

Introduction

EARLY IN MY ACADEMIC career I discovered that before I get too far into a lecture it is worth checking whether I am in the right classroom, with the right audience, and that everyone agrees what subject is to be covered. The term regulatory reform means so many different things to different people that I should explain carefully, and early, which particular aspects this book addresses, for many regulatory reformers will not find their major interests represented here.

The subject of this book is the reform of regulatory and law enforcement *practice*, so it has more to do with changing the behavior of regulators than with changing regulations. It is more about management than about law. As such, the book is intended for government officials who have regulatory or law enforcement responsibilities, includes police, customs, any other agencies that use enforcement powers, and any internal departments that play a watchdog function (such as the offices of inspector general), even though many of these do not normally think of themselves as regulators. The book is also intended for legislators, overseers, and others who care about the nature and quality of regulatory practice and who want to know what kinds of behavior and performance they should demand from regulatory and enforcement agencies.

The Distinctive Nature of Regulatory and Enforcement Responsibilities

The important features that distinguish regulatory and enforcement agencies from the rest of government are precisely the important features that they share. The core of their mission involves the imposition of duties. They deliver obligations, rather than services.

Society entrusts regulatory and enforcement agencies with awesome powers. They can impose economic penalties, place liens upon or seize property, limit business practices, suspend professional licenses, destroy livelihoods. They can restrict liberty, use force, and even kill—either in the heat of some dangerous moment on the street or through the cold calculation of the execution room. They use these powers not against foreigners in war but against citizens in peacetime. How regulatory and enforcement agencies use these powers fundamentally affects the nature and quality of life in a democracy. Not surprisingly, regulators are scrutinized more closely and criticized more regularly for their uses or abuses of power than for their stewardship of public resources. Their routine use of state authority and coercion distinguishes them from the rest of government and carries its own distinct strategic and managerial challenges.

The nature and quality of regulatory practice hinges on which laws regulators choose to enforce, and when; on how they focus their efforts and structure their uses of discretion; on their choice of methods for procuring compliance. Yet the vogue prescriptions for the reinvention or reform of government, which have been swirling around regulatory executives for close to ten years, say little about these issues and sometimes seem to ignore them altogether. The popular prescriptions for reform focus on service, customers, quality, and process improvement, not on compliance management, risk control, or structuring the application of enforcement discretion. They rely heavily on management tools and methods imported from the private sector, which has few comparable challenges.

Of course, the prescriptions for customer service and process improvement can be useful in the regulatory context and have been applied to considerable effect by many agencies. But they will never be enough; these ideas are unlikely to provide complete or satisfactory prescriptions for regulatory reinvention or reform, because regulatory functions represent an anomaly in the context of customer-driven government. When people are arrested or fined or have their license revoked or

their property seized, most often they are not pleased. Government does not seek to serve them in that instant. In many cases government creates an experience for them that is by design unpleasant. Of course, those being arrested, fined, or forced into compliance are entitled to be treated fairly and with human dignity. But when law is put in action against them, they receive treatment they did not request, did not pay for directly, will not enjoy, and will not want to repeat. In this context, the notions of quality governance in widest circulation simply fall short. The notion of customer falls short. Regulators need a broader vocabulary, so they can think in terms not only of customers but of stakeholders, citizens, obligatees, objects or targets of enforcement, beneficiaries, taxpayers, and society.¹ The underlying nature of the regulatory business requires that individual or private satisfaction be weighed against, and often sacrificed to, broader public purposes. Whatever difficulties we face in translating service models to government will be most acute in regulatory and enforcement domains.

Regulators have learned the value of adopting customer service ideas for certain aspects of their business, but most are aware that they need a broader portfolio of ideas as they search for strategies that are at once economical with respect to the use of authority and genuinely effective in procuring compliance and mitigating risks.

A Focus on Regulatory Practice

Why focus on regulatory practice rather than on the quality of the regulations themselves? I am grateful to my colleague Cary Coglianese for his neat partition of regulatory reform issues into four major subject areas: the scope of regulation, its nature, its locus, and the behavior of regulators. The first area (scope) covers issues of deregulation, reregulation, and regulation of emergent risks or markets. The second (nature) covers consideration of alternative forms of regulation, such as the use of tradable permits in pollution control and the establishment of negotiated resolution procedures. The third (locus) covers questions of centralization or decentralization, levels of regional or local autonomy, and in the United States centers mostly on the relationship between federal and state law. The fourth (behavior) covers the strategies, tactics, policies, operational methods, and culture of regulatory agencies.

