DESIGNING EFFECTIVE REGULATION: A NORMATIVE THEORY

BENEDICT SHEEHY* AND DONALD FEAVER**

I INTRODUCTION

Regulation that is ineffective in meeting its objectives can be just as harmful to government, businesses and consumers through unintended consequences, as no regulation or over-regulation.[1]

It has long been recognised that regulation may be conceptualised as a system-like construct of interdependent parts.[2] It has also been recognised that regulatory systems are not created in a vacuum; rather, they are embedded within legal systems.[3] Like all legal systems, regulatory systems have both normative and positive dimensions. The normative dimension is the focus of this article which deals with theoretical and policy considerations determining the design of regulatory systems.[4] The positive dimension, by contrast, is less abstract and deals with the implementation of normative policy choices by translating them into positive legal norms.[5] Both dimensions can be viewed as being made up of numerous interconnected and interdependent components. This article addresses these components with respect to the normative dimension by identifying them,

* Director of the Branded Trust Foundation. Email: b.sheehy@btassurance.com.
** Director of the Branded Trust Foundation. Email: d.feaver@btassurance.com.

1 Christine Parker and Kirsi Kuuttiniemi, 'Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance' (Report, Public Management Committee, Organisation for Economic and Cultural Development, 2000) 10 <http://www.oecd.org/regreform/regulatory-policy/1910833.pdf>.

2 See, eg, J B Ruhl, 'Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State' (1996) 45 *Duke Law Journal* 849; Jeffrey Rudd, 'J B Ruhl's "Law-and-Society System": Burying Norms and Democracy Under Complexity Theory's Foundation' (2005) 29 *William & Mary Environmental Law & Policy Review* 551.

3 See generally Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russel Sage Foundation, 1975); Duncan Kennedy, 'Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940' (1980) 3 *Research in Law and Sociology* 3; Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419; Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342.

4 Adrian Vermeule, 'Connecting Positive and Normative Legal Theory' (2008) 10 *University of Pennsylvania Journal of Constitutional Law* 387.

5 The positive dimension is addressed in an unpublished forthcoming article that is complementary to this article.

and analysing their composition, position and linkages within a regulatory system.

The importance of such an analsysis lies in the policy and practical outcomes. A normative regulatory framework that is incoherent is a set-up for failure. For example, where a normative framework includes two opposing norms, the policy and practices developed under the framework will undermine each other, leading not only to a waste of resources, but more importantly, a failure to achieve the intended governance objectives.

Accordingly, the objective of this article is to identify and examine the normative components of regulatory systems. More specifically, the question this article seeks to answer is whether the salient characteristics of each component and its relationships with other components can be identified. In order to answer this question, the article first focuses on the subject of regulation: human behaviour and social practices, and the different ways of viewing the problems these practices generate. It is these practices and problems that give rise to a decision to regulate and the choice of the measures that 'should' be put in place to resolve those problems. This article then focuses on identifying the attributes of components and the relationships between them. The purpose of this exercise is to determine whether a clearer undertstanding of the interrelationship between components enables the deduction of general principles that could guide the design of more coherent and effective regulation.[6]

To that end, Part II sets out the theoretical foundation of this investigation by discussing the key concepts used throughout this article, including a discussion of social practice theory and definitions of coherence, regulation and regulatory coherence. Part III provides a framework and describes the normative processes surrounding the identification of social phenomena requiring a regulatory response. Part IV deals with policy framing and Part V sets out a methodology for the selection of a coherent regulatory approach. Finally, in Part VI, a matrix is presented that identifies critical relationships that set out general patterns

II THEORETICAL OVERVIEW

Law can be conceived of as a social institution that coordinates the behaviour of organisational and human actors.[7] Human behaviour is complex. On the one hand, it is individually psychologically derived and driven. On the other, it is socially motivated and has external relational implications where an individual's psychologically motivated actions interact with those of other actors.[8] In

6 The importance of 'coherence' as a legal phenomenon is discussed in Andrew Smorchevsky, 'Editorial' (2013) 36 *University of New South Wales Law Journal* 994.

7 See Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007); Luhmann, above n 3.

8 This area of inquiry is recognised as 'culture and cognition': Paul DiMaggio, 'Culture and Cognition' (1997) 23 *Annual Review of Sociology* 263.

Luhmann's words, '[o]ne can conceive of law as a social system … if one takes into consideration the fact that this system is a subsystem of society'.[9]

The inquiry into whether and how human behaviour having social effects should be altered and redirected can be approached in many different ways.[10] The question of whether to regulate is usually viewed as a political decision that involves identifying and determining if a social problem is sufficiently important to warrant a coordinated response. In addition to being political, decisions about regulating behaviour are usually also highly ideological decisions. Conversely, the rationalist approach asserts that an objectively determined, pre-existing problem should be identified and analysed using deductive reasoning consistent with the scientific method leading to a consensus-based rationally generated solution.[11] While reasonable, this approach has significant shortcomings. At a most basic level it is inconsistent with research into human cognition and decision-making. It is well known that humans, the allegedly psychologically rational actors of the ideal model, often reject scientifically sound information inconsistent with their beliefs.[12] The research also suggests that people are more inclined to accept the views of others whose beliefs about the world are similar to their own.[13] In other words, people will reject scientific opinion in favour of an opinion that supports their own world view.

From what is known about how humans approach problems and make decisions, both as individuals and as collectives, the rational ideal remains just that – an ideal. The notion that evidence-based policy,[14] even with only a small amount of political debate will lead to a rational policy outcome is not supported by the evidence. The rational approach sidesteps the difficult but necessary inquiry into the existence of the social problem – a task that requires analysis of complex socio-psychological phenomena.[15] In other words, matters 'in need of regulation' are by no means the fixed, objective, self-evident, external phenomena that some assert they are.[16]

An alternative approach to the objective rationalist frame of inquiry considers the influence of cognition, culture and related ideology within the broader

9 Gunther Teubner, Richard Nobles and David Schiff, *The Autonomy of Law: An Introduction to Legal Autopoiesis* in David Schiff and Richard Nobles (eds), *Jurisprudence* (Butterworth, 2003) ch 19, 7.

10 Julian Henriques et al, *Changing the Subject: Psychology, Social Regulation and Subjectivity* (Methuen, 1984).

11 Reza R Dibadj, *Rescuing Regulation* (State University of New York Press, 2012) 50–2.

12 See Dan M Kahan and Donald Braman, 'Cultural Cognition and Public Policy' (2006) 24 *Yale Law & Policy Review* 149, 162–3; Brendan Nyhan and Jason Reifler, 'When Corrections Fail: The Persistence of Political Misperceptions' (2010) 32 *Political Behavior* 303.

13 Raymond S Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2(2) *Review of General Psychology* 175.

14 See Greg Marston and Rob Watts, 'Tampering with the Evidence: A Critical Appraisal of Evidence-Based Policy-Making' (2003) 3 *The Drawing Board: An Australian Review of Public Affairs* 143.

15 DiMaggio, above n 8.

16 Dorothy Holland and Naomi Quinn, 'Culture and Cognition,' in Dorothy Holland and Naomi Quinn (eds), *Cultural Models in Language and Thought* (Cambridge University Press, 1987).

context of social systems.[17] This socio-psychological approach challenges the more simplistic rationalist understanding of law and regulation. Rather than perceiving social phenomena as objective social facts, this approach views social facts that may attract regulatory interest as having cultural and psychological origins that are manifest as *social practices* having *social effects*. These two concepts, *social practices* and *social effects*, though related, are quite distinct analytical terms and their distinction has important implications as discussed throughout the rest of this article.

A *social practice* is a behaviour that is carried out by one actor repeatedly or by multiple actors on a 'one-off basis' over a period of time.[18] For example, the act of murder is a behaviour that may be done repeatedly by the same actor or by many different actors at many different points in time. In either case, it is a human action that is repeated over time and that has social effects. *Social effects* are the impacts on a society of sets of human behaviour, that is, social practices. For example, a social effect of mass education is a literate society with all its social, cultural, political and economic implications. Social practices that have no social effects of concern do not attract regulatory attention. Hence, there is no need to regulate them. Alternatively, where a social effect is desired but there is no social practice to give rise to those effects, regulation may be used to create a new social practice which generates the desired social effect.

The question then arises: what is to be the focus of regulation – the social practice or the social effects? Before that question can be answered, three issues must be addressed. The first touches on the basic question of meaning and raises the question: what is the meaning attached to – the social practice, the effect of that practice, or both? Where the action has no particular socially significant meaning, it will not attract social and regulatory attention and hence no regulation will follow. For example, homosexuality in Canada was stripped of socially significant meaning, which ultimately led to decriminalisation, when the then Minister of Justice, later Prime Minister, Pierre Trudeau stated that 'the state has no business in the bedrooms of the nation.'[19] Once an action has socially significant meaning, however, it may well attract the state's regulatory attention.

Secondly, if an action is perceived as having has no effects of concen – in the natural, social or spiritual realms – it is not regulated because the effects of that

17 Cognitive psychology indicates that people have mental schemas which they use heuristically when confronting novel situations or dealing with new information. These schemas both represent knowledge and process information in non-deliberative, automatic ways. When new information is encountered, it is filtered through people's schemas before they pay attention to it and critically examine and evaluate it. These schema may be connected to intellectually designed frameworks known as ideologies, or simply coherent with Douglas' group-grid cultural theory: Roy D'Andrade, *The Development of Cognitive Anthropology* (Cambridge University Press, 1995); Pamela E Oliver and Hank Johnston, 'What a Good Idea! Ideologies and Frames in Social Movement Research' (2000) 5 *Mobilization: An International Quarterly* 37; Mary Douglas, *Natural Symbols: Explorations in Cosmology* (Barrie & Rockliff, 1970).

18 Andreas Reckwitz 'Toward a Theory of Social Practices: A Development in Culturalist Theorizing' (2002) 5 *European Journal of Social Theory* 243.

19 Martin O'Malley, 'Unlocking the Locked Step of Law and Morality', *The Globe and Mail* (Toronto), 12 December 1967, 6, thereafter used repeatedly by Trudeau.

behaviour are not perceived as problematic. For example, if a social practice such as religious or political affiliation, or behaviour such as homosexuality or clear cut logging is deemed to be significantly harmful to society or to the individual or nature which sustains human life, it is likely to be prohibited. Accordingly, it is correct to state that the social effect is the trigger for regulating the social practice.

