

REGULATION IS A VERB

CARY COGLIANESE*

I. INTRODUCTION

Regulation plays a vital role in protecting society.¹ Because it is so vital, regulators need to avoid thinking of regulation as a noun—that is, as just a set of rules or rulebooks. Instead, regulators should think about regulation as a *verb*—that is, as a suite of ongoing actions. The dynamic nature of the world demands active, agile *regulating*, not necessarily more *regulation*.

This message applies across all domains of regulation, including those that involve the oversight of licensed professionals in fields as diverse as medicine, engineering, and law. In this essay, I begin by explaining why the professions themselves are so important to society and then show why those who regulate professions, like all regulators, should view regulation as more than a static set of rules.

The purpose of regulation is to change human behavior to improve outcomes in the world.² Since both human behavior and the world are constantly changing in ways that can affect these outcomes, regulation must be similarly dynamic. If regulators are to prevent problems before they arise, as well as to minimize the harms from problems that do arise, they must treat regulation as a verb.

Copyright © 2024, Cary Coglianese.

* Edward B. Shils Professor of Law and Political Science, and Director, Penn Program on Regulation, University of Pennsylvania. This essay is an edited version, with footnotes added, of a keynote address delivered by the author at the International Congress of the Council for Licensure, Enforcement, and Regulation (CLEAR), Dublin, Ireland, May 2023. CLEAR is an international organization of regulators of occupations and professions.

¹ See, e.g., W. KIP VISCUSI, JOSEPH E. HARRINGTON JR. & DAVID E. M. SAPPINGTON, *ECONOMICS OF REGULATION AND ANTITRUST* 2-3 (5th ed. 2018); GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY* 4 (2017).

² Cary Coglianese, *Building Better Compliance*, 100 *TEX. L. REV. ONLINE* 192, 200 (2022); Cary Coglianese, *The Challenge of Regulatory Excellence*, in *ACHIEVING REGULATORY EXCELLENCE* 3 (Cary Coglianese ed., 2017).

II. REGULATING THE PROFESSIONS

When it comes to regulating and licensing professions, it helps at the outset to offer a reminder of why the work that professionals do can be so consequential to society. One way of seeing the importance of professions is simply to look to some of the great calamities and disasters of recent years in the United States, each of which has involved a clear, if not even direct, connection with the work of different professions. Consider, for example, how engineering professionals' work has figured into nearly any major industrial accident or disaster, whether the Boeing 737 Max air crashes³ or the Deepwater Horizon oil spill.⁴ Or look at how accountants' work figured into financial crises, such as the Enron scandal of 2001 or the subprime mortgage crisis of 2007–2008 that led to the Great Recession. In the weeks leading up to January 6, 2021, a few members of the legal profession played a central role in crafting shady strategies and perpetuating falsehoods that laid a foundation for the now infamous assault on the U.S. Capitol.⁵ And the opioid epidemic has involved doctors and pharmacists as unwitting, or at times witting, collaborators in a pattern of over-prescriptions that contributed to skyrocketing cases of addiction and tragically high numbers of deaths.⁶ These are but a few examples that illustrate the importance of professions and, by extension, the *prima facie* need for their regulation.

³ Ian Duncan et al., *Boeing 737 Max Crashes Were 'Horrific Culmination' of Errors, Investigators Say*, WASH. POST (Sept. 16, 2020, 1:10 PM), https://www.washingtonpost.com/local/trafficandcommuting/boeing-737-max-crashes-were-horrific-culmination-of-errors-investigators-say/2020/09/16/72e5d226-f761-11ea-89e3-4b9efa36dc64_story.html [<https://perma.cc/FLR9-XRHM>].

⁴ Richard Simon, *BP Report on Well Disaster Faults Mechanical, Human Failures*, L.A. TIMES (Sept. 9, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-sep-09-la-na-oil-spill-bpreport-20100909-story.html> [<https://perma.cc/8W56-DTW5>].

⁵ Debra Cassens Weiss, *Why the Jan. 6 Committee Highlights Actions of Three Lawyers and an Ex-Law Prof in DOJ Referrals Against Trump*, AM. BAR ASS'N J., <https://www.abajournal.com/web/article/why-the-jan-6-committee-included-3-lawyers-and-an-ex-law-prof-in-doj-referrals-against-trump> [<https://perma.cc/RSS8-A4QW>] (Dec. 20, 2022, 8:05 AM). See generally JONATHAN LEMIRE, *THE BIG LIE: ELECTION CHAOS, POLITICAL OPPORTUNISM, AND THE STATE OF AMERICAN POLITICS AFTER 2020* (2022).

