



**PENN PROGRAM ON  
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**Beyond Best-in-Class:  
Three Secrets to Regulatory Excellence**

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## Beyond Best-in-Class: Three Secrets to Regulatory Excellence

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How could a society build the best regulatory agency the world had yet seen? One obvious thought experiment that could provide a blueprint for such an endeavor would be to identify the best component parts from agencies around the world, and cobble together an institution out of the “best of the best.” Basketball aficionados sometimes engage in this kind of daydreaming, imagining the result if one could take, say, Michael Jordan’s athleticism, Larry Bird’s eyes, Julius Erving’s hands, Allen Iverson’s reflexes, Wilt Chamberlain’s strength, and assemble a “best of” chimera.<sup>1</sup> Perhaps an agency starting from scratch, or able to undergo a wholesale rebuild, would try to emulate the best risk-informed (or solution-informed<sup>2</sup>) priority-setting system it could find, then look to another agency or another country for the best set of processes for encouraging broad and deep public comment, then identify a third agency’s method for targeting scarce enforcement resources, a fourth agency’s internal whistleblower protection system, and so forth.

Attaining such an assemblage would certainly be unrealistic, because an agency with finite resources cannot be outstanding in every conceivable way simultaneously, and in practice, the agency would likely overspend on the attributes it assembled first, having nothing left over for other important pieces of the puzzle. But I see three different reasons why such a “best of the best” assemblage might not even be *desirable*:

1. It fundamentally assumes that we should settle for each of the components to be *only as good* as today’s best examples. Raising the level of any regulatory agency’s attribute to “best in class” status is certainly laudable, but conceptually it precludes a step change to a higher and hitherto-unrealized level of performance. The “best in class” typewriter is still inferior in speed and qualitatively lacking in the capacity to remember documents for subsequent editing, as compared to even an average personal computer.
2. Each component part that a new or rebuilt agency would emulate would likely be construed in only one of the three forms of what Cary Coglianese has called the “TAO” of regulatory excellence —as a *trait*, an *action* (or a set of actions), or an *outcome*. Any of the elements of an excellent regulatory amalgamation can be expressed in one or more of these three aspects, which are akin to different parts of grammatical speech; they are different ways to describe the same concept, either in terms of what an agency values, what it does, or what it achieves.<sup>3</sup> For example, the attribute of honesty can be construed as a trait, in adjectival form: “we are (or ‘we pledge to be’) trustworthy.” It can be construed as an action, in verb form: “we keep our promises.” Or, it can emulate an outcome, in participial form: “we are trusted” (e.g., surveys of stakeholders reveal this). In the various meetings and dialogue sessions I participated in about regulatory excellence as part of the Penn Program on Regulation’s (PPR) Best-in-Class Regulator Initiative, I heard as desirable a steady stream of “adjectives, verbs, and participles” from commenters, generally interchangeably. It’s hard to see all three facets at once, and tempting to think that any one invocation of a virtue covers all three, as if they are

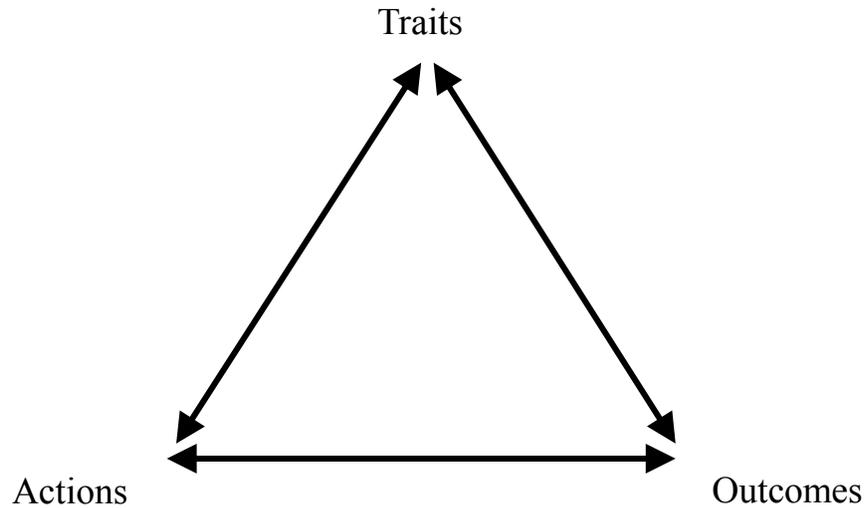
redundancies. But more importantly, there are six *connections* among the three facets—each one relates mutually to the other two—and in this paper I will argue that true regulatory excellence is more about the *introspective and careful alignment* of each of the three forms than what they are *per se*.

3. The sports analogy, ported over to constructing a public organization, is not actually apt, because it views each attribute as existing on a one-dimensional ordinal scale. In sports, a speedy player is unambiguously better than a plodding one, and a player who can leap over a boulder is clearly better than one who can't jump over a brick. I assert, in contrast, that for nearly all of the important attributes of a public regulatory agency, *we should not seek superlative versions of average traits, actions, or outcomes, because the very virtues one might simple-mindedly seek to maximize have opposite poles that are also virtues*. Consider the simple attribute “speedy” as it might apply to a regulatory agency. Is being “deliberate,” which is the polar opposite of speedy, a vice? Clearly not—speed is desirable but to the same extent so is thoroughness, and this is quite different from a “good, better, best” scale where nothing is lost by moving towards the superlative. Maximizing virtues that regulatory agencies correctly see as attractive is risky, because it means minimizing or repudiating as many competing virtues.

For these reasons, I suggest that a regulatory agency could achieve a goal of going “beyond best-in-class,” to real excellence, by focusing on two visions of continuous improvement: (1) aligning its “TAO” to achieve coherence and synergy; and (2) finding the elusive equilibrium, for each of a long list of attributes I will enumerate (and many others left unstated here), between two *competing virtues*, which I will also refer to as “reconcilable demands.” But true regulatory excellence, I further argue, cannot be attained without a third and final leap. An excellent agency must not merely be “mission driven,” but “mission ruthless,” rejecting to the fullest extent possible any behavior that elevates any other goal above that of maximizing public value according to its mission. Assembling an agency that does *these* three things well is the key to comparative and absolute success.