Finally, once a social effect is described as desirable or undesirable, the question becomes: what is to be the focus of the regulation? Is it the social effect, the social practice, or the meaning of a social practice? For example, consider the case of killing another human: is it the practice that is prohibited as in a charge of murder? Or is it the social effect – regulating the violent resolution to conflicts and related underlying causes? Or is it the meaning that is regulated as one sees that killing humans is allowed when the meaning is associated with nationalism in war, or justice in jurisdictions with death penalities and with basic rights where self defence is accepted as a defence against a murder charge? This conceptualisation of both social practices and social effects reveals their deeply normative foundations and implications.

It is the meaning attached to practice and effect that provides the justification for regulation. This creation and attachment of meaning, of course, occurs in the particular context of the debate concerning how a particular social problem 'should' be framed. Clearly, any focus on social practice or social effects is an inherently normative activity. How a social effect is identified, eliminated, modified or created requires turning attention to the social practice that gives rise to that effect. This transition from effect to practice corresponds to a shift from the normative to positive – the shift from the policy 'should' to the legal 'must' and the rules that achieve the practice or behavioural change, initiation, modification or prohibition.

Therefore, for the purposes of this article, the meaning and effects of a social practice underlie what will be referred to as the perception and characterisation of the organising problem. Once these have been established, attention is turned to the specific social practice. It is the actions associated with the social practice itself that are regulated with the objective of achieving a different effect. Hence the *purpose of regulation is to alter social practices to achieve a different social effect*. In other words, since social practices are the cause of social effects, accordingly, regulation must target social practices if it is to achieve the desired social effect – whether promoting or prohibiting the social effect. Although the statement appears to be intuitive, the underlying concepts and distinctions have critical implications for the coherent design of regulation.

A Coherence and Legal Systems

To state that social practices and their social effects have important systemic implications for law and law systems seems trite. It is one thing to conceptualise law and regulation as ethereal social control systems. However, it is quite another to identify and articulate their systemic attributes in a clear, objective mechanical manner. Social systems are networks of relationships between actors whose behaviour is to a large degree influenced by formal or informal institutional

arrangements which reflect the culture. These relationships between actors are manifested in and through social practices. Smooth functioning relationships depend upon coherence between actors' understanding of, and participation in, coherent institutional relationships. In this context, coherence is a concept that is helpful in describing the qualitative nature of these linkages and relationships, both within formal and informal institutional contexts.

Coherence is a broad and well established concept. It comes to law from its origins in philosophy where it has proved useful in terms of epistemology and axiology. It has provided a basis for evaluating knowledge claims, justificatory theories and theories of truth. More recently, legal philosophers such as Raz,[20] and others have used notions of coherence drawn from this analytical tradition to ground their ideas and arguments surrounding the origin and purposes of law in society. Described by Bertea as 'an "ideal" feature of law', coherence has been a rich source of insight into the nature of law and the activities of judges.[21] Judges themselves have long relied on coherence as an evaluative tool. For example, in *Sullivan v Moody*,[22] a case concerning the duty of care in the tort of negligence, a unanimous bench of five of the High Court of Australia opined:

> More fundamentally, however, these cases present a question about coherence of the law … A duty of the kind alleged should not be found if that duty would not be compatible with other duties … How may a duty … rationally be related to the functions, powers and responsibilities of the various persons and authorities who are alleged to owe that duty?[23]

Significantly for this article, the Court recognised the *relational* quality of coherence. Coherence in this context refers to the nature of the interface or linkage between two rules, norms or things. As a relational quality, coherence has been referred to as a *property* that emerges when the linkages between both similar and distinct classes of legal concepts (norms, principles, values or 'units of analysis') align conceptually with minimal friction or logical inconsistency.[24] MacCormick describes the relationship between different legal concepts whereby

---

20 Joseph Raz, 'The Relevance of Coherence' (1992) 72 *Boston University Law Review* 273.

21 Stefano Bertea, 'The Arguments from Coherence: Analysis and Evaluation' (2005) 25 *Oxford Journal of Legal Studies* 369.

22 *Sullivan v Moody* (2001) 207 CLR 562, 581 [55]–[56] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

23 Ibid 581 [55]–[56].

24 Coherence is the critical *ideal* that acts as the linking mechanism connecting discrete legal concepts or collections of legal concepts. It is this linking quality embedded within the concept of coherence that will be described as having both dynamic and structural characteristics. The dynamic properties of coherence come into play at a local level, the level at which legal decisions and rules are made, and have a normative character. The extent to which local change is coherently incorporated within the broader legal system as a whole is more a matter of structural and positive characteristics.

> the coherence of a set of norms is a function of its justifiability under higher order principles or values … provided that the higher or highest-order principles and values seem acceptable as delineating a satisfactory form of life, when taken together.[25]

In this framing, facts are the 'lowest order' unit of analysis in legal thinking that can be linked. Where linked coherently, the result is *narrative* coherence being 'the kind [of coherence] used in "drawing inferences of fact from evidentiary facts"'.[26] Whether a coherent set of facts are legally significant, however, requires evaluating their relevance in relation to a higher order class of legal concepts – rules.[27] This linkage has been described as *normative* coherence.[28] Unlike narrative coherence, which links fact to fact at a case level, in normative coherence facts are given normative significance and linked to rules, a higher order legal concept. As a higher order unit of analysis, rules determine which facts have legal significance. This process involves the exercise of discretion in interpreting rules and applying the facts to arrive at a coherent *decision*.[29]

A coherent decision is the outcome of logically aligning facts and rules. Although a decision may appear to be coherent on its face, it may not fit coherently within the larger corpus of law forming the larger institution of the *legal system*. This level of coherence, *systemic* coherence requires that the relationship between all the parts of the whole be in conceptual alignment. Therefore, law must be narratively, normatively and systemically coherent in all its levels if it is to be truly coherent.[30] If the legal system is viewed as a subsystem of the broader *social system*, the argument then follows that systemic coherence also extends to the relationship between the legal system and the social structures extending beyond it.[31] Incoherence between the legal system and society leads to a loss of faith in the law and law's legitimacy.

B Coherence in Regulatory Systems

Regulation is a term that has a multiplicity of meanings. Grammatcially, regulation can be a noun as in 'delegated regulation' or equally a 'rule made by an authority'.[32] In this narrowest sense, regulation is 'a term usually employed to

---

25 Neil MacCormick, 'Coherence in Legal Justification' in Aleksander Peczenik, Lars Lindahl, and Bert van Roermund (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11–14, 1983* (D Reidel Publishing, 1984) 235, 238.

26 Bertea, above n 21, 372, quoting ibid 235.

27 Steven Shavell, 'The Appeals Process as a Means of Error Correction' (1995) 24 *Journal of Legal Studies* 379.

28 MacCormick, above n 25, 235 ff.

29 Aleksander Peczenik, 'Law, Morality, Coherence and Truth' (1994) 7 *Ratio Juris* 146; Amalia Amaya, 'Legal Justification by Optimal Coherence' (2011) 24 *Ratio Juris* 304.

30 Niklas Luhmann, 'Law as a Social System' (1989) 83 *Northwestern University Law Review* 136.

31 J M Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence' (1993) 103 *Yale Law Journal* 105.

32 See further Dimity Kingsford Smith, 'What is Regulation? A Reply to Julia Black' (2002) 27 *Australian Journal of Legal Philosophy* 37.

describe provisions of an ancillary or subordinate nature which the executive, or a Minister, or some subordinate body is empowered to make to facilitate the carrying out of a statute.'[33] Alternatively, regulation is increasingly used as a verb 'to regulate' and confusingly, used as a synonym, for the more conceptually ambiguous term 'governance'. Rather than examining the technical or governmental aspects of regulation, this article focuses on its systemic characteristics and asks the following two questions: what are the features of regulation that give it a system-like quality? What is the nature and role of coherence within that system?

The notion of regulation as a self-contained law system is a concept that can be traced to international law. For example, in *United States Diplomatic and Consular Staff in Tehran*,[34] the International Court of Justice discussed how the *Vienna Convention on Diplomatic Relations*[35] constituted a self-contained system of rules distinct from the customary international law of state responsibility.[36] This notion of 'self-contained' law was further considered in *California Advocates for Nursing Home Reform v Bonta*,[37] and subsequently ensconced in legislation defining regulation as 'every rule, regulation, order, or standard of general application … *adopted by any state agency* to implement, interpret, or make specific the law enforced or administered by it'.[38] This definition of regulation supplements the traditional rules-oriented definition by including the organisational component – the agency. Regulation for this reason is often associated with an agency, a specialised organisational body, which may be empowered to create, interpret and enforce the rules it administers.

In combination, these definitions sketch out a concept of regulation that broadly accords with the notion of a 'self-contained' law system. A law system can be generalised as consisting of: a body of substantive rules of a specialised nature that specifies its own internal remedial mechanisms that are administered by a dedicated organisational construct, and that is conferred some combination of governance functions and powers which it exercises in carrying out its responsibilities. In this way, regulatory systems can be viewed as specialised law systems being mechanisms that enable the state to distribute governance powers and functions among a group of quasi-independent bodies that make up the organisational landscape of contemporary government – the regulatory state.[39]

---

33 *Re Gray* (1918) 57 SCR 150, 179 (Anglin J).

34 *(United States v Iran) (Judgment)* [1980] ICJ Rep 1.

35 *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

36 *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Judgment)* [1980] ICJ Rep 1, 40 [86].

37 *California Advocates for Nursing Home Reform v Bonta*, 130 Cal Rptr 2d 823 (Ct App, 2003).

38 State of California, Government Code Section 11342.600 (emphasis added).

39 Candace Jones, William S Hesterly and Stephen P Borgatti, 'A General Theory of Network Governance: Exchange Conditions and Social Mechanisms' (1997) 22 *Academy of Management Review* 911; Keith G Provan and Patrick Kenis, 'Modes of Network Governance: Structure, Management, and Effectiveness' (2008) 18 *Journal of Public Administration Research and Theory* 229.

C Regulatory Coherence

Regulatory systems are a subspecies of law embedded within the more general institution of law. Law in its traditional institutional form is manifest as a diverse collection of rules, such as common law and statute, as well as courts and enforcement apparatus, such as the police force. With the rise of the regulatory state and the dramatic change in the structure of government, law in the form of self-contained regulatory systems has become the dominant form of public law. Regulatory agencies are the governance mechanism that have facilitated this restructuring of government within most Organisation for Economic and Cultural Development ('OECD') countries.[40] Given that regulatory systems are now used perform the bulk of the work of contemporary government, it is imperative that their design and operation be better understood.