⁶ Peter Pronovost, *How Doctors Have Contributed to—and Can Help Reverse—the Opioid Epidemic*, WALL ST. J. (Sept. 14, 2017, 11:25 AM), <https://www.wsj.com/articles/how-doctors-have-contributed-toand-can-help-reversethe-opioid-epidemic-1505402734> [<https://perma.cc/4DSQ-CZYM>].

To be clear, I do not mean to suggest that professionals—or their regulators—necessarily cause all of society’s calamities. Although some crises certainly can be prevented by better professional work, the root cause of other crises decidedly stems from outside the professions due to shortsightedness, selfishness, or just poor decision-making by the clients of professionals. With some calamities, the failings of other regulators altogether, such as those responsible for overseeing banks, insurers, or offshore oil drilling rigs, rather than regulators of professions, figure more centrally into the oversights and failures leading to catastrophic harm.

Moreover, even when members of a profession are implicated in or fail to prevent disasters and crises, this clearly does not imply that their entire profession is guilty or responsible.⁷ The existence of calamities—even when some professionals are responsible—also cannot be taken to suggest that the professions at issue do not, on balance, perform very positive roles for society. Much the same can be said about regulators in the wake of disasters and crises. Across all realms of regulation, disasters and crises are highly visible, but regulatory successes are not.⁸ Regulatory success equates to life as it should be: planes taking off and landing at their destinations; patients recovering from illness and injury; animals being well cared for; and so forth. We cannot easily recognize all the avoided disasters that stem from the diligent and effective work that professions and their regulators do because non-disasters are simply not visible. For this reason, it is much harder to quantify and counterbalance against any harms all the preventative good that occurs because of the responsible work of competent, diligent professionals and those who oversee them.

Significant value also comes from professionals’ positive roles in *responding to* disasters and crises, such as by restoring health and repairing communities.⁹ The healing work performed by members of health care and social work professions, for example, often follows

⁷ See, e.g., W. Bradley Wendel, *The Good Lawyers of January 6* (Cornell L. Sch., Working Paper, June 1, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5012066 [<https://perma.cc/E62U-5MKK>].

⁸ Christopher Carrigan & Cary Coglianese, *Oversight in Hindsight: Assessing the U.S. Regulatory System in the Wake of Calamity*, in *REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION* 1, 13 (Cary Coglianese ed., 2012).

⁹ For an excellent discussion of the vital role played by those who respond to disasters, see JULIETTE KAYYEM, *THE DEVIL NEVER SLEEPS: LEARNING TO LIVE IN AN AGE OF DISASTERS* (2022).

failures by other professionals and other regulators.¹⁰ In these and many other ways, society relies on professionals overseen by regulators to fix problems and heal the wounds that others have created.¹¹

The kinds of big disasters and crises I have highlighted here—airplane crashes, financial collapses, oil spills, and opioid epidemics—also obviously do not implicate all the professions. They have little to do, for example, with the work of optometrists, early childhood educators, or veterinarians. Yet by pointing out recent examples of catastrophic failures and their connection with some professions, two important implications follow that apply to regulators of any profession.

First, disasters and crises vividly show that adverse consequences can follow from the conduct of professionals and other regulated entities—and, by extension, from the quality of regulatory efforts to oversee them. Not all negligent or reckless conduct, of course, produces cataclysmic consequences for society. But, make no mistake, it can still be cataclysmic at an individual level. The child who is neglected or abused by a licensed day care provider or the patient who suffers a medical error or inadequate treatment by a poorly trained health professional may not show up on the nightly news broadcast. Still, for the affected individuals, the failure to receive appropriate professional services can be devastating.¹²

Second, the persistence of disasters and mistakes—whether of the large, cataclysmic kind or the smaller, but no less traumatic, individualized kind—means that regulators and the professionals they oversee can always do better. Professions and their regulators should be continuously striving to improve. As a society, we want professionals of all kinds to do better to prevent harms from occurring in the first place and to increase the quality of their care and service delivery. The vital mission of regulating to bring about a better tomorrow provides a common thread linking all regulators of professions—indeed, linking all regulators of any kind.¹³

¹⁰ See, e.g., Frank J. Zenere, *Response to the Collapse of the Champlain South Tower Condominium*, 50 COMMUNIQUÉ 12 (2021).