Before covering these themes, I want to offer one prefatory point: excellence requires more than meeting individual challenges as they come – it requires a deliberate philosophy of *how* to meet challenges. In a thought-provoking column about “agency” (in the sense of “capacity to act,” not that of a building or a bureaucracy), *New York Times* columnist David Brooks defined agency as “not just the confidence and drive to act [but] having engraved inner criteria to guide action.”<sup>4</sup> In various meetings in the PPR project, I heard repeatedly from stakeholders that while they would certainly welcome a regulatory agency that provided more data, drafts of proposals, and the like, what they really wanted above all was an *explanatory* agency, one that let the public in on its thought processes and rationales for decision. In clinical psychology, therapists distinguish between “transparency” -- providing information -- and “apparency,” which involves inviting dialogue about underlying motives and reasoning.<sup>5</sup> But Brooks is advocating here for more than being forthcoming about “the why”; he stresses the “quality of the why” and implies that the key determinant of that quality is whether the decision criteria are “engraved,” rather than ginned up *post hoc*. I am optimistic that many actions by a regulatory agency that could strike some or even many stakeholders as capricious would instead be something a stakeholder could regard as “disadvantageous to me personally, but acceptable

**Figure 1:  
Alignment of Attributes of Excellence**



broadly,” if the agency had grounded the action in a *pre-articulated* statement of philosophy and predilection. This does not at all imply a straitjacket, because the statements themselves need not describe how tradeoffs will be balanced, just that the agency will do so with certain values in mind.<sup>6</sup>

### **Aligning the Regulatory “TAO”**

The attributes that make some regulators truly excellent could be variously described as traits of the agency, its actions, or the outcomes that it effectuates.<sup>7</sup> It seems reasonable that all three of these ways of capturing excellence are necessary, and that none is more important than the other two. While not disagreeing with this generalization, I suggest that the *connections* between each of the attributes are more important than are the attributes themselves.<sup>8</sup> The leaders of a regulatory organization should imagine themselves standing at each of the three vertices of a triangle (see Figure 1), looking “both left and right,” and asking themselves: “Have we aligned this set of attributes to each of the other two?” To answer this question, the leaders could rely on appraisals from the organization’s staff, its overseers, its various publics, or neutral experts convened for the purpose. The key is for the regulator to appraise whether the traits it espouses are leading to purposive actions consistent with attributes of excellence, whether those actions are begetting outcomes in causal, direct, and efficient ways, and whether those outcomes represent changes in the world (or the maintenance of desirable states of nature) that it should be proud of, given its stated traits.

These questions of appraisal may be more easily posed if the regulator appreciates the signs and symptoms of misalignment. To spur reflection, I offer in Table 1 six cautionary statements about what can happen, for each of the six connections, when the “bridge is out” and the connection is misaligned, or is a mirage. Befitting my career as a practitioner of quantitative

**Table 1:  
Cautionary Statements about Regulatory Misalignment**

1. Traits without aligned actions are *hypocrises* (the agency is not what it says it is). For example, the agency may claim to have an efficient “worst risks first” priority-setting system, but consistently and without rationale eliminates small risks at great expense while ignoring inexpensive solutions to reduce large risks.
2. Traits without outcomes are *platitudes* (the agency is what we says it is, but that does not do society any good). For example, the agency’s rhetoric emphasizes the most efficient opportunities for maximal risk reduction, but evidence shows that the risks it says it targets are rising rather than falling.

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3. Actions without traits are *signs of capture* (the agency “goes along to get along”), which casts a shadow on the actions themselves—they are likely to change with the tide. For example, the agency abandons otherwise worthwhile rulemaking or enforcement projects when affected stakeholders complain.
4. Actions without outcomes are *drudgery* (the agency is very busy, but probably just moving sand from one proverbial pile to another). For example, the agency is blind to the risk-increasing side-effects of its interventions and ends up foisting risks off onto other subpopulations.

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5. Outcomes without traits are *capricious*, easily undone or reversed (the agency is affecting change for change’s sake). For example, the agency could be approving a string of risky products and having to preside over recalls when some of them are found to have harms far in excess of the benefits they confer.
6. Outcomes without actions are *signs of inertia*, and easily become raw material for a self-satisfied agency. For example, each of the first 23 times that the Space Shuttle flew without incident, NASA arguably was convincing itself that the inherent risks were acceptable and perhaps even becoming smaller—yet in fact, the risk per launch remained quite high, so the program was coasting along on the (temporarily) good outcomes preceding the near-inevitable failure.

risk assessment and cost-benefit analysis, I offer along with each statement a general example of a misalignment within a hypothetical agency that professes to have “risk-based” attributes.

A world-class agency asks the “Who are we?,” the “What should we do?,” and the “What should we achieve?” questions in concert. It “inspects” the connections (as a pipeline owner would inspect its network) between each kind of attribute for gaps and misalignments.<sup>9</sup> It should

do so not only to serve the public interest, but to improve its reputation and reap the rewards thereof (which in turn it can “recycle” to the public in the form of wise decisions unswayed by fleeting criticisms). Consider, for example, an agency that explicitly professes a philosophy (a trait) of being willing to take institutional risks that have small (or even slightly negative) *expected* net benefit but have a very large upside best-case scenario. For such an agency, a “failure” (an outcome that goes awry) may well be seen as “a bold gamble that did not pay off this time,” whereas the same course of events presided over by an agency with a reputation for passivity may be seen as “what happens when you let that agency out of your sight.”