In this context, regulatory coherence is a subspecies of legal coherence developed and applied in the context of regulation and regulatory systems. It provides powerful insights into both the abstract (normative) and mechanical (positive) aspects of regulation. While the attributes of coherence remains the same for both legal and regulatory coherence – that is, frictionless, aligned relationships – legal coherence focuses on the relationships between facts, rules and decisions while regulatory coherence focuses on the relationships between the components and processes of regulatory systems.[41] Additionally, regulatory coherence draws attention to the unique characteristics of regulation.

Regulatory coherence is also a theory of law examining how normatively founded political decisions[42] charged with social control are institutionalised.[43] It is a theory that sheds light on how regulation is more effectively designed as well as a framework for analysis and evaluation. As such, it is of considerable utility to policymakers, policy analysts, legislators, regulators and consultants such as lawyers. It enables policymakers to avoid basic problems arising from poor regulatory design including policy incoherence, systemic fragmentation and

40 See Donald Feaver and Benedict Sheehy, 'The Shifting Balance of Power in the Regulatory State: Structure, Strategy and the Division of Labour' (2014) 41 *Journal of Law and Society* 203. There is a large body of literature on the regulatory state. See, eg, Harold Seidman and Robert S Gilmour, *Politics, Position, and Power: From the Positive to the Regulatory State* (Oxford University Press, 4th ed, 1986); Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1993); Richard H Pildes and Cass R Sunstein, 'Reinventing the Regulatory State' (1995) 62 *University of Chicago Law Review* 1; Giandomenico Majone, *Regulating Europe* (Routledge, 1996); Martin Loughlin and Colin Scott, 'The Regulatory State' in Patrick Dunleavy et al (eds), *Developments in British Politics 5* (Macmillan Press, 1997) 205; Michael Moran, 'Review Article: Understanding the Regulatory State' (2002) 32 *British Journal of Political Science* 391.

41 Donald Feaver, 'The Coherence of Multilateral Regulation' (2006) 13 *Australian International Law Journal* 33; Donald Feaver and Nicola Durrant, 'A Regulatory Analysis of International Climate Change Regulation' (2008) 30 *Law & Policy* 394.

42 Benedict Sheehy, 'Re-thinking Securities Regulation: A Comparative Study of ASX, NYSE, and SGX' (2006) 2 *Corporate Governance Law Review* 191.

43 Luhmann, above n 8.

ultimately, regulatory failure.[44] It does so by providing an explanation for degrees of success or failure in the grey area between the extremes. As a theory, it allows predictions to be made through the identification of critical patterns relating to the linkages between the component parts of a regulatory system. Finally, these relational patterns have the attributes of general principles that can be used to guide how the parts of a regulatory system should be designed to fit together more coherently reducing, thereby, the likelihood of regulatory failure – in whole or in part. This article will now turn to examine those component parts.

III COMPONENTS OF REGULATORY SYSTEMS

The first challenge in using a systemic approach to design or evaluate regulation is identifying the components that make up a regulatory system. The second challenge is to determine whether those components fit together coherently. Figure 1 provides an illustration of the main components. The components are structured along two discrete axes – a horizontal and a vertical. The components of the horizontal axis are analysed in this article.

The horizontal axis depicts the normative dimension of regulation as being made up of four components. These are the perception of the organising problem, the characterisation of the organising problem, policy framing, and the choice of approach. The intersection of the normative and positive axes, the translation point, marks the shift from the abstract socio-political processes to the more mechanical issues of structuring the administrative machinery of the system which commences with the drafting of the legislation or other founding document. In other words, this intersection is the point at which the policy prescription, which should inform the architecture of the regulatory system, is formalised as legislation or other soft law instruments such as codes of practice.[45]

Although described at this high level of generality as components, each component is made up of one or more decision-making processes. For example, the first component of the normative dimension involves a process of identifying what is referred to as the organising problem.[46] Once an organising problem is perceived and construed as having normative implications, that is, 'something should be done about X', people may mobilise to demand a public response. The perception that a social practice poses an undesirable social effect, that is, a harm,

---

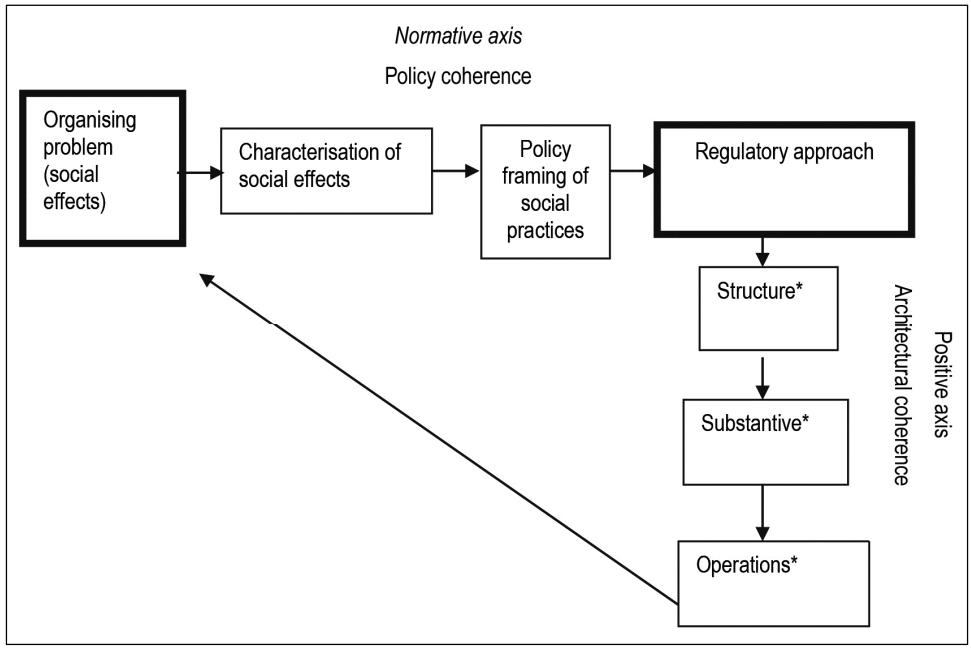
44 See further Jacques Forster and Olav Stokke, 'Coherence of Policies towards Developing Countries: Approaching the Problematique' in Jacques Forster and Olav Stokke (eds), *Policy Coherence in Development Co-operation* (Frank Cass, 1999) 60, citing Paul Hoebink, 'Coherence and Development Policy: The Case of the European Union' in Jacques Forster and Olav Stokke (eds), *Policy Coherence in Development Co-operation* (Frank Cass, 1999).

45 The vertical axis is the positive dimension of regulation made up of a further four components: an authoritative or constituting document or piece of legislation, which creates a structure, substantive rights and duties, and an administering body of some type: Donald Feaver and Benedict Sheehy, 'A Positive Theory of Coherent Regulation' (2013) (unpublished, copy on file with authors).

46 For a discussion of how the term 'risk' is not entirely appropriate, see Malcolm K Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008).

provides the basis for a normative or moral 'should' for leaders to prevent the harm from occurring by somehow altering the social effect. Alternatively, a perception that something is good and desirable for a society may prompt a normative 'should' response to facilitate an activity or thing being done to generate a positive social effect.

Figure 1 Regulatory Coherence

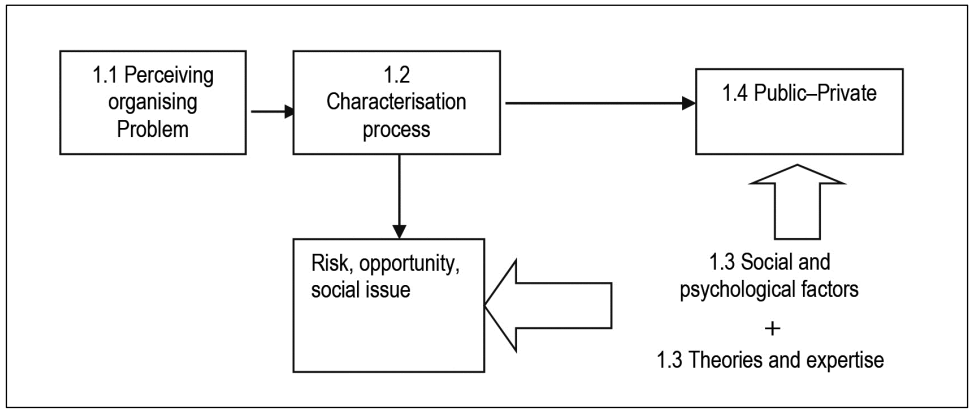


Once an organising problem is identified, policymakers must then turn to the second process – characterisation. The characterisation process emphasises the many ways of looking at the same phenomenon. As Epictetus observed several thousand years ago, '[m]en are disturbed, not by things, but by the principles and notions which they form concerning things.'[47] What one person considers a risk, another may consider an opportunity. Characterisation relies on the complex psychosocial processes referred to previously in Part II as relating to culture and cognition. Given that unanimity concerning characterisation is unlikely to occur, and further, that many organising problems may rightly be perceived as having various conflicting but coexisting characterisations, a prioritising and ordering of

47 Epictetus, *The Enchiridion* (Elizabeth Carter trans, Internet Classics Archive) <http://classics.mit.edu/Epictetus/epicench.html>. Interestingly, the same quotation is used to discuss the complexity of policy with respect to multinational corporations and foreign direct investment in Stephen D Cohen, *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (Oxford University Press, 2007) 19.

normative preferences will be necessary. This process is part of the political task of creating policy. The process is more easily understood in the language of 'framing' – that is, how people's understanding of events is shaped by social[48] and psychological processes[49] and then converted into policy objectives. The fourth and final component of the normative dimension is the process of selecting the regulatory approach – the 'how' to achieve the policy objective. The choice of regulatory approach is the component that should coherently tie the problem-objective-solution relationship together thereby providing the conceptual blueprint or 'strategy' underlying a coherent regulatory system.

Figure 2: Organising Problem, Characterisation and the Public–Private Divide



A Perceiving the Organising Problem

The first component of the normative dimension, as indicated in Figure 1, involves perceiving the existence of a social problem, an 'organising problem' – that is, social effects that may warrant a public response. This process requires the identification and broad demarcation of the social effects of a particular social practice and a decision that those social effects require attention. Whether an organising problem will garner attention or not is influenced by psychological and social factors – culture and cognition – which change over time. What may be perceived as harmless play or a rite of passage having no social effects of concern at one point in history, such as drinking and driving, may be viewed as posing an unacceptable risk of injury or death at another point in time, as drinking and driving does in this era.

