Pace University
DigitalCommons@Pace

Pace Law Faculty Publications | School of Law

1-1-1985

Review of The Regulation of Quality, Products, Services, Workplaces and the Environment

David S. Cohen
Pace University School of Law, scohen2@law.pace.edu

Follow this and additional works at: http://digitalcommons.pace.edu/lawfaculty

Part of the Consumer Protection Law Commons

Recommended Citation
David Cohen, Review of The Regulation of Quality, Products, Services, Workplaces and the Environment, 19 U. Brit. Colum. L. Rev. 133 (1985), available at http://digitalcommons.pace.edu/lawfaculty/429/.

This Book Review is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

BOOK REVIEWS

THE REGULATION OF QUALITY, PRODUCTS, SERVICES, WORKPLACES AND THE ENVIRONMENT, edited by Donald N. Dewees, Toronto: Butterworths, 1983. Pp. xvi, 345. $75.00 — This book is the fourth in a monograph series on *Studies in Law and Economics* published by Butterworths in collaboration with the Law and Economics Programme at the University of Toronto Faculty of Law. The programme, which has been operating since 1979 under the direction of Michael Trebilcock, has generated a number of novel and extraordinarily fruitful initiatives in legal education and scholarship, including appointment of non-law academics to the Faculty, encouragement of visiting professors at the law school, organization of a law and economics workshop series, and establishment of interdisciplinary law and economics and public policy analysis courses as important components of the undergraduate and graduate legal education programmes at the law school.

This book obviously (and the editor acknowledges this fact) grew out of the experience of the authors in the programme and will be of interest to anyone who is interested in how we make individual and collective decisions which affect the quality of our lives. The four subjects of regulation explored in the book are product quality, professional services, occupational health and safety, and the environment. Particular emphasis is placed respectively on the administration of the federal *Hazardous Products Act* and the energy efficiency of consumer durables, the operation of insurance markets (with particular emphasis on life insurance), the regulation of psychotherapeutic services, and the control of environmental pollutants from diesel engines. Most of us are affected directly by decisions of judges and bureaucrats and by operations of the market in many if not all of these contexts, and for that reason alone the book makes valuable reading. In addition, as professionals involved in studying, influencing and making decisions which affect the quality of goods,

HeinOnline -- 19 U. Brit. Colum. L. Rev. 133 1985

services and the environment, we have much to learn from the analytical framework, case studies and conclusions presented by the authors. While the book has its shortcomings, it represents an important and stimulating development in Canadian legal literature.

The structure of the book is designed first to introduce relatively unsophisticated readers to the now familiar law and economics analysis and then to explore its application in the selected subjects of regulation. The first two chapters form Part I of the book, giving a general overview of the regulatory policy literature. The first chapter, authored by Don Dewees, Michael Trebilcock and Frank Mathewson, articulates the well-accepted market failure rationale for government regulation (of quality and most other goods) and then presents a rather more attenuated discussion of ethical and political rationales for regulation. While I have no quarrel with this approach, which is certainly enlightened relative to some others,[1] I find it difficult to accept that restoration of efficient outcomes (that is, the pursuit of welfare maximization) represents a non-normative criterion applicable to an evaluation of quality regulation policies.

Chapter 2, written by the same authors, explores and critically evaluates a range of alternative regulatory tools which we might adopt to achieve quality objectives, including information creation, transfer and monitoring policies, legal liability regimes, taxation and subsidy policies, direct governmental regulation through standard setting and licensing, and direct government provision of goods and services. These chapters are required reading for anyone interested in development of public and legal policy in quality regulation or the choices open to us in implementing those policy objectives. Again, the arguments are familiar and the description accurate, but the treatment of political and ethical as opposed to welfare maximization objectives is very brief. For example, the description of the intractable problems associated with valuation of human life, while not inaccurate, is dealt with on three occasions in seventy-six words. That itself is a grave deficiency, and unfortunately the authors do not refer us to their primary sources for these remarks.

In Part II of the book, consisting of the succeeding four chapters, three economists and one "lawyer with training in economics" apply

---

[1] The perspective commonly adopted by regulatory analysts is an economic model, which fails to acknowledge or to take into account its own ethical implications, other ethical perspectives and political and institutional considerations. See, for example, E. M. Gamlich, BENEFIT-COST ANALYSIS OF GOVERNMENT PROGRAMS (1981); R. Posner, ECONOMIC ANALYSIS OF LAW (2nd ed. 1977), ch. 13.

HeinOnline -- 19 U. Brit. Colum. L. Rev. 134 1985

the theoretical models and regulatory instruments described in Part I to four sectors of the economy: product quality regulation, regulation of professional service quality, occupational health and safety regulation, and environmental quality regulation. I can only evaluate critically the chapter by Ronald Hirshhorn on Regulating Quality in Product Markets. It seems that while Hirshhorn admits that economic efficiency is recognized as only one social objective in product quality regulation, he fails to consider and evaluate the distributional objectives (as opposed to consequences) of policies relating to product quality. Hirshhorn's criticism of the legal liability regime as a regulatory tool to achieve appropriate levels of quality is justifiable notwithstanding that his criticism is premised on an inaccurate description of the legal allocation of entitlements, the choice between strict and negligence standards, and the existence of controls (through contributory negligence rules, remoteness rules and causation concepts) on consumer behaviour associated with an increased incidence of product-related accidents. Despite these weaknesses, this chapter indicates that legal liability regimes are particularly ill-suited to achieve objectives relating to service, product, environmental and workplace quality. This point, I might say, is consistent with the conclusions in all the other chapters in this part of the book.