### **Finding the “Sweet Spot” when Virtues Compete**

In addition to alignment, regulatory excellence requires the agency to recognize that most of the qualities it aspires to will coexist with competing virtues of the opposite sign. The excellent regulator arrays these “reconcilable demands” into pairs so that it can periodically calibrate its behavior, communications, and planning in order to navigate wisely between them, and to make conscious choices that optimize, rather than one-dimensionally maximize. These choices arise in all facets of a regulator’s operations, but I have organized them into three groupings in Table 2: those that arise in planning and problem-solving, those that affect internal management decisions, and those that must be confronted in conducting analysis and responding to evidence.

In Table 2, each row is divided into five aspects. The natural way to explore any attribute is to begin with the second and fourth columns, which represent competing virtues. As one moves towards the extremes (the first or fifth column), each virtue is replaced by a descriptor of “crossing the line” into excess. The middle column is intended to describe some form of equilibrium embodying some of each desirable quality. Consider, for example, the first row in the table. Although regulators should engage with stakeholders from a position of humility, being willing to modify or abandon a policy or science-policy position in the face of convincing, compelling, or poignant argument, agencies should also lead, opining with confidence from their expertise and their unique responsibility to amass evidence and manage competing claims when rights clash (e.g., freedom to pursue profit versus freedom from involuntary risks without commensurate benefits).

Furthermore, each competing regulatory virtue can spiral into a vice if taken to excess: a confident agency can become so enamored with its own voice that it fails to listen at all, treating the public to the worst of both worlds (imposing demands on the public’s time to engage with the regulator if they want to be heard, but enduring public comment only grudgingly and treating the process as a charade). A humble agency can similarly err so much on the side of making no offense that it becomes an empty vessel, bowing to the first or the loudest argument and even gravitating towards arguments that cause it to repudiate the agency’s own past positions and policies (out of a sense that humility entails never imposing its will on society).<sup>10</sup> For example, I recently criticized my former agency (the U.S. Occupational Safety and Health Administration, or OSHA) for issuing back-to-back Requests for Information on chemical exposure limits as the sole output of five years’ work on that issue. The agency said it was “having a dialogue,” but my

**Table 2:  
Some Competing Virtues That Regulators Must Navigate**

A. Regulatory Process, Planning, and Engagement:

<i>Taken to Excess</i>	<i>Virtue</i>	<i>“Sweet Spot”</i>	<i>Virtue</i>	<i>Taken to Excess</i>
Groveling; self-loathing	Open-mindedness; humility	Empathetic Leadership	Confidence	Arrogance/Haughtiness
Hysterics (no reasoning)	Intuitive reasoning	Humane analysis	Quantitation	Cold automaticity
Hides from the media	Cautious with the media	“Pushes” info judiciously	Cozy with the media	Relentlessly self-promoting
“Obsessive-Compulsive”	Meticulous	Solves small problems easily, or not at all	Sees big picture	Blasé
Sloughs responsibility	Does only what it must	Grows slowly	Fills voids	Grabs turf, with or without tools to succeed there
Punitive (“born to regulate”) <sup>11</sup>	Strict	Prods the best to do a little better; prods the worst to do a <i>lot</i> better	Flexible	Captured
Micro-management by specification standards	Considers best available technology	Allows regulated to meet <i>either</i> specification or performance standard	Considers exposure and risk	Rigid enforcement of performance standards
Heedless/manic pace	Speedy	Finish 90% in 10% of time and consider stopping	Thorough; plodding	Glacial; catatonic
Cares only about sunseting regulations and burden reduction <i>per se</i>	Seeks to relieve unnecessary or outdated burdens	Sets agenda containing a mix of forward-looking and backward-looking priorities based on incremental net social benefit	Seeks to add regulations to the CFR based on “unfinished business”	Cares only about adding to the rulebook <i>per se</i>
Hounds industry leaders to make trivial improvements	Leaves industry leaders alone	Engages industry leaders so as to leverage better behavior among their customers, suppliers, etc.	Promotes industry leaders to show good examples to others	Uses industry leaders to aggrandize the agency
	Determined to promulgate uniform (“one size fits all”) regulatory requirements	Develops rules with a small number of different “tiers” that accommodate large differences in circumstances among the regulated	Disburses so many exceptions and variances that “one size fits one”	
	Reluctant to change features of the NPRM (narrow definition of “logical outgrowth”)	Engraved process for what constitutes compelling evidence to change a major feature of a proposal	Regulatory proposals contain open-ended “details to be added later” so as to maximize public input	

**Table 2, continued:  
Some Competing Virtues That Regulators Must Navigate**

**B. Internal Management**

<i>Taken to Excess</i>	<i>Virtue</i>	<i>“Sweet Spot”</i>	<i>Virtue</i>	<i>Taken to Excess</i>
Free-for-all of internal chaos and sabotage	Encouragement of dissent	Engraved process for whistleblower protection	Regimented	Para-militaristic (crushes dissent w/prejudice)
Nepotism and inbreeding	Values institutional memory	Adaptive plan to balance skills	Values “new blood”	Churn for its own sake, esp. to encourage veterans to quit (Christie Whitman example at EPA)

**C. Science and Risk Management**

<i>Taken to Excess</i>	<i>Virtue</i>	<i>“Sweet Spot”</i>	<i>Virtue</i>	<i>Taken to Excess</i>
Protect the most vulnerable sub-interest, regardless of “cost” (note—when protecting financial interests, the “cost” accrues as the risk/harm done by not regulating)	Eye on equity	Analytic process to give additional weight to tails of distribution (“equity improves efficiency”)	Eye on maximizing total net benefit	Declare victory whenever B>C (a little or a lot)
	Emphasizes modeling/inference rather than measurement	Bayesian learning that integrates (with uncertainty) the findings of models and measurements	Emphasizes monitoring as the gold standard	
Unwillingness to “risk any regulatory cost” or job loss (“inverse precautionary principle”)	Averse to low-probability, high-consequence (LPHC) economic costs	Explicit non-linear weighting of spectrum of possible values of net benefit, considering the probability of each <sup>12</sup>	Averse to LPHC health and environmental harms	Unwillingness to “risk any harm” (traditional precautionary principle)
	Sets environmental/health/safety (EHS) goals and seeks to achieve them at minimum cost	Considers a range of options of varying degrees of cost and benefit	Sets cost constraint and seeks to maximize the amount of EHS benefit achievable under that constraint	

reaction was that “it is time for the agency to stop asking for input and reveal something about its preferred path forward—if you want to have a dialogue, the way to start it is to speak.”<sup>13</sup>