The identification and process of ascribing meaning to the social effects of a social practice must occur as part of the perception of the organising problem

48 Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Harvard University Press, 1974).

49 Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 *Science* 453.

well before the regulatory process commences. As Best notes, 'not all harmful conditions are considered social problems … no condition is a social problem until someone considers it a social problem.'[50] This observation reinforces the point made previously that 'social problems are projections of collective sentiments rather than simple mirrors of objective conditions'.[51] The corollary also holds: social recognition and expression that the social effects of a particular social practice are potentially harmful or otherwise significant is a precondition to political acknowledgement and action. Policymakers and legislators are unlikely to regulate a social practice that does not warrant attention.[52]

B Characterising the Organising Problem

The second component of the normative dimension is a series of decisions made when the social effects of a social practice are acknowledged as being a matter of social concern or an organising problem. The organising problem must be analysed and then characterised, or classified. The need to so interpret and characterise problems was discussed over 400 years ago in *Heydon's Case*.[53] In that case, Lord Coke asserted that a purposive approach to legal interpretation requires an inquiry to discover and understand the 'mischief' Parliament seeks to remedy.[54] In other words, Lord Coke sees law as an effort to remedy the social effects of some social problem and it is the job of the courts to interpret the law in a manner that resolves the problem consistent with Parliament's intent. The nature of this inquiry has not altered over the centuries and it involves a process of problematising or framing a schema of interpretation that allows policymakers, legislators and judges 'to locate, perceive, identify, and label' in order to organise and imbue with a meaning an organising problem that will provide a foundation for political response.[55]

The characterisation process, at its core, involves classifying the organising problem's social effects as being one or more of three broad types: a social issue,[56] a risk,[57] or an opportunity.[58] Each is explained in more detail below.

---

50 Joel Best, *Images of Issues: Typifying Contemporary Social Problems* (Transaction Press, 2nd ed, 2009) 5.

51 Stephen Hilgartner and Charles L Bosk, 'The Rise and Fall of Social Problems: A Public Arenas Model' (1988) 94 *American Journal of Sociology* 53, 53.

52 This should not be confused with issues where legislators have been reluctant to act for political reasons even in the face of clear evidence that gun control is in the public interest. Alternatively, politicians may manufacture social problems for political purposes.

53 *Heydon's Case* (1584) 3 Co Rep 7a; 76 ER 637.

54 A principle of statutory interpretation known as the 'purposive approach' or the 'mischief rule', is derived from the following statements by Lord Coke in *Heydon's Case*: 'What was the mischief and defect for which the common law did not provide'; and 'What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth': (1584) 3 Co Rep 7a, 7b; 76 ER 637, 638.

55 Goffman, above n 48, 21.

56 An issue that calls for some form of coordinated response: Mancur Olson Jr, *The Logic of Collective Action: Public Good and the Theory of Groups* (Harvard University Press, 1965); Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 *American Journal of Sociology* 481; Russel Hardin, *Collective Action* (Johns Hopkins University Press, 1982); Andrew A King and Michael J Lenox, 'Industry Self-Regulation without Sanctions: The Chemical Industry's Responsible Care Program' (2000) 43 *Academy of Management Journal* 698.

1 Social Issues as Social Coordination Problems

Social issues can be generalised as that particular type of organising problem the effects of which impact on the *whole* of society and affect its stability or advancement. Social issues that threaten or harm social stability are referred to as systemic harms. Systemic harms, not unlike public goods, call on the public resources of the state; however, they must be distinguished from public goods. In both cases, fashioning an effective response to those social effects poses a *social coordination problem*. In referring to systemic threats, Raab and Selznick describe how a coordination problem arises 'where organized society appears to be seriously threatened by an inability to order relationships among people.'[59]

Society's inability to spontaneously order relationships to deal with a threat effectively or to facilitate seizing the chance to advance the public good leads to the proposition that broad social coordination problems must be addressed by another means – usually a public authority such as a government – which is usually centralised, that is capable of marshalling resources and putting into place institutional arrangements to contain, minimise, mitigate or eliminate the systemic threat or harm. For example, the creation of an army or a police force that has the authority and resources to counteract, mitigate or eliminate the threat or harm to society.[60] Although salient and urgent, societies do not spontaneously develop and implement such comprehensive, systematic or adequately resourced solutions without a high degree of coordination.[61]

Alternatively, social issues that do not pose a threat to social stability may instead have the social effect of advancing some societal goal – such as those related to public health or education – often referred to as 'the public good'. The advancement of 'the public good' is a social effect – a matter quite distinct from the economic unit of analysis, 'public goods'.[62] Given that the important social effect of such things as a stable society, good governance and healthy civic institutions – that is, 'public good' – rely on effective regulation, it is important to clearly distinguish the two. Morrell, expanding on Shergold's 'shared benefit',[63] distinguishes the two as follows:

---

57 T R Lee, 'Perception of Risk: The Public's Perception of Risk and the Question of Irrationality' (1981) 376 *Proceedings of the Royal Society of London Series A: Mathematical and Physical Sciences* 5 .

58 Barry M Mitnick, *The Political Economy of Regulation: Creating, Designing, and Removing Regulatory Forms* (Columbia University Press, 1980); Sparrow, above n 46.

59 Earl Raab and G J Selznick, *Major Social Problems* (Harper and Row, 2nd ed, 1964) 3.

60 Michael E Levine and Jennifer L Forrence, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis' (1990) 6 *Journal of Law, Economics, & Organization* 167.

61 Steven P Croley, *Regulation and Public Interests: The Possibility of Good Regulatory Government* (Princeton University Press, 2008).

62 Benedict Sheehy and Donald Feaver, 'A Social Theory of Regulating Public Good' (2013) (unpublished, copy on file with authors).

63 Peter Shergold, 'Ethics and the Changing Nature of Public Service' (1997) 56 *Australian Journal of Public Administration* 119.

> When we speak of 'the' public good this is a shorthand signal for shared benefit at a societal level. This abstract (philosophical/political) sense should not be reduced to the established specific (economic) sense of 'a' public good. There is of course some conceptual overlap between the two concepts: other things being equal, the fair and efficient provision of public goods contributes to the public good, and the unfair, inefficient provision of public goods harms the public good.[64]

A definition emphasising 'a shared benefit' identifies one aspect of what constitutes 'the public good' – a social benefit that is shared 'at a societal level'. The 'shared' aspect implies that the social benefit is achieved through some measure of interaction and cooperation. In order to ensure that the benefit is indeed shared, a government is empowered, whilst acting as a controller, to exercise coordinative authority, expend resources, and to organise and direct a coordinated action. In this way, as Teubner observes, in drawing upon Luhmann, 'law becomes a system for the coordination of action within and between semi-autonomous social sub-systems.'[65]

2 Risks as Collective Action Problems

Unlike organising problems characterised as social coordination problems – that is, those which affect all of society to some degree – risks affect society differently. Risks do not have ubiquitous systemic effects. Risks are defined by Baldwin and Cave as 'the probability that a particular adverse event will occur during a stated period of time, or result from a particular challenge.'[66] That is to say, risks are both temporally and spatially bound. Furthermore, risks have a number of additional characteristics that social problems lack. For example, they may be voluntarily undertaken or imposed, individual or collective, naturally occurring or the result of social arrangements and practices.[67]

Thus, unlike a social coordination problem that is universal in nature, the temporal and spatial characteristics of risks mean that a more limited class of actors – particularly at the level of individual persons and organisations – are more likely to be associated with the organising problem. Most importantly, if the aggregation of these individual risks generates social costs, research indicates that those social costs can be mitigated more optimally through some form of collective action response. Therefore, risks can be characterised as collective action problems where 'rational individual action can lead to a strictly Pareto-inferior outcome, that is, an outcome which is strictly less preferred by every

---

64 Kevin Morrell, 'Governance and the Public Good' (2009) 87 *Public Administration* 538, 543 (citations omitted).

65 Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239, 242.

66 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 86.

67 See Lee, above n 57; Brendon Swedlow et al, 'Theorizing and Generalizing about Risk Assessment and Regulation through Comparative Nested Analysis of Representative Cases' (2009) 31 *Law & Policy* 236, 254.

individual than at least one other outcome'.[68] In order to avoid a Pareto-inferior outcome, a regulatory response in the form of a collective action solution is a more optimal way of 'provid[ing] mutual protection against risk'.[69]

The line between social coordination problems (social issues) and collective action problems (risks) is blurry at times. For example, climate change can be characterised as both a social issue and as a risk. As a social issue, climate change affects all of humanity. Accordingly, a universal, coordinated solution is required to address it. If it characterised as a risk, however, an analysis of climate change turns from one of global concern to one of assessing how different segments of society are affected. For example, people living along ocean coastlines face a greater risk of being displaced than those living on higher ground. Risk-based businesses, such as insurance companies, which have a greater exposure to the costs of climate change likewise are signficantly involved in addressing the risks. Therefore, climate change can be characterised as both a social coordination problem requiring a certain type of regulatory response, such as measures to reduce carbon emissions such as a national carbon tax, as well as a risk to different subsets of society which of course require a different type of regulatory response, such as measures designed to reduce risks associated with ocean-side living such as local coastal planning and development rules, or rules on mandatory policy inclusions. Rather than choosing one or the other characterisation, it may be that a regulatory system should be designed to address both.

3 Opportunities/Enablers

A third form of organising problem can be characterised as an opportunity that arises under even narrower circumstances and targets a relatively specific class of actors. These circumstances arise when the state authorises or provides private actors with an opportunity to engage in an activity that either directly or indirectly provides a broader social benefit. Such opportunities usually provide an economic benefit to a private provider.[70] For example, by granting a privately owned railroad a monopoly for the provision of services on certain routes, the economies of scale inherent in railroad economics should result in prices lower than could be achieved under a more competitive market structure.[71]

The public creation or authorisation of a private opportunity directed towards achieving some public benefit is often associated in economics with the legislative creation of some form of property right. For example, intellectual property laws grant inventors a time-limited monopoly in the form of a legal privilege to exploit the development, production and sale of an invention (a

68 Michael Taylor, *The Possibility of Cooperation: Studies in Rationality and Social Change* (Cambridge University Press, 1987) 19.