Whatever changes the first three areas of reform may produce, and whatever amendments to law result, it falls to regulatory agencies to implement them. The style and nature of their implementation can

surely make or break any new set of rules. Philip Howard, in his popular assault on the suffocating nature of regulatory law, observes: “Law can’t think, and so law must be entrusted to humans, and they must take responsibility for their interpretation of it.”² Part of the solution to the overwhelming mass of centralized, prescriptive regulations, Howard says, is to give regulators greater latitude and discretion, so they can make sensible judgments in response to individual situations—because the application of blanket prescriptions leads, in particular cases, to foolishness. Twelve years earlier, Eugene Bardach and Robert Kagan were similarly struggling with the problem of “regulatory unreasonableness,” and they too pointed to the role official discretion would inevitably play in any resolution:

Much that is excessive about protective regulation springs, at one level, from the overinclusiveness of centrally formulated rules applied broadly to enterprises that differ in technology, attitudes, capabilities, potential for harm, and costs of abatement. In some degree this problem arises . . . from the sheer technical difficulty of writing suitably differentiated rules, and in some degree it arises from the inflexibility that our legal and moral norms impose on governmental conduct. Whatever the constellation of causes, though, one obvious remedy for the problem is to institutionalize a certain amount of official discretion to mitigate the effects of over-inclusive rules either at the field enforcement level or in the course of higher-level appeals and reviews. This could mean creating explicit legal authority for inspectors to overlook certain violations, authorizing enforcement officials (in conjunction with regulated parties) to work out alternative means of reaching regulatory goals, introducing more explicit bargaining over compliance schedules, transforming inspectors from “cops” into “consultants” in some areas, or any number of other things.³

Regulatory agencies exercise discretion as a matter of course—and at many different levels. At the higher managerial levels, executives have considerable latitude in allocating resources, constructing programs, assigning personnel, focusing inspection and enforcement programs, choosing where and how to expend the agency’s efforts, and setting the nature and style of their interactions with the regulated community.⁴ Such latitude sometimes derives from authorizing statutes, having been consciously granted by lawmakers. More often it results from ambiguous or conflicting mandates,

overlapping jurisdictions, the need to respond quickly to changing conditions not foreseen in law, or the simple fact that agency resources are insufficient to do everything, so somebody has to make choices.

At the field level, inspectors, auditors, and enforcement officers hold considerable power to do good or evil, to dispense justice or injustice. Police patrol officers and regulatory inspectors work mostly alone or in pairs and far out of sight of supervisors. The enforcement myth, which has so often saved regulators from having to account for their uses of discretion, is that they enforce the law uniformly, across the board, without fear or favor. It is not, and was never, true. They choose not to enforce laws for many reasons, some good, some bad: they did not have time, they were on their way to something more important, there were too many violators and no sensible way of choosing between them, it was a silly law, making the arrest would have provoked a riot, the offender had political connections or was a friend or worked for the IRS or had a sticker on his car acknowledging contributions to a police charity.

Granting broader discretion to regulators may serve to moderate the excesses of centralized, command-and-control-style legislation. It also brings its own dangers. Bardach and Kagan point out how regulatory regimes can appear oppressive, not because the laws are flawed but as a result of the behavior of individual enforcement officials: “The present [1982] discontent with protective regulation, as expressed in most complaints about it, has almost nothing to do with aggregate costs and almost everything to do with particular costs and aggravations imposed by particular enforcement officials on particular institutions and businesses.”⁵ Even when frontline staff do enforce the law precisely as written, the action may still be experienced as an injustice.⁶ Perhaps the law was defective, or obsolete, or ignorant of the particular circumstances. Or perhaps, even if the law was applicable and appropriate, this application of it was inequitable, discriminatory, or vindictive. Or perhaps the official had a bad attitude, coming across as overbearing, condescending, or unhelpful.