Somewhere in between the qualities of humility and confidence lies the trait (and accompanying actions) of “empathic leadership,” which we might define as a regulator with officials who can sincerely say to the interested public: “We have listened to your point of view, and to yours over there as well, but we were not established as a tabula rasa—we have views of our own – and in light of those prior views and how they have been informed by your views, we come out here on this decision, for these reasons.”

Table 2 contains roughly 20 additional spectra representing competing virtues that can be taken to excess, or where an agency can simply focus on one to the exclusion of the other; in either case, the regulator will end up far from the “sweet spot” that balances the demands thoughtfully.

But how can the agency find such a balance in each of these many cases? No general answer could apply to all agencies across the world’s varied political systems, regulating a vast array of economic, environmental, or other externalities. The only answers can be specific to each agency, and to its own specific circumstances. Certainly the decision of when a virtue becomes excessive will also be highly subjective and will require both self-reflection and external “reality checks” from the agency. However, I can offer three general principles that may aid the process of moving from one virtue partially (but no further) towards its mirror-image.

*Simple, first-order strategies are more likely to fail.*

“Balance” connotes splitting the difference, or other tactics to “even out” the extremes. The exact midpoint of a spectrum is just a special case of an equilibrium point where the endpoints happen to be of equal size or intensity, or where the costs of error do not depend on the sign of the deviation.<sup>14</sup> There is no reason to assume these special conditions hold for the kind of navigation that agencies must do between virtues and among disparate publics. Similarly, a strategy of trying to smooth out controversy on average, by following one decision near one tail of the spectrum of virtues with another one at the opposite end, will succeed only by luck, not by design. Excellent regulators are very wary of the bromide that says “if you’ve made everyone unhappy you must be doing something right.” This may hold true on occasion, but certainly it is equally valid (though less prominently uttered) to conclude that “*if you’ve made everyone unhappy, you might be doing everything wrong.*”

Agencies are often led to strategies of compromise or over-correction for sound reasons, by explicit requests from competing stakeholder groups, or even by strategic requests from the same group over time, so it is easy to sympathize with agencies that pursue these paths. For example, David Kessler’s strategy in the mid-1990s of asserting the Food and Drug Administration (FDA) jurisdiction over tobacco, but only regulating with respect to sales and marketing to youth,<sup>15</sup> arguably was grounded on sound reasons. But it may have also failed initially because it introduced a legal inconsistency. In the Supreme Court decision rejecting the FDA’s authority to regulate tobacco, the majority noted that, had the FDA’s statute given the

agency authority to regulate tobacco, the decision to treat cigarettes as a drug delivery device with risks but no benefits would have actually compelled the FDA to ban them outright.<sup>16</sup> Here the “foot in the door” strategy may have caused the door to slam on the agency’s foot.

A few years later, OSHA made a strategic mistake (or perhaps it fell for a trap) when it promulgated an ergonomics rule that was in almost every respect the mirror opposite of a draft rule put forward by the agency years before that the regulated industries had roundly denounced. The first proposal was specification-based in the extreme, causing a flood of complaints about how it did not let firms innovate and solve problems on their own. By contrast, the ultimate ergonomics rule was entirely designed around management-based innovation, and the complainants then reversed themselves and denounced the rule for lacking specificity.<sup>17</sup> These critics ultimately succeeded in convincing Congress to invalidate OSHA’s final rule. Clearly, agencies that fail to articulate and follow an “engraved inner criterion” for navigating these channels are supremely vulnerable to the “no good deed goes unpunished” reaction to their attempts at compromise or at win-some-lose-some balance.

*There are several different kinds of equilibria, and physical analogies may provide some guidance for choosing among them.*

There are actually several “sweet spots” on the face of a tennis racquet, none of which is located exactly at the center of the face, and each of which has different physical properties.<sup>18</sup> One point, located near the center, allows the player to hit the ball with the minimum of vibration transmitted back to her arm, while a ball hit at a second point (the “center of percussion”) nearer to the bottom of the face transmits the least “shock.”<sup>19</sup> A third point, closer still to the throat of the racquet, offers the maximum return velocity for a given incoming velocity. An excellent regulator will have some insight into whether it wants to avoid “vibration” (which could be analogized to low-level but chronic criticism), avoid “shock” (a dramatic short-term setback), or assert more influence over the debate—and may well choose an *asymmetric* balance between one virtue and another based on its own experience, and that of sister agencies it converses with, in order to find the particular “sweet spot” needed in each case.

Another example of an asymmetric equilibrium comes from astrophysics—when one astronomical body orbits another, there are several orbits in between the two where a spacecraft can take advantage of certain special properties.<sup>20</sup> The first such “Lagrange point” between the earth and the sun allows a craft to make stable observations without overtaking or slowing down relative to a fixed point on Earth. This point is located much closer to the earth than to the sun (about 1 percent of the distance between them). This is not quite the same as the point where the gravitational forces exerted by the two bodies are equal, but the analogy may be useful; the craft must “keep its distance” from the stronger pull of the sun, in the same way that any agency *might* deliberately choose a behavior that moves only a small distance towards the more powerful attraction of the competing virtues. Perhaps in the clash between speed and thoroughness, for example, it can seem so tempting to rush and take credit for some regulatory achievement that the thoughtful agency will recognize this and choose to move somewhat more deliberately than it is otherwise might be tempted.