69 Elinor Ostrom, 'Collective Action and the Evolution of Social Norms' (2000) 14 *Journal of Economic Perspectives* 137, 138.

70 In many cases, the public actors involved are government business enterprises.

71 Thomas K McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D Brandeis, James M Landis, Alfred E Kahn* (Harvard University Press, 1984).

patent). Similarly, the granting of a telecommunications licence permits suitable private actors to exploit a public commons such as airwave bandwidths provided certain conditions are met. In all cases, the state grants some form of privilege, permission, incentive or licence, usually regulated by contract, as a means of facilitating and coordinating the production, distribution and consumption of a public or private good to further a broader social policy objective.

C Choice of Characterisation

Whether the effects of a social practice are characterised as a social issue, risk or opportunity depends on how policymakers view the problem – whether they believe it is an objective or subjective phenomenon they are dealing with. The tendency among policy-makers to objectify social phenomena is noted by Best who states that policymakers 'characterize problems in particular ways: They emphasize some aspects but not others, they promote specific orientations, and they … advocate particular solutions.'[72] The result is that rather than taking a subjectivist approach, which allows social phenomena to be construed in many different ways, policymakers often view social problems as though they were objective, but of course, view them through ideologically influenced lenses. For example, a complex issue such as immigration can be characterised as posing a risk, such as permitting criminals to gain entry, an opportunity, such as promoting economic growth, or as creating a range of social issues that cannot be classified as either a risk or opportunity, such as diversity in thinking which may lead to innovation and creativity or which may lead to community frictions arising and difficulties of sociocultural integration. One way to approach this fundamental subjectivity is by looking at cultural anthropology.

Culture and cognition scholars, Dan Kahan and Donald Braman, utilise Douglas[73] and Wildavsky's work,[74] using environmental regulation as their example. Kahan and Braman observe that:

> Egalitarians and solidarists are … sensitive to environmental risk, the reduction of which justifies regulating commercial activities that are productive of social inequality and that legitimize unconstrained self-interest. Individualists predictably dismiss claims of environmental risk as specious, in line with their commitment to the autonomy of markets and other private orderings. So do hierarchists, who perceive warnings of imminent environmental catastrophe as threatening the competence of social and governmental elites.[75]

Each characterisation, whether social issue, risk or opportunity, carries with it a general normative impetus in a particular direction and has specific normative imperatives. A risk should generally be addressed in terms of avoidance or

---

72 Best, above n 50, 9.

73 Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Routledge, 1st ed, 1966).

74 Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* (University of California Press, 1982), exploring how different cultures identify and respond to risk.

75 Kahan and Braman, above n 12, 154 (citations omitted).

resilience generation. For example, a specific risk of death due to building collapse creates specific imperatives around building standards. An opportunity should take account of benefits and costs as well as their respective distributions. A social issue requires considerable study, and greater community consultation. Understood in this way, the characterisation of the organising problem is a first step toward the political framing of the regulatory problem as well as the first step towards identifying the normative orientation that a policy response is to take. Once identified as a risk, opportunity or social issue, how the organising problem will be solved is influenced by the experts whose theoretical and disciplinary frameworks are used to further analyse and understand a problem – a matter to which we will return later.

D Addressing the Public–Private Threshold

Implicit in the characterisation of the organising problem is a rough assignment of the problem to either the public or private side of a society. This aspect of the characterisation process involves a struggle between opposing ideologies and norms concerning a dualistic public–private universe.[76] Each society marks the public–private divide differently and places it in a different social location. Nevertheless, to understand the regulatory process it is critical to explicitly identify this concern, the issues involved and the regulatory implications.

Placing the organising problem on the public–private continuum is an important step in moving from the organising problem to a policy response. This step is critical because classifying an organising problem as a public or a private problem influences whether and to what extent the state's authority and resources will be marshalled in aid of any proposed regulatory project.[77] Where the organising problem is cast as public, there is a normative imperative on the state to engage its power and resources to address it. Matters characterised as social coordination or collective action problems are deemed to be of public significance and are believed to belong in a public forum subject to public regulation.[78]

By way of contrast, regulation directed to interactions between private actors is usually left to private parties to resolve through such private mechanisms as laws of contract, tort and property. Even non-legal regulatory mechanisms such as family pressure, or institutional pressures are deemed appropriate in the private sphere.

While the location of the dividing line between public and private spheres is hotly contested in many countries, this important contest has theoretical and ideological dimensions unlikely to be resolved by regulatory coherence.

---

76 Leigh Hancher and Michael Moran, 'Organising Regulatory Space' in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, 1989) 275, quoted in Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 60.

77 Gillian E Metzger, 'Privatization as Delegation' (2003) 103 *Columbia Law Review* 1367.

78 Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Press, 1994) 3.

Nevertheless, identifying and explicating this particular point of contest represents a critical starting point in the policy process where the characterisation of the organising problem represents an essential benchmark or starting point from which the policy framing and design of the legal architecture proceeds. In this way, the characterisation of organising problem serves as an essential frame of reference. It should be noted, however, that this frame of reference is not fixed and often undergoes revision and reconceptualisation over time as governments, ideologies, societies and environments change.[79] Such revised frames of reference are often the grounds for reform initiatives.

IV FRAMING THE POLICY RESPONSE

The framing of the policy response begins the formalising process of transforming an identified organising problem into regulation through the policy process. Jenkins defines 'policy' as 'a set of interrelated decisions taken by a political actor or group concerning the selection of goals [and] means of achieving them within a specified situation where those decisions should, in principle, be within the power of the actors to achieve.'[80] This popular definition is helpful because it identifies how the policymaking process involves determining the objectives and methods of resolving a problem within a given social context. More importantly, it acknowledges the relational characteristics of the policy-making process. What it does not mention, however, is the need to ensure that the characterisation of the organising problem and the framing of the policy response bear a coherent relationship.

For a regulatory system to be normatively coherent, the relationship between how the organising problem is characterised – that is, whether the social effects of a social practice are classified as a social issue, risk or opportunity – and the policy framing in response to that characterisation must be in alignment. Although seemingly tautological, this is a critical point at which regulation can 'be derailed' for a range of reasons. More specifically, the choice of whether a problem is characterised as a social issue or as a risk has a profound impact on the choice of objectives, targets and the distribution of benefits and burdens. Misalignment between characterisation and framing can result in formulating the wrong objectives, targeting the wrong groups or inequitably distributing benefits and/or burdens and costs.

An additional concern is that despite the characterisation chosen, incoherence may yet arise between problem type and framing if the choice of objectives, targets and distributions is ideologically rather than logically determined. For example, if the problem is characterised as a social coordination problem such as job market failure and the target becomes unemployed individuals who are

79 Morton J Horwitz, 'The History of the Public–Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

80 W I Jenkins, *Policy Analysis: A Political and Organizational Perspective* (St Martin's Press, 1978) 15.

encouraged to 'take personal responsibility', a level of unnecessary incoherence is introduced.

Ideology subverts the policy framing process if policymakers let psychologically motivated preferences drive their decision-making rather than ethical or technical considerations.[81] Decision-making using ideological preferences is akin to intuitive decision-making where cognitive processes reflect a type of

> naïve realism … [which] refers to the disposition of individuals to view the factual beliefs that predominate in their own cultural group as the product of 'objective' assessment, and to attribute the contrary factual beliefs of their cultural and ideological adversaries to the biasing influence of their worldviews.[82]

This occurs when policymakers who would be best to characterise organising problems using a Habermasian discourse approach[83] instead use a rationalist/individualist approach which claims to have objective knowledge about social phenomena.[84] Of particular concern in this regard are the claims common in economics – a discipline that purports to offer objective and scientific advice and projections but is normatively loaded.[85] The agenda of the entire discipline is pursuit of this acknowledged normative goal, assumed to be incontestable: 'efficiency above all else'.[86] This is not to say efficiency is unimportant, rather, it is to point out that efficiency is but one many normative drivers of regulatory design. A further problem arising from economic analysis is its commitment to methodological individualism. While an effective approach for economic modeling, it would seem self-evident that supra-individual problems such as those faced by societies regularly are indisposed to individualist analytical approaches.

The basic problem is that the economic agenda is so pervasive that economic policy advisers themselves fail to appreciate that other considerations such as efficacy or equality may be equally or more important than efficiency. Further, the nature of the individual–society relationship escapes economic analysis. Value-laden assumptions, economic or otherwise, used to formulate and evaluate policy can subvert the inquiry and influence policy choices inappropriately resulting in regulation that is doomed to fail from the outset.

By way of contrast, social constructivist approaches acknowledge the subjective nature of knowledge and the collective nature of social coordination. Nevertheless, these social constructivist approaches struggle to gain political traction. The likely reason is that they are difficult concepts and as difficult

---

81 This intuition is the core issue in culture and cognition's application of Douglas' life work.

82 Kahan and Braman, above n 12, 164 (emphasis altered).

83 Jane Mansbridge, 'On the Contested Nature of the Public Good' in Walter W Powell and Elisabeth S Clemens (eds), *Private Action and the Public Good* (Yale University Press, 1998) 3.

84 Paul Guyer, *Kant and the Claims of Knowledge* (Cambridge University Press, 1987).

85 Daniel M Hausman, *The Inexact and Separate Science of Economics* (Cambridge University Press, 1992).

86 Ogus, above n 78, 23–5; Benedict Sheehy, 'The Frightening Inadequacy of Economics as a Worldview: A Reply to Professor Hsiung' (2006) 17 *Journal of Interdisciplinary Economics* 445.

concepts they challenge policymakers and politicians themselves, not to mention the voting public which has little time for nuanced debate, and like all humans, cognitively prefer simple solutions and simplified narratives.[87] Although these constructivist approaches may capture the cultural and cognitive realities of a society better, they are more analytically challenging and complex. The unfortunate tendency that arises is to switch attention towards more easily construed, but wrong, answers.[88]

A Normative Ordering

Turning to the policy task, politicians, with their individual biases and ideologies, are required to deal with what Rawls refers to as lexical ordering. A lexical ordering 'is one that requires us to satisfy the first principle in the ordering before we can move on to the second.'[89] This requires the policymaker to undertake what amounts to a normative ranking of the different possible characterisations of the organising problem – that is, which social effects will be assigned higher priority and which ones a lower priority. An example of how this normative ordering works can be drawn from Ayers and Braithwaite's applied research which utilised Rawls' conceptualisation of lexical ordering. Ayers and Braithwaite developed an understanding of the motivation and decision making of actors as they implemented a ranking ordered according to normative priorities. They provide an example of such a normative ordering in the case of a manager who made a distinction between things that would be ordered as 'Must do. Should do. Could do. Won't do'. [90]

This normative ordering of social effects to determine the primary focus of regulation may also be influenced by other considerations. Where a policymaker has unlimited authority to choose which social effect(s) it both desires and has the power to address, the normative ordering of policy priorities is unfettered. In democratic contexts, a policymaker is limited by political and jurisdictional issues, such as a division of powers between federal, state and local authorities. As a result, policymakers may be limited to addressing only that characterisation which both falls within their scope of authority and is popular among their electoral constituencies. For example, a local council will not have the authority to address the broad social issues associated with global warming such as forcing business to reduce carbon emissions. However, a local council may have the authority to enact and enforce building code standards that mandate better energy efficiency or standards to mitigate flood risks.