¹¹ See, e.g., Dimitrios Jannussis, Georgia Mpompetsi & Kollaras Vassileios, *The Role of the First Responder*, in EMERGENCY MEDICINE, TRAUMA AND DISASTER MANAGEMENT: FROM PREHOSPITAL TO HOSPITAL CARE AND BEYOND 11 (Emmanouil Pikoulis & Jay Doucet eds., 2021).

¹² It also certainly can be the case that too much regulatory activity, thoughtlessly pursued when not justified or carried out in an arbitrary or vindictive manner, can create undue costs or harms to those individuals and firms that are subject to regulatory obligations.

¹³ CARY COGLIANESE, *REGULATING FOR A BETTER TOMORROW* (forthcoming).

III. WHY REGULATION IS A VERB

Having touched on the importance of society's professions and the regulators that oversee them, I want to turn to why it is so important to think about regulation as a verb. Readers should fear not; my purpose is not to offer a grammar lesson. Instead, my aim is to urge all regulators to do their part to resist a faulty way of thinking that sees regulation as a noun—a thing, a solution, or even at times *the* solution. As opposed to a set of rules or rule books, regulation should instead be thought of in terms of action. It is an ongoing, ever-dynamic process.¹⁴

Unfortunately, regulatory professionals too often ask merely whether their rules should be “prescriptive,” “performance-based,” “risk-based,” “principles-based,” “market-based,” or any number of other adjectives that modify “regulation” as a noun.¹⁵ Asking about the nature of rules is far from irrelevant. But it can be blinding and lead to passivity.

It is too easy to declare: “This is the fix, the cure.” It is too simplistic to advocate just for replacing so-called command-and-control regulation—an adjective almost always used pejoratively¹⁶—with some other preferred design of a rule and then thinking all will be well. The reality is

¹⁴ See NAT'L ACAD. OF PUB. ADMIN., *AGILE REGULATION: GATEWAY TO THE FUTURE* 5 (2022).

¹⁵ See, e.g., Brian Meacham, *Risk-Informed Performance-Based Approach to Building Regulation*, 13 J. RISK RSCH. 877, 879 (2010); Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 1, 16 (2008); Julia Black, *Forms and Paradoxes of Principles-Based Regulation*, 3 CAP. MKTS. L.J. 425 (2008); Robert Stavins, *Market-Based Environmental Policies*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION (Paul Portney & Robert Stavins eds., 2000); *Right-Touch Regulation*, PRO. STANDARDS AUTH. FOR HEALTH & SOC. CARE (June 9, 2023), <https://www.professionalstandards.org.uk/what-we-do/improving-regulation/right-touch-regulation> [<https://perma.cc/DYC3-BZPG>]. On this last cited example, I note that, even though proponents of “right touch” regulation do contemplate active regulating, the term itself uses passive language, namely “right-touch,” rather than the more active if albeit more cumbersome “right-touching.”

¹⁶ Eric W. Orts & Cary Coglianese, *Debate: Collaborative Environmental Law: Pro and Con*, 156 U. PA. L. REV. PENNUMBRA 289, 308 (2007) (explaining that the language of command-and-control is “almost always used to distinguish the writer’s (or speaker’s) own preferred approach from disparaged alternatives that are conveniently placed under the ‘command and control’ banner. Too often this phrase simply undercuts opposing views by applying a pejorative label to them, sometimes without any accompanying substantive argument or analysis”) (quoting commentary by Cary Coglianese).

that there is no single tool that will work in all cases, for all problems, for all time. Regulating well requires ongoing vigilance and responsiveness.¹⁷

Perhaps it may be caricaturing slightly to point to a tendency of regulators to be captivated by various promised “tools” or “fixes.” But only slightly. For years, I have attended conferences and heard that the answer to what ails regulation rests with the adoption of “RIA,” or “regulatory impact assessment.”¹⁸ Others have proclaimed that the cure rests with “the standard cost model.”¹⁹ There is nothing inherently wrong with either RIA or the standard cost model. Indeed, assessing the impact of regulations is vitally important.²⁰ But RIA conceived as a tool—a thing, a noun—is not a be-all solution.