Regulatory agencies, by their conduct, can take perfectly reasonable law and produce oppressive regimes. Similarly, by choosing wisely what to enforce, when, and how, regulatory agencies can take an unmanageable accumulation of laws, many of which might be obsolete, and deliver perfectly reasonable regulatory protection. In their 1986 study of the regulation of strip mining in the coal industry, Neal Shover, Donald Clelland, and John Lynxwiler observe: “Now law is writ, and laws are

rules. They are paper threats. They represent the state's intent to regulate certain forms of behavior. But laws on the books mean little in and of themselves. They are meaningful only insofar as they are backed by the mobilization of state powers, law in action."⁷ These authors also note the relative lack of attention given to regulatory behavior in academic discussions of regulatory reform: "An emphasis on the politics of the implementation process—what goes on behind the administrative façade—is a notable gap in theoretical approaches to regulation."⁸

In focusing on the behavior of regulators, I prefer the phrase *reforming regulatory practice* than the alternative *administrative reform*. Regulators do so much more than administer laws. They also deliver services, build partnerships, solve problems, and provide guidance. They choose not to administer a law. And in addressing important public problems they frequently seek to influence behaviors that are not regulated. Moreover, the term *administrative reform* hints at the unreasonable notion that law is made first and administered second and that the two processes are clearly distinguishable and separable.⁹ In practice, lawmakers have to understand the capabilities and propensities of regulatory agencies and design regulatory frameworks that make good use of them.¹⁰ Regulators, depending on their conception of their role, may adopt an energetic and proactive stance in proposing and pursuing the kind of laws they think should govern their work.

Would-be reformers of the Environmental Protection Agency's authorizing statutes press hard (and have been doing so for some time) for a new, integrative, risk-based statute that would more scientifically balance the attention given to environmental and health hazards. The National Academy of Public Administration's 1985 study of the EPA, in advocating such a change, stresses the importance not only of creating the statute but of having the EPA work with Congress to set strategic priorities (presumably on a continuing basis): "Better and broader risk analyses could improve this process; the biggest gains, however, would come from creating an agency that could better convert knowledge into effective action."¹¹ If the benefits to be derived from better environmental law depend so heavily upon the EPA learning how to use risk analyses in their operations, and if learning that skill would not automatically follow from passing such a law, then one has to wonder how much society might benefit from the EPA learning that skill, even without any change in the law. (Some EPA officials would protest that they already have the skill but are constrained by the array of existing laws.)

In any case, regulatory practice has received less attention to date than other aspects of regulatory reform—and not just in the United States. In 1995, the Public Management Service of the Organization for Economic Cooperation and Development, summarizing its evaluations of regulatory approaches across the twenty-nine member countries, commented:

Even after the most rigorous decision-making process inside the administration, regulation has yet to pass the most demanding test of all—the public must agree to comply with it. Yet implementation—consisting of strategies such as education, assistance, persuasion, promotion, economic incentives, monitoring, enforcement, and sanctions—is very often a weak phase in the regulatory process in OECD countries, which tend to rely too much on ineffective punitive threats and too little on other kinds of incentive.¹²

So I focus on the reform of practice, because many others focus so heavily on reform of law. Also, so much of the interesting action occurs in the realm of regulatory practice: that is where there is an important story to be told, where so many innovations have recently appeared, and where much might be gained or lost whether or not new legal frameworks eventually appear.

A Focus on Social Regulation

This book is more about social regulation than economic regulation. That does not necessarily mean it has no relevance for economic regulation. Various practitioners within the field of economic regulation have told me it has relevance for them. But I am not an economist, so I am obliged to leave that determination to the experts.

For the sake of those not familiar with the distinction between social and economic regulation (which is somewhat fuzzy): social regulation centers on issues of health, safety, welfare, working conditions, and the environment; whereas economic regulation concentrates on the healthy functioning of markets. Agencies of social regulation tend to cover specific risks or threats but do so across many or all industrial sectors. By contrast, agencies of economic regulation typically regulate a specific industry (such as utilities, financial services, transportation, or communications) and seek to guarantee adequate competition, efficient markets, fair trade practices, and consumer protections.¹³ The majority of

the cases and examples in this book come from the domain of social regulation. So economic regulators may feel a little left out of the discussion. Please accept my apologies, and read on.