The practical implications of normative ordering are that it clarifies the social space which will take priority and hence 'policy space' within which a regulatory system is being designed to operate. This clarification enables policymakers to

87 Daniel Kahneman, *Thinking Fast and Slow* (Allen Lane, 2011).

88 Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin Books, 1966).

89 John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 42–3.

90 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

shift their focus from the social effects that they wish to address to a focus on specific policy choices such as framing more explicit policy objectives and identifying particular the actor/targets whose social practices are the concern of the regulation.

B Choosing the Policy Objective, Targets and Distributions

Where an ideological agenda does not subvert the policy framing process, the first steps towards developing the policy response involves making explicit the objectives and identifying the targets of the policy response. Although sometimes used interchangeably, where objective is taken to mean the 'object' of the regulation, the two concepts are directed towards different aspects of policy and entail separate political decisions. In brief, the objective of a policy concerns the 'what is to be achieved' – how are the social effects of a social practice to be altered? The target of the regulation concerns the 'what/who is to be regulated'. In determining the former, it is often the case that the most 'coherent' choice of the latter will emerge as a matter of course.

Restating what the 'objectives' of regulation should be requires returning to the discussion relating to social practices and their effects. Is the objective of regulation to, first and foremost, change a social effect or is its objective to change a social practice causing that effect? Using the definition of policy as a guide, where the term objective is synonymous with outcome, it is the social effects that remain the focus – that is, the objective of regulation is to achieve some change in the social effects.

For example, there may be a disproportionately high rate of traffic injuries and deaths in a particular region. Many of these injuries and deaths may be caused by drivers with high blood alcohol. Achieving reduction in accident rates requires investigation into the problem. The population in the region may have a culture of heavy drinking. This drinking may be exacerbated by a high incidence of depression within the community which in turn may be attributed to high levels of unemployment and regionally poor economic conditions.

In this example, the organising problem can be characterised in several different ways. First, it may be characterised as a social issue having universal implications. The dangers posed by driving under the influence are the same irrespective of community. Alternatively, the higher incidence of drink-driving among a particular group within a specific region may warrant special attention. How the organising problem is characterised and normatively ordered provides insight into how the appropriate policy objective is determined.

In the foregoing scenario, a range of social effects are potential candidates as the focus of the policy objective:

- road traffic accidents caused by drink-driving generally;
- higher than average number of road traffic accidents in this particular region;
- community culture of drinking;
- community mental health issues; or

- economic problems of unemployment and the stagnant regional economy.

Similarly, depending on the objectives of the scheme, there are a range of possible targets of the policy response:

- drink-drivers;
- community and its cultural attitudes and behaviour towards alcohol;
- community and mental health issues; or
- foreign investors.

Correctly identifying the relationship between the policy objective – that is, what social effects are to be regulated – and the actors engaged in the social practice as targets of regulation is critical. Regulation is more likely to fail where an incoherent alignment of policy objectives and targets is chosen. Explaining this distinction is important.

The choice of target is a different decision from the choice of objective. The choice of target concerns the question of what or who it is to be regulated. Take narcotics as another example. Who and what is to be regulated in the chain of distribution? Is it the plant or is it the grower of the plant? Is it the suppliers of the narcotic to the consumer or the consumer alone that is to be regulated? Depending upon which target is chosen, different types of administrative bodies, legal powers, resources and regulatory bodies need to be involved – again, illustrating the normative impetus contained in the organising problem. Questions concerning objectives and targets often involve a discussion of the distribution of costs and benefits. It is important not to construe costs and benefits too narrowly. Such costs and benefits include factors such as rights and liabilities, public health, communal harmony, power, prestige, information and its asymmetries, and disgrace, in addition to the economic measures of these factors and their distributions. Further, given that costs are more readily identified and measured while benefits tend to escape cost-benefit analysis, it is important to understand that such analysis is a limited tool.

A clear articulation of the policy objective provides the basis upon which community and stakeholder consultation and debate can occur.[91] Effective regulation requires legitimacy and hence attention to society's institutions. This attention can be effectively achieved through some type of community consultation where debate is likely to have a significant effect on policy. Where this type of consultation is effective, the consultation process may result in an entirely different normative policy framing being chosen. As a result, the policy framing process is one of locating and positioning the political choices which underlie the design of the regulatory scheme into the institutional setting.

91 It is important that the policy debate be framed in broad terms at this stage in the regulatory process: Brian W Head, 'Three Lenses of Evidence-Based Policy' (2007) 67 *Australian Journal of Public Administration* 1.

C Policy Coherence

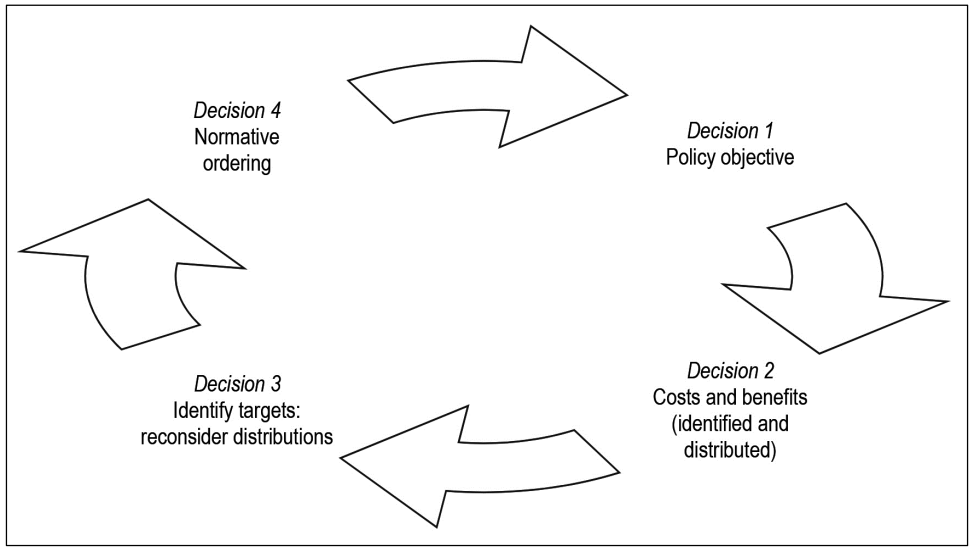
The choice of objectives and targets can have broader design implications, which relate to a term that has begun appearing in the literature – policy coherence. As an emerging idea, some confusion arises as to whether policy coherence refers to internal or external policy coherence.

1 Internal Policy Coherence

Internal policy coherence is focused on the relationship between outcomes of the processes following on from characterisation. The question of whether a policy is internally coherent depends on whether the set of policy choices are selected and framed fit together as illustrated in Figure 3. The four choices central to the policy framing process are:

- normative ordering (ranking of social effects to be responded to);
- clarifying the policy objective (what social effects are to be changed);
- identification of the policy targets (whose social practice is to be altered); and
- determination and distribution of costs and benefits.

Figure 3: Internal Coherence



Although this may seem logical and obvious on its face, terminology such as ‘targets’, ‘objectives’, ‘approaches’ and ‘strategies’ are frequently confused in the literature and utilised as if they were synonymous. For example, what we describe in this article as normative coherence one can find expressed elsewhere as a form of policy coherence and defined as ‘consistency between targets and instruments on the one hand and, on the other hand, among targets … [and]

consistency found between policy intention and policy outcome.'[92] Another example of confusing the terms in the policy discussion is the statement that 'consistency … between policy intention and outcome' is generally sound, followed by the odd non sequitur, '[i]n this respect, policy coherence is a measure of institutional effectiveness.'[93]

2 External Policy Coherence

Effective regulation must also be coherent with the existing legal and institutional landscape.[94] This connection between the regulation and its environment is referred to as external policy coherence. Whether a policy is externally coherent can be examined at several different levels. In the broadest sense, the question is whether it reflects the 'political imperative that derives from the risk of appearing inconsistent in the electoral arena and an economic imperative that arises from the need to organise a large and complex organisation'.[95] That is to say, a coherent policy response presents to the electorate that society is being goverened coherently and that policies are not undermining another. That an externally coherent policy response is dependent in the first instance on the normative characterisation is made clear by Stokke and Forster who state that governance 'will be affected by systemic factors such as, in particular, a coherent norm system, procedures for the implementation of these norms … and institutions responsible for policy decision-making, monitoring and enforcement of the norms set.'[96] In other words, external policy coherence is an imperative for government is a type of overall policy or a 'meta-policy'.

Robinson continues this line of thought by observing that

> policy decisions are a function of conflict and debate within government organisations, and are subject to public pressure and contending political considerations … [often leading to] a dissonance between policy commitments and policy outcomes.[97]

Incoherence at a policy level results when there are too many unresolved conflicting interests and values, an inappropriate normative ordering, or an unduly inflexible normative ordering which does not recognise the necessity of adjustment within a dynamic social or natural environment.[98] Coherence in the

---

92 Rolf Langhammer, 'On the Coherence and EC Policies: A Contradiction in Itself?' in Kiichiro Kuasaku, Michael Plummers and Joseph Tan (eds), *OECD and ASEAN Economics: The Challenge of Policy Coherence* (Organisation for Economic and Cultural Development, 1995) 201, 213.

93 Ibid 213.

94 Cass R Sunstein et al, 'Is Incoherence Outrageous?'" (2002) 54 *Stanford Law Review* 1293; Cary Coglianese, 'Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy' (2002) 54 *Stanford Law Review* 1217.

95 Michael Di Francesco, 'Process Not Outcomes in New Public Management? "Policy Coherence" in Australian Government' (2001) 1 *The Drawing Board: An Australian Review of Public Affairs* 103, 105.