In a similar vein, it seems worth observing that the European Union developed an initiative that for many years was known as Better Regulation²¹—again, “-tion,” not “-ting.” This initiative, among other things, focused on “better tools for better policies.”²²

Various countries have in recent years implemented “one-in-one-out” policies that call for taking one regulation off the books for each new one added.²³ In some jurisdictions, the ratio has been one-in-two-out,

¹⁷ John Braithwaite, *Responsive Excellence*, in *ACHIEVING REGULATORY EXCELLENCE* 23, 26 (Cary Coglianese ed., 2017); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

¹⁸ Claudio M. Radaelli, *Regulatory Impact Assessment*, in *THE PALGRAVE ENCYCLOPEDIA OF INTEREST GROUPS, LOBBYING AND PUBLIC AFFAIRS* (P. Harris et al. eds., 2020).

¹⁹ ORG. FOR ECON. CO-OP. & DEV., *INTERNATIONAL STANDARD COST MODEL MANUAL* 8 (2012).

²⁰ Cary Coglianese, *Thinking Ahead, Looking Back: Assessing the Value of Regulatory Impact Analysis and Procedures for Its Use*, 3 *KLRI J.L. & LEGIS.* 5, 16 (2013) (discussing the importance of assessing the impact of regulation).

²¹ *Better Regulation: Why and How*, EUR. COMM’N, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation_en [<https://perma.cc/96DP-8B7G>].

²² *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Better Regulation for Better Results – An EU agenda*, EUR. ENV’T AGENCY (May 19, 2015), <https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52015DC0215&qid=1702948650910> [<https://perma.cc/GHY7-GZWC>].

²³ ANDREA RENDA ET AL., *FEASIBILITY STUDY: INTRODUCING “ONE-IN-ONE-OUT” IN THE EUROPEAN COMMISSION* 6 (Dec. 5, 2019), <https://cdn.ceps.eu/wp-content/uploads/2019/12/Feasibility-Study.pdf> [<https://perma.cc/NT6F-L8A3>].

one-in-three-out, and even more.²⁴ At the federal level in the United States, the first Trump Administration often called this approach “2-for-1”²⁵—as if regulation were akin to an item on sale at a local grocery store or shopping center.²⁶

This kind of regulatory accounting is the epitome of regulation as a noun. Regulation as a noun is something that can just be counted up, often with the notion that the fewer rules, the better. We have seen the World Bank, for example, develop a Doing Business Index.²⁷ It is based on the view that the number of rules makes a key difference in how easy it is to start up a new business.²⁸ The Organization for Economic Cooperation and Development (OECD) has similarly tracked regulation for many years using a “Product Market Regulation” index.²⁹ Researchers at the Mercatus Center in the United States have also been engaging in a kind of regulatory accounting: literally counting in regulatory codes the number of obligation-related words such as “should,” “shall,” and “must.”³⁰

This view of regulation as a noun—as words on paper, books on shelves, or other tangible objects—predominates not just among policymakers and

²⁴ *2010 to 2015 Government Policy: Business Regulation*, DEP’T FOR BUS. INNOVATION & SKILLS, <https://www.gov.uk/government/publications/2010-to-2015-government-policy-business-regulation/2010-to-2015-government-policy-business-regulation> [<https://perma.cc/DT8Y-VGLQ>] (May 8, 2015).

²⁵ Proclamation No. 13771, 82 Fed. Reg. 9,339 (Jan. 30, 2017); Robert J. Shiller, *Why Trump’s 2-for-1 Rule on Regulations Is No Quick Fix*, N.Y. TIMES: THE UPSHOT (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/upshot/why-trumps-2-for-1-rule-on-regulations-is-no-quick-fix.html> [<https://perma.cc/Y4CJ-2C7T>].

²⁶ The second Trump Administration has released a 1-in-10-out initiative. Exec. Order No. 14,192, 90 Fed. Reg. 9065 (Feb. 6, 2025).

²⁷ *Databank: Doing Business*, THE WORLD BANK, <https://databank.worldbank.org/source/doing-business> [<https://perma.cc/72LB-9M3X>].

²⁸ *See Business Regulatory Environment*, THE WORLD BANK (June 9, 2021), <https://www.worldbank.org/en/topic/investment-climate/brief/business-regulatory-environment> [<https://perma.cc/UK4J-LDRA>].

²⁹ *Indicators of Product Market Regulation*, ORG. FOR ECON. CO-OP. & DEV., <https://www.oecd.org/economy/reform/indicators-of-product-market-regulation/> [<https://perma.cc/QTP2-BEC7>].