*In some cases, the ideal involves offering both faces to the world, rather than an intermediate position between them.*

The leap from “best in class” to truly excellent may depend on the agency creatively seeking game-changing responses to various demands so as to recast them as win/win opportunities. For example, the tension between performance standards (opposed by stakeholders who call for guidance and decry the “arrogance” of issuing vague requirements) and design standards (opposed by those who decry “micro-managing” by bureaucrats) can sometimes be sidestepped by issuing regulations that combine the two regimes. Specific rules can be combined with a “safe harbor” design that allows anyone to innovate away from it as long as equivalent or better performance emerges. Similarly, the tension in cost-benefit decisionmaking between efficiency and equity is usually portrayed as zero-sum, but by deriving utility functions that recognize the disproportionate cost of subjecting individuals to concentrated risks or to inordinate costs, an agency can seek solutions that maximize an enriched conception of net benefit that does not ignore the special concern rightfully given to “tail risks” and “tail costs.”<sup>21</sup>

### **Finding “Comfort in the Cause”**

To this point, I have argued that an excellent regulatory agency needs to articulate not only a mission statement but an “alignment statement” and a “values statement.”<sup>22</sup> The synergy among these aspects of policy and practice could permeate every major objective of the agency: for example, the U.S. Environmental Protection Agency (EPA) could foreshadow the next five years of one of its major Clean Water Act programs by stating something like: “We will increase the mileage of U.S. rivers that are fishable and swimmable by [X] percent per year during 2015-2020; we will do so by a portfolio of the following [Y] actions; and we will prioritize, plan, fine-tune, implement, and evaluate these actions within a public process dedicated to [Z] values.” In order to make statements such as these meaningful and worthy, the agency needs above all to understand its mission and seek to advance it single-mindedly.

In reflecting on my own experience as a manager in, and advisor to, regulatory agencies at the federal, state, and local levels, as well as mindful of the litany of examples of “regulatory breakdown,”<sup>23</sup> I remain concerned that agencies too often expend their limited financial, human-resource, and political resources in service of masters other than their core missions. Incisive self-evaluation may reveal that what appears to be—or is rationalized to be—action in service of the mission turns out instead to be in service of the leadership of the agency, the executive overseeing the government, one favored constituency alone, the personal ambition of a decision-maker or advisor, or the preservation of the institution – rather than the principles for which the agency was established to serve.

As one of many possible examples (this one informed by first-hand participation), early in my time as OSHA’s director of health rulemaking, the Department of Labor’s chief OSHA lawyer entered the morning executive meeting with news of an exciting “win” for the agency: an appellate court had upheld OSHA’s right not to make progress on a proposed rule reducing levels of hexavalent chromium (Cr-VI) in U.S. workplaces, despite the plaintiffs’ demonstration that three years had elapsed without any tangible reason for OSHA’s failing to meet a self-generated deadline for proposing the rule.<sup>24</sup> According to OSHA’s own risk estimates, more

than 500,000 U.S. workers were exposed to concentrations of Cr-VI sufficient to increase their lifetime excess risk of lung cancer by more than one chance per 1,000 (in contrast to the usual level of 1 chance per million that EPA generally considers *de minimis*). I recall asking, in hindsight naively, whether we could accommodate two things: our desire to assert our newly-upheld right to exercise considerable discretion, along with the importance of this particular issue to any reasonable risk-based priority list. We could, I ventured, wait a decorous interval and then announce that despite the court decision, we would exercise our discretion by *restarting* this moribund rulemaking—not because we were petitioned to do so, but because we had studied the issue and made such a finding. This flabbergasted my colleagues, who did not accept the premise that we would ever react to a grant of authority not to do something by turning around and doing it anyway, even at a more leisurely pace.<sup>25</sup> Defending the primacy of the agency (and perhaps promoting the narrow interests of a reduced workload) had, in my opinion, clashed with defending the mission of the agency. And here the mission lost. The authorizing statute for OSHA, after all, states that “Congress declares it to be its purpose and policy... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”

What are the forces that push or tempt agencies to forget or cloud their missions? The scholarly literature has tended to focus on two bugbears that can warp the agency from without:

- (1) excess dependence on (perhaps, but not necessarily culminating in, “capture by”) interest groups that are no longer (or never were!) central to the mission;<sup>26</sup> and
- (2) “goal ambiguity,” wherein the simultaneous duty to police a regulated industry and promote it economically, or to deter harmful conduct while assisting firms already in compliance to further improve their performance, causes agencies to become “jacks of all trades but masters of none.”<sup>27</sup>

As important as these sorts of forces are, I think the more powerful one is *chauvinism*—the insular banding-together of agency personnel to defend the institution and only incidentally the mission. Chauvinism, or its more toxic cousin (tribalism), is the suspension of higher functions that can make a sports fan root for a player with an unsavory personal life, until the day that player wears another uniform and the fan suddenly realizes how blind he has been to his own cherished beliefs.<sup>28</sup> In my experience, this pathology in the regulatory world can exist within a vicious circle: it sometimes only develops when the agency is truly under siege from self-interested external groups, but the “bunker mentality” reflex tends to frustrate and goad on the critics, resulting in yet more perceived need to defend the organization as the *de facto* mission of the staff and management.