96 Forster and Stokke, above n 44, 18.

97 Mark Robinson, 'Governance and Coherence in Development Co-operation' in Jacques Forster and Olav Stokke (eds), *Policy Coherence in Development Co-operation* (Frank Cass, 1999) 399, 409.

98 Peter J May et al, 'Policy Coherence and Component-Driven Policymaking: Arctic Policy in Canada and the United States' (2005) 33 *Policy Studies Journal* 37.

policy process arises to the extent that agreement can be achieved on one overall value or objective, or when a political bargain is struck creating an agreed upon normative ordering, or a single party's power including their economic, political and social power is able to override the others and exert its influence on the political outcome.

A more technical aspect of external coherence requires coherence between different parts of government – or at least government functions. For example, objectives underlying corporate regulation addressing issuance of securities should be coherent with regulation of securities markets and financial intermediaries.[99] In this regard, privatisation and ideological preference for market regulation has introduced additional incoherence; however, it was not by accident or inadvertence, but as an intended consequence.[100] It is far from clear that such intentional incoherence has produced the anticipated benefits.[101]

V SELECTING THE REGULATORY APPROACH

The selection of the regulatory approach is perhaps the most contentious aspect of the normative dimension and is a topic that has generated a considerable literature across several disciplines. The policy literature defines the regulatory approach as the method that will be used to achieve the policy objectives.[102] It is a point where a strongly coherent linkage between objectives and approach is critical to the success of a regulatory system. Yet, it is also the point where incoherent choices are frequently made undermining the design of effective regulation. In the context of this article, the normative choice of regulatory approach turns on the question: what is the most normatively coherent method for achieving policy objectives?

This question is at the cusp of the conceptual shift resulting from a change in focus from the social effects of social practices to a focus on the behaviours composing the social practices themselves. This shift requires asking the question of how best to achieve a desired social effect by altering a social practice: is it by commanding a behaviour, modifying a behaviour, guiding a behaviour or disciplining a behaviour? Each of these four behavioural changes, as will be discussed below, align with well known 'techniques' – a term broadly synonymous with what is referred to as regulatory approach in this article.

---

99 Sheehy, above n 40.

100 Di Francesco, above n 95.

101 See, eg, David Marsh, 'Privatization under Mrs Thatcher: A Review of the Literature' (1991) 69 *Public Administration* 459.

102 Selver B Sahin and Donald Feaver, 'The Politics of Security Sector Reform in "Fragile" or "Post-Conflict" Settings: A Critical Review of the Experience in Timor-Leste' (2013) 20 *Democratization* 1056.

A Politics or Principles?

The decision surrounding which regulatory approach to select has been described in many ways. Earlier literature describes it as a choice made by selecting from several semi-formulaic 'techniques or mechanisms'.[103] The mechanisms most frequently identified in the literature are: command and control, principles-based, market-driven or self-regulation. The notion of selecting an approach 'off the shelf' is somewhat simplistic and as will be explained below, requires complex judgements. Gunningham, Grabosky and Sinclair suggest that the decision should be guided by 'adhering to a number of *regulatory design principles*' which 'have hitherto not featured prominently on the policy agenda'.[104] Although the decision is ultimately made by a political body, such as the executive or legislature, the selection choice is frequently subverted at much earlier stages in the policy-making process. Ideology, political influence and even an adherence to intellectual fashion by advisers and experts all influence the decision.

Selection decisions motivated by ideological considerations can result in highly incoherent outcomes[105] and in extreme cases, regulatory failure. For example, where social problems having strongly public characteristics are addressed using highly private approaches, such as markets, the likelihood of regulatory failure increases.[106] The rapid and deep regulatory reform of the airline industry in the United States in the 1980s, which had previously been regulated using command and control approaches, was 'deregulated' by using market-based approaches. Rather than achieving the intended objective of stabilising a volatile industry, it further destabilised the industry resulting in an escalation in bankruptcies, declining safety standards, the withdrawal of services from less dense routes, and unfair pricing practices.[107] Such issues as the withdrawal of

---

103 See, eg, Baldwin, Cave and Lodge, above n 66, 34.

104 Gunningham, Grabosky and Sinclair inquire whether the determination of the regulatory approach is driven primarily by a *political choice* or whether the design of the legal architecture is derived from what they described: Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998).

105 Horwitz, above n 79, 1423–8.

106 Benedict Sheehy, 'Regulation by Markets and the Bradley Review of Australian Higher Education' (2010) 52 *Australian Universities' Review* 60.

107 See Stephen Breyer, 'Airline Deregulation, Revisited', *Business Week* (online), 20 January 2011 <http://www.businessweek.com/stories/2011-01-20/airline-deregulation-revisitedbusinessweek-business-news-stock-market-and-financial-advice>. Breyer, in discussing the unforeseen consequences of deregulation, mentions the harms to airline workers in passing: 'Nor did anyone foresee the extent to which change might unfairly harm workers in the industry.' But, following his own economic normative ordering, Breyer justifies this by continuing: 'Still, fares have come down' and earlier mentioning the 'industry's spectacular growth'. Such arguments, however, are disingenuous as growth and fare reductions have simply followed a trajectory well underway prior to deregulation: David Morris, 'The High Price of Airline Deregulation', *Alternet* (online), 14 September 2005 <http://www.alternet.org/story/25495/the_high_price_of_airline_dergulation>. A former CEO of American Airlines offered the following summary:

services from smaller centres have had profound effects on communities where businesses have closed, unemployment has increased, tax bases eroded, and put schools and hospitals in a downward spiral.[108] Although some have benefited, more have not. Airline regulation is a complex, multifaceted problem that is best characterised as having elements of all three problem types: social coordination, risks and social enablement. In cases such as this, a single regulatory approach cannot be used. All must be engaged and directed towards different aspects of the problem.

Regulation, like many other things, goes through phases and unsurprisingly, politicians often select fashionable approaches instead of using principles of coherence. For example, when politicians realise that command and control approaches are not necessarily the best way to regulate all problems, experimentation with alternative approaches such as risk-based approaches ensued. Although risk-based regulation is an appropriate choice under certain circumstances, it has become the dominant approach for most reforms and new regulation since its introduction in the 1990s. The popularity of this approach may result from the fact that most social phenomena have a risk dimension and can, therefore, be characterised as a risk. As a result, policy analysts tend to focus only on the risk related characteristics of an organising problem rather than examining and considering the whole. By limiting their framing to the risk dimensions of the problem, alternative characterisations and normative orderings are neglected thereby precluding analysis of equally or more important aspects or objectives.[109] Risk-based approaches, which are appropriate at some points along the public–private continuum, are inappropriate elsewhere and may further lead to other problems such as over- or under-resourcing legally or economically.[110]

Another example of a regulatory fad is Ayres and Braithwaite's 'responsive regulation'.[111] Although a powerful and useful conceptual framework, responsive regulation is not a regulatory approach. Responsive regulation is better described

---

> The consequences [of deregulation] have been very adverse. Our airlines, once world leaders, are now laggards in every category, including fleet age, service quality and international reputation. Fewer and fewer flights are on time. Airport congestion has become a staple of late-night comedy shows. An even higher percentage of bags are lost or misplaced. Last-minute seats are harder and harder to find. Passenger complaints have skyrocketed. Airline service, by any standard, has become unacceptable.

Bill McGee, 'Why Airline Reregulation Is No Longer Taboo', *USA Today* (online), 2 September 2008 <http://usatoday30.usatoday.com/travel/columnist/mcgee/2008-09-02-airline-regulation_N.htm>, quoting Robert Crandall (Speech delivered at the New York, United States, June 2008).

108 Phillip Longman and Lina Khan, 'Terminal Sickness', *Washington Monthly* (online), March 2012 <http://www.washingtonmonthly.com/magazine/march_april_2012/features/terminal_sickness035756.php#>; Brad Plumer, 'Should We Worry about Cities Abandoned by Airlines?', on *The Washington Post* (24 April 2012) <http://www.washingtonpost.com/blogs/wonkblog/post/has-airline-deregulation-failed/2012/04/24/gIQAruJneT_blog.html>.

109 Sparrow, above n 46.

110 All regulation may not be risk regulation, but risk regulation is an identifiable, very large subset of regulation. If the contents of this risk universe can be specified to a reasonable degree, we will be in a position to theorise and generalise about risk assessment and regulation: Swedlow et al, above n 68.

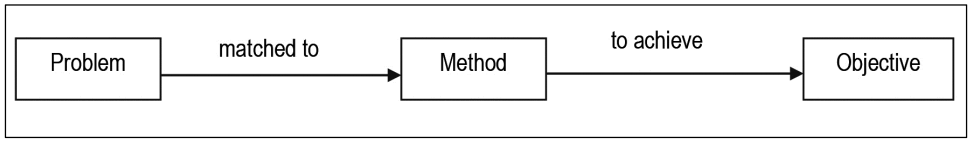
111 Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

as a strategy for improving compliance – a small part of a larger regulatory system – by more effective management of relationships between regulators and regulatory targets.

B Principles and Approach

All agree that regulation should follow 'good design principles'. However, there is very little research that identifies what these good principles are. Scholarship surrounding this question has not moved much beyond Breyer's observation that policymakers should endeavour to coherently match the *method* of achieving the objective of the regulation to the *problem* it is intended to solve.

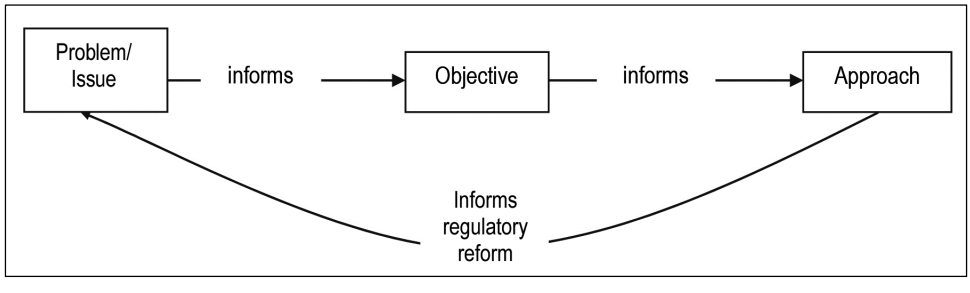
Figure 4:



Since Breyer's initial analysis, this principle has gone largely uncontested despite the following limitations of that analysis:[112] first, his study focuses exclusively on economic regulation. Secondly, it is outdated in that new regulatory approaches have since been developed. Finally, as will be argued below, Breyer conflated the units of analysis – that is, legal concepts – that require alignment to determine the most coherent regulatory approach.