Even among social regulators, there may be some who will find their agency mentioned nowhere here. I hope that will not make the book irrelevant for them. I have deliberately avoided focusing on domain-specific technicalities, and I am in any case not qualified to teach the finer points of tax administration, the scientific bases for environmental protection, or the distinctive technical specialties of any other regulatory profession. Rather, I present examples and lay out arguments with the broadest possible application. In this I follow others more wise and experienced, such as Robert Kagan. In a 1978 study, he examines the roles of the Cost of Living Council and the Office of Emergency Preparedness in the administration of a nationwide wage-price freeze,

not to assess the desirability of wage and price controls or the relative merits of regulation as compared to the free market, but to provide insight into the nature of the administrative legal decision process and the making and application of rules in regulatory agencies. . . .

A case study of any single agency casts light on the activities of others, insofar as it is consciously comparative in its mode of inquiry and presentation and focuses on *dimensions* of the legal process and the environment of decision that are common to all legal institutions.¹⁴

I trust, therefore, that regulatory and enforcement officials whose agencies are not mentioned explicitly in these pages will nevertheless find the conceptual frameworks and analytic apparatus they need to navigate their own reform landscape.

Structure of this Book

Sections of this text will be more important for some readers than others. Legislators—particularly those newly appointed—will find that part 1 provides essential background on regulatory reform and explains the accumulation of pressures acting on regulatory practice, including the influence of party politics (chapter 3). Prescriptions for reform, as well as the influence of the reinvention movement, are discussed. In particular, it examines the strengths and limitations of customer service,

process management, and other managerial practices imported from the private sector, explaining why these prescriptions are never adequate guidance for reform of regulatory practice and describing the confusion that results when they are thoughtlessly applied within the regulatory arena (chapters 4 and 5).

Part 2 describes something much more promising but less well understood—the emergence of a new regulatory craftsmanship, which brings with it the ability to specify risk concentrations, problem areas, or patterns of noncompliance, and to design interventions that effectively control or reduce them. In other words, to *pick important problems and fix them*.

I suspect some may be puzzled that such an orientation can be counted as new or even worth writing a book about. Are not risk control and problem solving precisely what the public would expect from agencies of social regulation? Surely these agencies were established in order to control risks to human health, to human welfare, and to the environment. If so, then why—when they do it successfully—does anyone regard such behavior as noteworthy, pioneering, or innovative? If public safety officers could not identify issues of public safety and tackle them effectively, then why are they on the job? What value is a tax agency that does not know how to manage taxpayer compliance? Or an occupational safety and health administration that could not identify important workplace hazards and eliminate them? Or an environmental agency that could not identify and effectively address environmental problems?

The surprising truth is that when regulators do manage to focus their attention on thorny, persistent, and specific problems, and when they devise interventions that work, we often applaud such work as if it were *not* expected. One might properly inquire what other work occupies regulators most of the time. Taking this line of argument too far might do regulatory agencies some injustice. Their missions are amorphous and multifaceted, their statutory obligations miscellaneous and poorly integrated. Each of their activities contributes toward some aspect of mission accomplishment, even if the tangled web of causes and effects makes linking specific actions to specific outcomes difficult or impossible. Indeed, we would all hope that most of what regulators do is useful to a point.

Nevertheless, a new direction for regulatory practice clearly emerges, exemplified by a broad range of regulatory innovations (described in

chapter 6). Pioneering agencies are reemphasizing the core purposes of social regulation; developing new, systematic approaches that break those broad purposes down into specific projects; and developing managerial systems that oblige staff to invent solutions, project by project. That such actions pop up on the public administration scanner as innovations suggests that they were not easy, that somehow executives had to wrestle the requisite resources and attention away from other, all-consuming tasks, and that the nature of the organizational apparatus necessary to support such actions was not obvious. If it were all easy and obvious, then regulators everywhere would be doing it all the time, and there would be nothing innovative about it.

The central contention of this book is that while apparently simple ideas about risk control and problem solving remain for the most part very poorly understood, they represent the opportunity for profound changes in regulatory practice and should be adopted as foundations for reform. Part 2 teases out the essential elements of this emerging problem-solving capability, describes the various routes by which different agencies have come to it, and considers what it would really take—in terms of organizational infrastructure and managerial practice—to place effective risk control at the heart of routine operations.