The first step to reversing this vicious circle is for the agency to engage in a difficult form of self-reflection. Real self-reflection sometimes means admitting mistakes. As the U.S. Secretary of Transportation said recently in response to the recall of millions of cars with defective airbags: “Defective agencies, like defective people, need the capacity for self-reflection and to make room for self-improvement... And that is what NHTSA is doing today.”<sup>29</sup> I have no special insight into how agencies can awaken to the need for such reflection, although I am not sanguine about prospects for this in agencies that discourage constructive criticism from staff and that view dissent as a form of treason. Jumping off from a metaphor Cary Coglianese has

offered, that a regulatory agency is in some respects like a parent,<sup>30</sup> I think that one of the hardest but most necessary questions parents must ask themselves periodically is whether what they are recommending or insisting their child do is motivated truly by what is best for the child, or what allows the parents to experience vicarious success or enjoyment.<sup>31</sup> Of course it is possible that these interests coincide, and that in the regulatory realm what is good for the agency is also what is best for the nation, but a regulator (like a parent) that occasionally imagines itself forced to justify its behavior to skeptical evaluation will be less likely to confuse the two.

This advice begs the question of how an agency can distinguish with confidence among competing conceptions of its mission. Clearly a primary source of an agency's mission can be found in the text of its authorizing legislation, including any legislative history, other ancillary accounts, and judicial interpretations. Beyond this, although no set of observations could possibly apply as given to the entire panoply of regulatory agency types and circumstances, it is possible to offer some elaborations on regulatory-agency missions that may be useful broadly. Most agencies could use the following questions as starting points for self-reflection about their fidelity to their mission, with any negative answers needing either correction or special justification:

- Does your agency avoid maximizing value along only one dimension? (When agencies protect the environment without regard to cost, or promote industry without regard to externalities, they construe the agency mission to avoid tradeoffs but still leave society with tradeoffs that are managed in ad hoc, opaque, or capricious ways.)
- If your agency is required to ignore something important in its decision-making (regulatory costs, distribution, feasibility, or the like), does it nevertheless *inform* society about what it must omit from the decision calculus?<sup>32</sup>
- Does your agency regard “small” changes in the economy as objects for special scrutiny to promote justice instead of just as a “rounding error”? (For example, is a finding that “few net jobs are created or lost,” but many citizens may still be forced to change jobs, the beginning of further analysis rather than the end of the story?)<sup>33</sup>
- Does your agency live up to the principles it holds up for the rest of society? (For example, does an environmental agency reduce its own water use or carbon footprint? Does a worker-safety agency maintain a low internal injury and illness rate?)<sup>34</sup>
- Does your agency seek to dispel myths about its mission, or about its own performance, even if they are popularized by important agency stakeholders and even if doing so casts your agency in a negative light?
- Does your agency respond to new and asymmetric burdens not by fulfilling them half-heartedly but by volunteering to *add* processes that equalize the playing field? (For example, I have argued that while Congress has required EPA, OSHA, and the Consumer Financial Protection Bureau to create panels composed of small business representatives to “preview” proposed regulations, there is no reason these agencies could not voluntarily create parallel panels of, respectively, community members *affected* by environmental impacts of small businesses, employees of small companies, or customers of small lenders.)<sup>35</sup>
- Does your agency regard the “porting” of problems so they fall outside of the agency’s narrow jurisdiction as an unacceptable short-cut instead of as a victory?<sup>36</sup>

- Is your agency willing to devolve authority to another agency that can do the job better, and to sunset programs that have succeeded and don't need to be continued?
- Does your agency resist exhortations to ignore “paper violations” of its regulations? (Without a reliable system for reporting conditions within regulated establishments, evidence-based problem-solving is stymied.)
- Does your agency seek to facilitate broad discussions whose goal is “coming to mature public judgment,” as opposed to airing “raw mass opinion”?<sup>37</sup> (An agency that engages stakeholders in discussions that highlight rather than bury information about uncertainties, limited resources and opportunity costs, and alternative solutions will foster light rather than heat, and can encourage disappointed stakeholders toward “reluctant acceptance” rather than frustrated acquiescence.)

## Conclusion

The heading for the previous section comes from a William Wordsworth poem called “The Character of the Happy Warrior,” in which the poet describes someone

Who, with a toward or untoward lot,  
 Prosperous or adverse, to his wish or not—  
 Plays, in the many games of life, that one  
 Where what he most doth value must be won...  
 Finds comfort in himself and in his cause;  
 And, while the mortal mist is gathering, draws  
 His breath in confidence of Heaven's applause:  
 This is the happy Warrior; this is he  
 That every man in arms should wish to be.

A regulatory agency that aligns its traits, actions, and outcomes, that navigates thoughtfully between competing virtues, and that keeps its core mission in its sights (and in its rear-view mirror as it evaluates), can and should be an edifice full of personnel who will find comfort in their tasks and be confident that they will *merit* applause even if they do not hear it often. How different this vision of institutional comfort is from the mood that too often characterizes regulators in an era of increasing expectations and diminishing resources! The folly of the spiral of downheartedness—“we have too few tools to get the job done, and no one appreciates what we do”—is that it begets resentment on the part of the public, which in turn reinforces beleaguered feelings within the agency.

No one wants a bureaucracy stuffed with self-satisfied workers pursuing happiness as an end in itself. But there is much to be said for a system that can attract, nurture, and validate workers who view public service as a source of pride, motivation, and comfort. In the special arena of regulatory public service, no one is (or at least no one should be) “born to regulate,”<sup>38</sup> but a “beyond best-in-class” regulator should attract people who are “trained to protect,” or “sworn to optimize,” or “born to shed light on, and diminish, tragic choices.”<sup>39</sup> These workers, and the publics they serve, deserve agencies that equip them to pursue this high calling.

## Notes

<sup>1</sup> John Denton, “Creating the Perfect NBA Player,” *Florida Today*, February 8, 2003, available at [http://enquirer.com/editions/2003/02/08/spt\\_wwwspthoopsnbaperf8.html](http://enquirer.com/editions/2003/02/08/spt_wwwspthoopsnbaperf8.html).

<sup>2</sup> Adam M. Finkel, “Solution-Focused Risk Assessment: A Proposal for the Fusion of Environmental Analysis and Action,” *Human and Ecological Risk Assessment*, 17(4), August 2001, pp. 754-787.