Rather than aligning the problem directly with the regulatory approach, or method as Breyer would have it, a different sequence of relationships consistent with the analysis undertaken in this article is suggested and illustrated below.

Figure 5



112 In effect, in his seminal article, *Regulation and its Reform*, Breyer conflated the distinction between organising problem, which is a social phenomenon, and regulatory objective, which is a policychoice that flows from characterisation. An objective choice of regulatory objective cannot be made unless a social problem has been adequately characterised first.

The sequence of relationships requiring coherent alignment begins first with definition of a social problem. We have explained the social problem as being the social effects of a social practice. How those social effects *should* be regulated next depends on how those social effects are characterised. Stated another way, should the social effects of a social practice be characterised as a social issue, risk or opportunity? The characterisation, in turn, influences how the objectives of the regulatory system are determined. Using the definition of regulatory objective advanced earlier in this article, the objective of a regulatory system is to alter the social effects manifest as a social problem in a particular manner.[113] It is the regulatory objective that, in turn, determines the choice of the most appropriate regulatory approach. Therefore, the characterisation of the organising problem provides a normative impetus for identifying an appropriate objective, which, in turn, determines the most appropriate approach. These general relationships are presented in Table 1 below.

Table 1

Organising Problem Type	**Social Effect Change Objective**	**Primary Approach**
Social problem (systemic, salient and urgent)	Mandate or prohibit practice or behaviour	Command and control
Risk (localised practice or event)	Set standards of practice	Risk-based
Opportunity enabler	Enable practice	Principles-based
Social accountability	Discipline practice	Markets or other social institutions

This broad proposition can be reduced to four general relationships between the organising problem/objective/approach. The four general principles that guide the selection of the most coherent regulatory approach are as follows:

- where the social effects of a social practice are characterised as having systemic implications (either a threat, harm or benefit) that are both salient and require urgent attention, the state will regulate the social practice giving rise to those social effects by prohibiting a practice or mandating the practice or its alternation;

113 Breyer, by contrast, implied that the objective of regulation equates with a desired outcome.

- where the social effects of a social practice are characterised as posing a risk to some segment of society, the state will proscribe standards of behaviour applicable to that class that can or should modify or monitor behaviour in order to avoid or mitigate the potential risk;
- where the social effects of a social practice are characterised as an opportunity to facilitate a social advancement or benefit by encouraging or enabling a specific group to engage in specified social practice, the state will sanction a social practice; and
- where the social effects of a social practice do not require direct regulation, the state can use social institutions such as markets or the media as de facto oversight mechanisms to discipline a social practice.[114]

These four general principles are fine in theory, however, the distinctions between them in practice are opaque. An alternative way to conceptualise the most coherent choice of regulatory approach is by locating the problem/objective/approach relationship within Figure 6. Figure 6 illustrates the regulatory space and the relationship of regulatory approach to problem.

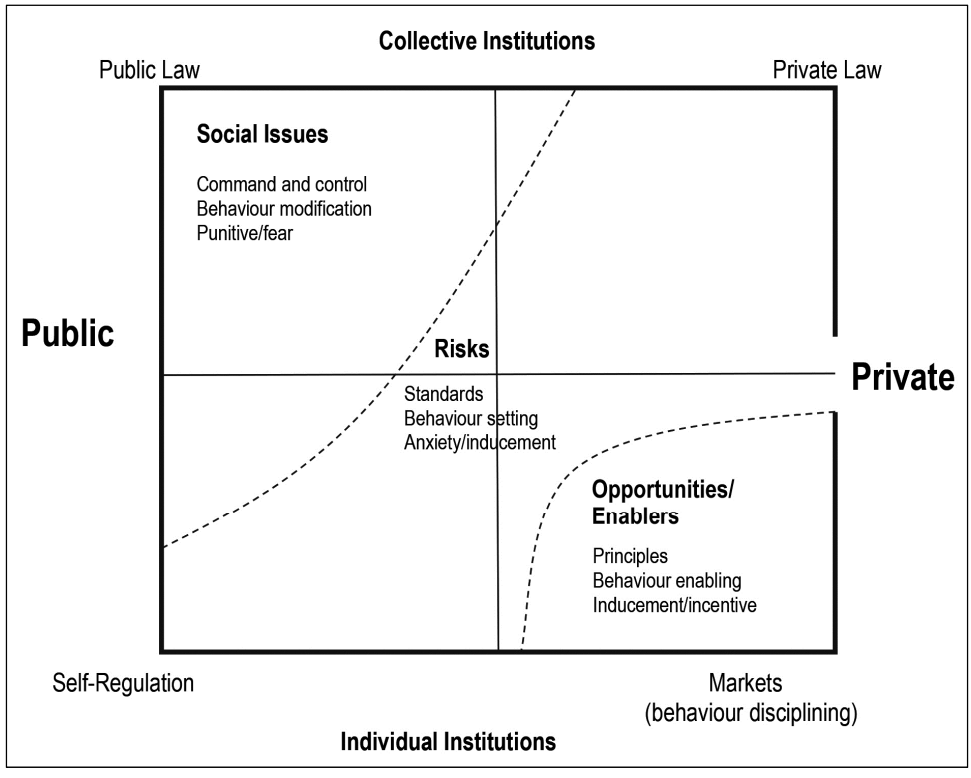
Although, as Scott notes, 'where the values to be pursued are really important … it is appropriate to use the most hierarchical, command and control type of regulatory [approach]',[115] it is also possible that social issues may be dealt with using less interventionist and less prescriptive approaches. An example of a social issue traditionally regulated using an alternative approach is professional self-regulation. Professional self-regulation, administered by professional bodies independent of central authorities for centuries, has usually used general principles embedded in codes of conduct administered at arm's length from the direct authority of the state.[116] Such regulatory approaches are well suited to their specific problem and objective.

114 The question that arises here is whether positive social effects can be generated where a social practice is disciplined by markets. If so, the social practice should not be regulated, hence justifying deregulation. If less formalised institutional discipline is not sufficient to counteract the negative effects of a social practice, that practice will require a more coordinated response.

115 'In fact, the importance of the values to be pursued has nothing to tell us about the relative effectiveness of different regulatory techniques in pursuing those values': Colin Scott, 'Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and Privatised Sectors' (2000) 6 *European Law Journal* 310, 325..

116 Benedict Sheehy, 'From Law Firm to Stock Exchange Listed Law Practice: An Examination of Institutional and Regulatory Reform' (2013) 20 *International Journal of the Legal Profession* 3.

Figure 6



Where the organising problem is characterised less as a social issue and more as a risk, there is a corresponding shift along the public–private continuum as the scope of the regulation's target narrows. This shift is illustrated in both Table 1 and Figure 6. As the organizing problem affects private rights of specific groups, a problem may be better dealt with using less public resource intensive methods.[117] For example, a targeted use of performance standard-setting and public inspections or third-party audits rather than the exercise of police power can be both more efficient and more effective.

Finally, there is space for organising problems characterised as opportunity. In such classes of organising problems the provision of a state-sanctioned benefit is targeted to more specific classes of private actor or actors in the private capacities in order to promote a social goal or provide a social benefit. This analysis is consistent with Douglas' group-grid theory of culture,[118] as applied by Kahan and Braman in the policy context.[119] As noted, ideologically individualist

117 Horwitz, above n 79.
118 Douglas, above n 17.
119 Kahan and Braman, above n 12.

cultures prefer to characterise the organising problem as an opportunity and prefer private orderings such as markets, while hierarchists prefer to ignore collective risks which may challenge the hierarchical authority of government and elites thereby coalescing with Kahan and Braman's approach to ideology and policy.[120]

VI CONCLUSION

The objective of this article was to identify and examine the normative components of regulatory systems. The purpose of this inquiry was to determine whether the attributes of, and interrelationships between components, would yield insights that might inform a more coherent composition and configuration of components. This inquiry was based on the premise that a more coherent linking of components could reduce or avoid altogether the prospect of regulatory failure. Further, the inquiry sought to determine whether any general principles regarding the composition and configuration of these components that might improve the prospect of regulatory success might be identified.

The first component of a regulatory system is the identification of an organising problem. Problems or issues requiring public attention arise as a result of the behaviour of people, their interactions with others or their physical environment. These behaviours are manifest as social practices that have wider social effects. The first decision in the regulatory process is whether the social effects of a social practice pose a social problem – an organising problem – that requires sort of public response.

Once a decision is taken that a social problem or issue does warrant a public response, the second component of the regulatory process is to examine and characterise that organising problem. If the problem has systemic attributes, it can be characterised as a broad social coordination problem. If an organising problem has the attributes of adverse events that are spatially, temporally or geographically bound, the organising problem has the characteristics of a risk. Finally, where the interests of society can be advanced by granting some social (usually private) actor a permission or privilege, a social opportunity or enabler arises.

The characterisation of the organising problem as a social problem, risk or opportunity identifies the attributes of an organising problem. The attributes of different organising problems set the foundation for how a regulatory policy should be framed so as to avoid regulatory failure. To increase the likelihood of regulatory success, the attributes of an organising problem must align coherently with the policy objectives and targets (actors) to be regulated. If an organising problem is characterised as a risk as opposed to a social coordination problem, the objectives and targets of a regulatory policy must align to such a characterisation.

120 Ibid 151–2.

In systematically analysing the components and their linkages, several broad patterns in the nature of propositions emerge. These propositions can be reduced to four general relationships between the organising problem/objective/approach. The four general principles guide the selection of the most coherent regulatory approach are:

- where the social effects of a social practice are characterised as having systemic implications (either a threat, harm or benefit) that are both salient and require urgent attention, the state will regulate the social practice giving rise to those social effects by prohibiting a practice or mandating the practice or its alternation;
- where the social effects of a social practice are characterised as posing a risk to some segment of society, the state will proscribe standards of behaviour applicable to that class that can or should modify or monitor behaviour in order to avoid or mitigate the potential risk;
- where the social effects of a social practice are characterised as an opportunity to facilitate a social advancement or benefit by encouraging or enabling a specific group to engage in specified social practice, the state will sanction a social practice; and
- where the social effects of a social practice do not require direct regulation, the state can use social institutions such as markets or the media as de facto oversight mechanisms to discipline a social practice.