Part 3 examines the underlying nature of the risk control, or problem solving, art. Chapters 15 and 16 reveal it as a substantial professional skill, equivalent in complexity to the practice of medicine, to which the spectrum of regulatory professionals should pay increased attention. Chapter 17 shows how adoption of a risk control framework would transform the ways in which discretion is understood and managed. And chapter 18 shows how any effective risk control operation requires, at its very core, a substantially enhanced analytic or intelligence operation.

Part 4 brings the various pieces of the puzzle together and focuses closely on the last major piece—the performance measurement story. Chapter 19 describes the performance account that would naturally accompany effective risk control, problem-solving, and compliance management operations. And chapter 20 shows how a few agencies—those more advanced in the development of these strategies—have recognized the need, and created the organizational fabric, to connect a proliferation of innovative field-level projects so they demonstrably contribute to the agency's high-level performance goals.

Several reviewers have suggested to me that the core of this book—the development of the problem-solving or risk control capacity (con-

tained in parts 2 and 3)—has relevance far beyond the field of social regulation. My colleague Derek Bok, reviewing an earlier draft, commented: “In fact, the process of problem-solving and problem identification that you describe is almost as broad as government itself. Is there any type of government program or any government agency that could not usefully employ the methods you advocate?”¹⁵

The art of risk control is clearly central to a number of fields not generally regarded as regulatory in nature—the most obvious examples being the related fields of public health, disease control, and injury prevention. But I must remain cautious, at least for now, in claiming any broader audience. Without studying such non-regulatory fields in some depth, I cannot tell whether the art of risk control is already better developed there than it is within the regulatory and enforcement professions. If it is better developed elsewhere (and I hope it is), then the usefulness of this book might lie in helping to transfer some of that expertise into the domain of government regulation. If it is not, then this text may be useful among a broader range of professions.

The Babylonian Test

The core readers of this book, the ones I have most in mind, are regulatory and enforcement officials along with others—particularly legislators and legislative staffers—who need to understand the constraints under which those officials operate and what can reasonably be expected of them.

If there are regulatory practitioners unclear whether they are in the right place, and on the right subject—or whether their time would better be spent elsewhere—I recommend the strategy employed by King Nebuchadnezzar. According to the Book of Daniel, King Nebuchadnezzar “dreamed dreams, wherewith his spirit was troubled, and his sleep brake from him.”¹⁶ He was surrounded, not by management theorists or scholars of regulation, but by magicians, astrologers, sorcerers, and Chaldeans. King Nebuchadnezzar sought of them an interpretation of his dreams yet found confusion in the plurality of offerings. The strategy he devised to sort them out was not to reveal his dream to any of them. Any who would proffer an interpretation had first to recount the dream, which, if they had it correct, the King would recognize. “Therefore tell me the dream, and I shall know that ye can shew me the interpretation thereof.”¹⁷ The penalty for getting it wrong, commensurate with the

times, was that the magicians and astrologers would be “cut in pieces, and their houses made a dunghill.”¹⁸

For the regulatory practitioners still with me, let me tell you (with some trepidation) your dream:

— There are too many laws to enforce and not enough resources. Enforcement, the distinctive competence of your agency, seems to have become politically unfashionable and is now accepted only grudgingly by those who hold political sway over you as a necessary evil, a thing of last resort, and better not to talk of it. Given your agency’s traditions of audit, inspection, and enforcement, embracing the new tools of voluntary compliance (education, outreach, partnership, customer service, negotiation, consensus building) has presented considerable cultural challenges, but you and your colleagues have persevered.

— In embracing the new tools, you thought senior management had adopted and communicated a well-balanced approach to compliance, but sometime within the last seven years, and quite unexpectedly, enforcement numbers or judicial referrals dropped precipitously. You do not remember anyone actually saying “we don’t do enforcement any more.” In fact, you are pretty sure no one would ever have said that. But apparently that is what everybody thought they heard.

— When your agency hit this bean dip phenomenon (that is, your enforcement bean counts dipped dramatically), howls of protest were heard from your traditional allies and advocates of your cause (unless you are a tax agency, in which case you have no traditional allies). Imploring you to return to your old ways, they argued that nothing works like enforcement and demanded an explanation for your agency’s apparent inactivity. “Innovation,” you replied, “newer, better methods, that reach further and get better results at less cost.” “Prove it,” they said. And you could not.