<sup>3</sup> Adam M. Finkel, Daniel Walters, and Angus Corbett, “Planning for Excellence: Insights from an International Review of Regulators’ Strategic Plans,” Penn Program on Regulation (2015), pp. 7-8, available at <https://www.law.upenn.edu/live/files/4460-finkel-walters-corbett-strategic-plan-analysis-ppr>.

<sup>4</sup> David Brooks, “The Agency Moment,” *New York Times*, Nov. 14, 2014, p. A27.

<sup>5</sup> Paul Wilkins, “Congruence and Countertransference: Similarities and Difference.” *Counseling*, February 1997, p. 40.

<sup>6</sup> For example, an agency might issue an update to its current five-year strategic plan in light of an unexpected economic recession, stating that for the time being, it would be more risk-averse with respect to rulemaking and enforcement actions that could tend to cause significant net job losses (and more likely to favor actions that would tend to create significant net new jobs).

<sup>7</sup> Cary Coglianese, “Defining and Assessing Regulatory Excellence,” available at <https://www.law.upenn.edu/live/files/4366-coglianese-discussion-draft1march-2015pdf>, pp. 1-2. Although initially referring to the three elements as “characteristics,” “actions,” and “outcomes,” Coglianese has subsequently characterized these as the “TAO” of regulatory excellence, for “traits,” “actions,” and “outcomes.”

<sup>8</sup> When contemplating the three facets that make up the “TAO” of excellence, I recalled an aphorism I read as a college student, which guided my thinking about the “alignment” metaphor: “*Love without courage and wisdom is sentimentality, as with the ordinary church member. Courage without love and wisdom is foolhardiness, as with the ordinary soldier. Wisdom without love and courage is cowardice, as with the ordinary intellectual. But the one who has love, courage and wisdom is one in a million who moves the world.*” Ammon Hennacy, *The Book of Ammon* (1953), at p. 136. Substitute “empathy, boldness, and quantitation” as less grandiose attributes for the three qualities in Hennacy’s statement, and consider that the “ordinary regulator” may well have one or two of these qualities, the “best in class” regulator may have two, and the “beyond best-in-class” regulator will have, and will align, all three.

<sup>9</sup> It is also possible that an agency will exhibit a quality that is out of step with *both* of the other vertices rather than just one. For completeness’ sake, I offer these adjectives to describe the three possible such cases: (1) outcomes without either actions or traits are *random* (and

certainly imply that no credit for outcomes is warranted); (2) actions without either traits or outcomes are *purposeless*; and (3) traits without either actions or outcomes are *vapid*.

<sup>10</sup> This particular attribute may be somewhat unusual, in that stakeholders may *perceive* one extreme as actually being an incarnation of the other. An agency that sincerely wants the public to shape its policies can end up being perceived as passive-aggressive, especially by the regulated community—as if the regulator is hiding its true conclusions and requirements rather than waiting for the public to help define them. When OSHA promulgated an ergonomics rule in 2000 that was unusually flexible and open-ended, conservative members of Congress denounced the agency for having a “secret plan” its inspectors would use to flesh out what was never made explicit in the rule itself, and this perception contributed significantly to the unprecedented Congressional veto of the rule. What may have been intended as a true concession ended up looking like a Trojan Horse. Adam M. Finkel and Jason W. Sullivan, “A Cost-Benefit Interpretation of the ‘Substantially Similar’ Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?,” *Administrative Law Review*, vol.64, no. 4 (Fall 2001), pp. 707-784, at 768-9.

<sup>11</sup> During the congressional veto of the OSHA ergonomics rule, several members of Congress remarked disapprovingly of a magazine interview with OSHA’s director of safety standards (Marthe Kent), who told the interviewer that “I was born to regulate... So long as I’m regulating, I’m happy... I think that’s really where the thrill comes from.”

<sup>12</sup> Adam M. Finkel, “I Thought You’d Never Ask: Structuring Regulatory Decisions to Stimulate Demand for Better Risk Science and Better Cost Estimates,” in review, *European Journal of Risk Research*.

<sup>13</sup> Robert Iafolla, “OMB Releases PEL Information Request to Begin Update of Chemical Exposure Limits,” 44 *BNA Occupational Safety and Health Reporter*, Oct. 2, 2014, p. 917.

<sup>14</sup> Adam M. Finkel, “The Cost of Nothing Trumps the Value of Everything: The Failure of Regulatory Economics to Keep Pace with Improvements in Quantitative Risk Analysis,” *Michigan Journal of Environmental and Administrative Law*, Vol. 4, no. 1 (winter 2014), pp. 91-156, at 108-9.

<sup>15</sup> David Kessler, *A Question of Intent: A Great American Battle with a Deadly Industry* (Public Affairs, Cambridge, Mass., 2001).

<sup>16</sup> *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

<sup>17</sup> Finkel and Sullivan, “A Cost-Benefit Interpretation,” at 767-770.

<sup>18</sup> I appreciate Eric Rich, a student of mine at Penn Law, for calling this to my attention.

<sup>19</sup> Richard M. Berger, “Tennis for Seniors,” available at <http://tennis.bergerweb.net/-SeniorsBook/racquetscience.shtml>; Nicholas James Savage, *Vibration Absorption in the Tennis*

*Grip and the Effects on Racquet Dynamics*, Doctoral Dissertation (2006), available at [http://www.sensorprod.com/news/white-papers/2006-08\\_vat/wp\\_vat-2009-08.pdf](http://www.sensorprod.com/news/white-papers/2006-08_vat/wp_vat-2009-08.pdf).

<sup>20</sup> See European Space Agency, “What Are Lagrange Points?,” available at [http://www.esa.int/Our\\_Activities/Operations/What\\_are\\_Lagrange\\_points](http://www.esa.int/Our_Activities/Operations/What_are_Lagrange_points).

<sup>21</sup> Carl Cranor and Adam M. Finkel (2015), “Toward Recognizing Individual Benefits and Costs in Cost-Benefit Decisionmaking,” in review at *Regulation & Governance*.

