achieving the policy goals set for them by the legislature. The authors generally disapprove of such prosaic measurements of performance against legislated goals because they may distract regulators from what the authors see as the regulator’s higher calling of true creativity in developing innovative public policies. For example, Professor Wagner counsels that “[s]implistic ‘output’ measures [for example, lowering pollution levels] could also frustrate

²⁵P. 29.

²⁶P. 28

²⁷P. 29.

²⁸Ibid.

²⁹P. 28.

³⁰Ibid.

³¹Ibid.

³²See generally Gary Becker, Crime and Punishment: An Economic Approach, 76 *Journal of Political Economy* 169 (1968). This is also the conventional argument for punitive damages over and above fully compensating victims for what they have lost. E. Donald Elliott, Why Punitive Damages Don’t Deter Corporate Misconduct Effectively, 40 *Alabama Law Review*. 1053 (1989).

³³For a less colorful expression of the concept, see U.S. EPA, Policy on Civil Penalties: EPA General Enforcement Policy #GM-21 (1984). Retrieved from <https://www.epa.gov/enforcement/policy-civil-penalties-epa-general-enforcement-policy-gm-21> (stating policy that the starting point for calculating civil penalties should be depriving the violator of the “economic benefit” from its violations).

³⁴P. 296.

efforts to think outside the box.”³⁵ My experience is to the contrary: objective measures of agency performance sometimes spur regulators to ask whether alternative approaches, such as market-based trading systems, might achieve regulatory objectives more efficiently than continuing to do what the regulators are used to doing.

The disdain with which most of the authors reject conventional measures of whether regulators are achieving the goals set for them by the legislature

amounts to a clear rejection of the official myth that administrative agencies are delegated “agents” implementing the instructions of legislatures. Instead, the consensus of these experts seems to endorse the primacy of “the administrative state” as independent, bureaucratic guardians of the public weal who deserve autonomy from interference by mere politicians. Woodrow Wilson, who thought that expert administration should correct the errors of democratic politics, would be pleased.³⁶

³⁵P. 50.

³⁶Woodrow Wilson, *The Study of Administration*, 2 June *Political Science Quarterly* 197–222 (1887).