A general problem with Part II is its paucity of empirical data offered to support the authors' assumptions and arguments. However, Part III of the book, chapters 7 through 11, attempts to meet that concern. Chapter 7 describes and evaluates the administration of the *Hazardous Products Act* since 1969 with particular emphasis on the process and criteria used in the Product Safety Branch in decisions to ban hazardous products or alternatively to establish standards for specific products. This chapter adds little to the two recently published works[2] in this area, one of which was written by Hirshhorn for the Economic Council of Canada's Regulation Reference. Chapter 8 examines regulatory initiatives related to energy use of consumer durables, including refrigerators, furnaces and automobiles. The economic analysis of the market imperfections associated with this quality characteristic is carried out with empirical data developed in earlier studies. The failings of this chapter relate to the absence of important if not determinative data relating to the existence and degree of divergent consumer tastes, and the total costs

[2] See Economic Council of Canada, Technical Report No. 10, PRODUCT SAFETY REGULATION AND THE HAZARDOUS PRODUCTS ACT (R. Hirshhorn) (1981). J. C. Shaul and M. Trebilcock, *The Administration of the Federal Hazardous Products Act* (1983) 7 CAN. BUS. L.J. 1.

HeinOnline -- 19 U. Brit. Colum. L. Rev. 135 1985

and benefits of information programmes. In Chapter 9, Frank Mathewson, an economist at the University of Toronto, examines the operation of insurance markets in Canada, with emphasis on the internal organizational structure of the firm and market imperfections in delivery of life, property and casualty insurance relating to moral hazard, adverse selection, and informational assymetries. Although interesting, the chapter will be difficult reading for lawyers without economic training.

Chapters 10 and 11 provide the most interesting reading in Part III. In Chapter 10, Michael Trebilcock and Jeffrey Shaul describe the regulation of the quality of mental health services. This chapter, unlike the others, discusses the civil liability regulatory regime in some detail, and again we see that this tool, and other output regulation in general, is unlikely to constitute an effective and accurate quality control policy. Written by Professor Dewees, Chapter 11, the final chapter in this section of the book, examines the regulation of particulate emissions from diesel automobiles. These are recognized as costs not likely to be borne by the producer either *ex ante* through multilateral bargaining or *ex post* through tort litigation. Regulatory alternatives of strict standard setting, effluent charges and pollution rights policies are discussed and evaluated. What is interesting in this chapter is the acknowledgement that the theoretical model is difficult to apply to environmental and occupational health and safety problems in which the harm is difficult to identify, estimate and quantify, the control technology does not yet exist, and the control costs are unknown. Nevertheless, the economic analytical framework can point us in some general direction and offer guidance as to some of the more clearly defined outcomes of the choices we make.

In the concluding chapter, Dewees, Trebilcock and Tuohy describe the conclusions arrived at in the earlier chapters and reflect on the complexity of the policy responses even when confined to an efficiency perspective. The authors then provide, somewhat belatedly, a critique of cost-benefit analysis which, while incomplete, allows one to recognize its assumptions and limitations and its tendency to mask distributive outcomes. Earlier presentation of this critical perspective would have better helped readers.

The discussion of the "Problems of Process" in this concluding chapter provides the book's most valuable rewards to economists looking beyond the boundaries of their discipline as well as to non-economists such as myself who prefer a multi-disciplinary approach to social analysis. We see here the first realistic attempt to describe

HeinOnline -- 19 U. Brit. Colum. L. Rev. 136 1985

institutional mechanisms which take into account efficiency norms, the reality of bureaucratic self-aggrandizement, special interest group influences, and ethical constraints on choice. It could have been set out earlier, perhaps in the sectorial and case studies.

As is evident from the foregoing discussion, my criticisms of the book are few and relatively trivial. First, the points made in the conclusion should have been expressed earlier. Second, ethical realities of welfare maximization might have been acknowledged and perhaps discussed in Part I of the book. Third, the ethical and political rationales for regulation might have been developed more fully and applied more rigourously in the sectoral analyses and case studies. Fourth, the book lacks an index, reducing considerably its value to potential readers who may be interested in only one aspect of quality regulation and want to inquire into the treatment of that issue across sectors and the case studies. Finally, I would have very much liked to see an analysis of the legal "quality standards", of both statutory and common law origin, which in their own way regulate the conduct of manufacturers, suppliers and product users, perhaps to a far greater extent than do the more obvious regulatory schemes.

Apart from those points, I highly recommend the book to academic and practising lawyers and congratulate the editor and authors on this important contribution to Canadian law.

DAVID COHEN†

---

† Of the Faculty of Law, University of British Columbia.

© David Cohen, 1984.