<sup>22</sup> In our exploration of features of regulatory-agency strategic plans around the world, we found one agency—the U.S. Environmental Protection Agency—whose plan specifically highlighted “core values” separate from discussions of mission, goals, and objectives. Adam M. Finkel, Daniel Walters, and Angus Corbett, “Planning for Excellence: Insights from an International Review of Regulators’ Strategic Plans.” EPA articulated the three values of “science, transparency, and the rule of law,” although its 80-page document only mentions these words in a couple of places in the narrative and offers no elaboration on why they were chosen or how the agency will embody them.

<sup>23</sup> Cary Coglianese, *Regulatory Breakdown: The Crisis of Confidence in U.S. Regulation* (University of Pennsylvania Press, 2012).

<sup>24</sup> Oil, Chemical, and Atomic Workers Union and Public Citizen’s Health Research Group v. OSHA, Third Circuit, No. 97-3532, decided March 13, 1998.

<sup>25</sup> OSHA made zero progress on this rulemaking during the subsequent four years, until the U.S. Court of Appeals for the Third Circuit (314 F. 3d 143, decided December 24, 2002) ordered the Agency to issue a proposed rule forthwith: “At some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough... We conclude that now is such a time. While competing policy priorities might explain slow progress, they cannot justify indefinite delay and recalcitrance in the face of an admittedly grave risk to public health” (emphasis added).

<sup>26</sup> For an evergreen example from more than 60 years ago, see Samuel P. Huntington, “The Marasmus of the ICC [Interstate Commerce Commission]: The Commission, the Railroads, and the Public Interest,” *Yale Law Journal*, vol. 61, No. 4, April 1952, pp. 467-509.

<sup>27</sup> Young Han Chun and Hal G. Rainey, “Goal Ambiguity in U.S. Federal Agencies,” *Journal of Public Administration Research and Theory*, Vol. 15, No. 1, pp. 1-30.

<sup>28</sup> Richard Kharasch, *The Institutional Imperative: How to Understand the United States Government and other Bulky Objects* (Charterhouse Books, New York, 1973).

<sup>29</sup> Anthony Foxx, quoted in Ashley Halsey III, “Federal Regulators Admit they Bungled Investigation of Deadly Auto Ignition,” *The Washington Post*, June 5, 2015.

<sup>30</sup> Cary Coglianese, “Rating Governmental Excellence,” *available at* <https://www.law.upenn.edu/live/files/4380-coglianese-discussion-draft2march-2015pdfpdf>, p. 5.

<sup>31</sup> Alice Miller, *The Drama of the Gifted Child: The Search for the True Self*, Harper Collins, 13<sup>th</sup> printing, 1980.

<sup>32</sup> Cass R. Sunstein, *Risk and Reason: Safety, Law, and the Environment* (Cambridge University Press, 2002), pp. 191-228.

<sup>33</sup> Cary Coglianese, Adam M. Finkel, and Christopher Carrigan (eds). *Does Regulation Kill Jobs?* (University of Pennsylvania Press, 2014).

<sup>34</sup> See the discussion of “walking the walk” in Finkel, Walters, and Corbett, “Planning for Excellence,” pp. 13-14. An agency that requires of itself what it seeks to require from the regulated community, of course, will likely avoid charges of hypocrisy and find its enforcement tasks easier to carry out.

<sup>35</sup> Adam M. Finkel, Testimony before the House Committee on Small Business (Regulatory Flexibility Act Improvements Hearing), June 15, 2011, at 7.

<sup>36</sup> John D. Graham and Jonathan B. Wiener (eds.) *Risk Versus Risk: Tradeoffs in Protecting Health and the Environment* (Harvard University Press, 1995).

<sup>37</sup> Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Changing World* (Syracuse University Press, 1991).

<sup>38</sup> See note 13 *supra*.

<sup>39</sup> Guido Calabresi and Philip Bobbitt, *Tragic Choices* (W.W. Norton and Co., 1978).

## **Beyond Best-in-Class: Three Secrets to Regulatory Excellence**

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### **About the Author**

Adam Finkel serves as the Penn Program on Regulation's first executive director. He is one of the nation's leading experts in the evolving field of risk assessment and cost-benefit analysis, with over twenty-five years of experience improving methods of analysis and making risk-based decisions to protect workers and the general public from environmental hazards. He is also a Clinical Professor of Environmental Health Sciences at the University of Michigan School of Public Health. From 2004-2007, he was a Visiting Professor of Public and International Affairs at the Woodrow Wilson School at Princeton University. From 1995 to 2000, he was Director of Health Standards Programs at the U.S. Occupational Safety and Health Administration (OSHA), where he was responsible for promulgating and evaluating regulations to protect the nation's workers from chemical, radiological, and biological hazards. From 2000 to 2003, he was OSHA's Regional Administrator for the Rocky Mountain states, in charge of all enforcement, outreach, and program evaluation for OSHA in a six-state region with a rapidly-expanding oil and gas industry. He is one of three people chosen to serve on both of the U.S. National Academy of Sciences (NAS) committees to review U.S. federal agency methods of risk assessment, convened at the 10th and 25th anniversaries of the influential 1983 NAS "Red Book" on the subject. Finkel recently received the Harvard School of Public Health Alumni Leadership Award for Public Health Practice, awarded for "selfless service and leadership in the practice of public health at the local, state, regional, national or international level." He has published more than 60 articles on risk assessment and management in the scientific, economic, legal, and popular literature, and is co-editor of three books: *Worst Things First? The Debate over Risk-Based National Environmental Priorities*; *Import Safety: Regulatory Governance in the Global Economy*; and *Does Regulation Kill Jobs?* With Cary Coglianese and others at Penn, he has led a Robert Wood Johnson Foundation-funded project developing of the first-ever application of machine learning and "big data" to the problem of regulatory inspection targeting.