— Meanwhile, legislative changes washed over your agency, requiring a clear demonstration of the results achieved by your regulatory actions. To justify agency funding, you now had to demonstrate the connection between specific activities and specific outcomes—a complicated intellectual task, which agency executives divided and delegated to the functional managers.

— The enforcement chief in particular complained this was not fair: in this mode of analysis, enforcement would always be undervalued. For no one (not even the academic experts of whom he had inquired) knew how to measure the broader deterrent effect of specific enforcement

actions. Enumerating the direct, local consequences of individual enforcement actions could never capture the broader impact on compliance rates. Besides, the enforcement function was more about delivering justice than producing any other kind of results.

— Other enforcement managers, clearly exasperated that they should have to defend their existence, explained that the reason the agency should maintain its commitment to enforcement was that without a credible deterrent none of the other new-fangled methods would work.

— The focus on the customer, imported from the private sector and pressed on you by the reinvention gurus, turned the developing crack in your organization into a fissure. Camps developed. The enforcement camp, accustomed to dealing with egregious violators, found the new language of customer service (especially the private sector notion that they should “delight people so that they come back for more”) plainly ridiculous. Investigators’ morale plummeted, and several left. Wiser birds amongst them hunkered down, expecting this too, like other management fads, would pass. The voluntary compliance camp, populated by younger, newer, and sweeter people, regarded the enforcement crew as dinosaurs, remnants of a bygone era.

— As conscientious executives, you all set about trying to pull the agency together, tackling this increasingly confusing mess with the management tools in vogue: quality management and process improvement. You found these tools useful for boosting the productivity and efficiency of functional units and for improving the accuracy and timeliness of your core, high-volume, operational processes (particularly those awkward ones that straddle multiple functional areas). Using *quality circles*, you even saw hitherto separate parts of your organization working together. *Participative management* wafted through, until middle management realized how it undermined their authority.

— An assortment of consultants came and went, adding to the confusion. Most of them, schooled in the private sector, were experts on change but had no idea what changes were needed, because none of them had any experience with enforcement or compliance work.

— But still the drum beat for results, results, results. With a quiver full of process improvements, you could demonstrate efficiency, timeliness, productivity, and customer satisfaction; but the legislature was asking for effectiveness, which meant showing that the world was a better place and that you had made it so.

— Ever eager to help, your loyal staff brought to your attention a few inspiring stories, dredged up from the bowels of the organization. Individuals or small groups acting on their own initiative had identified some important issue, problem, risk, or pattern of noncompliance; had invented a solution and implemented it; and it had worked. The world was a better place! At least, a little piece of it.

— You rewarded these individuals, celebrated them, and let them stand with politicians and dignitaries. Their exploits were written up—and then written off (by your critics) as anecdotes. You wondered why other employees could not behave so courageously and intelligently. But deep in your heart you knew (as all regulatory managers know) that none of the agency's managerial, administrative, or support systems required, supported, or rewarded such actions. These isolated success stories were really stories of organizational subversion. The heroes and heroines, celebrated by the politicians, were “good people locked in bad systems.” It was your job to mend the system.

— When you tried to promote such activity by diffusing innovations, your efforts were met with the depressing refrain, “It won't work here,” which sounded cynical to you at first. When you looked into the matter, however, you found that they were right: It wouldn't work here.

— You realized how precious it would be if staff throughout your agency routinely identified and tackled important problems, artfully picking the right combination of tools for the job, using enforcement judiciously and sparingly, designing solutions that worked; and how precious if you were able to demonstrate that your agency's normal operations (as opposed to these isolated exceptions) demonstrably made the world a better place—eliminated hazards, mitigated hazards, decreased exposures, reduced death rates, reduced injury rates, reduced accident rates, reduced illness rates, reduced crime rates, or increased compliance.

— You wondered which pieces of the existing organizational or managerial apparatus you could use to make such creative behavior the routine rather than the exception. As you pondered this, your thoughts turned to the strategic planning process and those excruciatingly dull meetings at which your management team periodically reasserted the organization's mission and values in terms sufficiently general and vague to justify all existing activity. At that point, or thereabouts, you woke up in a cold sweat.

Those who recognize this dream may be interested in the interpretation, which follows.