³⁰ *See, e.g., Patrick McLaughlin & Jonathan Nelson, NLRB Change Shows Agencies Can Simplify Regulations*, MERCATUS CTR. AT GEO. MASON UNIV. (May 11, 2018), <https://www.mercatus.org/economic-insights/expert-commentary/nlr-change-shows-agencies-can-simplify-regulations> [<https://perma.cc/2GBY-NJW8>].

researchers but also in popular discourse. Regulations are “rules of the road.” They are “guardrails.” They are also, most vividly, “red tape” and “paperwork.”³¹ In fact, this is why politicians often use piles of papers and stacks of books as props when they want to argue for deregulation or various regulatory reforms.³²

I do not mean to deny that regulation involves adopting words on paper or placing pages in rule books. It does.³³ Furthermore, as a social scientist, I have done my own counting of pages and words as part of some of my research projects.³⁴ As a lawyer, I can appreciate that regulations are words affixed to paper, and I recognize the virtues of having fixed rules and making them accessible for all to read.³⁵ Written rules foster consistency and equity and allow for future planning by others.³⁶ And yet, a real limitation arises from thinking too much about regulation as *just* a set of rules and rulebooks, especially in a dynamic world. There is a risk to thinking that if regulators could only put the right rule in place, regulatory problems would be solved.

A. *The Danger of Regulation as a Noun*

It can even be dangerous for regulators to adopt a particular regulatory tool, or the latest trendy regulatory strategy, and think their work is done. Let me offer two examples of the danger. Although these examples come from distinct regulatory domains, what happened in these instances can happen elsewhere, any time regulators succumb to a regulation-as-noun mindset.

³¹ PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 1–3 (2018); CASS SUNSTEIN, *SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT*, at x (2022).

³² See, e.g., Suzy Khimm, *Trump Cuts Red Tape at White House Event Touting Deregulation*, NBC NEWS, <https://www.nbcnews.com/politics/white-house/trump-cuts-red-tape-white-house-event-touting-deregulation-n829851> [<https://perma.cc/48LR-SX36>] (Dec. 14, 2017, 5:26 PM) (containing image of former President Trump posing beside stacks of paper).

³³ Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1128.

³⁴ *Id.* at 1127–30.

³⁵ Bernard W. Bell et al., *Improving the Affirmative Disclosure of Agency Legal Materials*, 13 MICH. J. ENVTL. & ADMIN. L. 342 (2024).

³⁶ Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1947–48 (2018); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE*, 155–58 (1991).

The first example comes from New Zealand, where officials in the 1990s modified that nation's building codes to follow a performance-based approach.³⁷ Performance-based regulation had been, and still is, widely touted as an ideal solution to regulatory problems.³⁸ Under performance-based regulation, the regulator adopts a rule that requires the attainment of a goal—one that reduces or solves the targeted problem—and then lets regulated entities find their own way to achieve that goal.³⁹ The flexibility offered by a performance standard is supposed to allow for more cost-effective outcomes.⁴⁰ But it only works if a regulator can specify the goal correctly and then measure if that goal is being met.⁴¹ The problem in New Zealand was that its performance-based building codes specified the applicable goal along merely one dimension—the structural integrity of the building.⁴² That is assuredly a matter of critical importance. But when builders started to use alternative building techniques to meet that goal, it became evident that some of these techniques also failed to protect buildings adequately from moisture build-up—the prevention of which was another important concern that was never specified in the performance-based regulation.⁴³ As a result, nearly ninety thousand buildings across the country suffered serious mold infestation, leading to an estimated \$11 billion in damages—a major crisis created by approaching regulation as

³⁷ See generally Peter John Mumford, *Enhancing Performance-Based Regulation: Lessons from New Zealand's Building Control System*, 24 (2010) (Ph.D. dissertation, Victoria University of Wellington), <https://researcharchive.vuw.ac.nz/bitstream/handle/10063/1206/thesis.pdf?sequence=1> [<https://perma.cc/QN7T-MXKF>]; Peter J. May, *Performance-Based Regulation and Regulatory Regimes: The Saga of Leaky Buildings*, 25 L. & POL'Y 381, 391–95 (2003); Derek Gill, *Regulatory Coherence: The Case of New Zealand* (ERIA Discussion Paper Series, Discussion Paper No. 12, 2016), <https://www.eria.org/ERIA-DP-2016-12.pdf> [<https://perma.cc/9JTY-S4FX>].

³⁸ Mumford, *supra* note 37.

³⁹ Cary Coglianese et al., *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN L. REV. 705, 706 (2003).

⁴⁰ *Id.* at 707.

⁴¹ Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 700–02 (2003); Cary Coglianese, *The Limits of Performance-Based Regulation*, 50 U. MICH. J.L. REFORM 525, 527–28 (2017).

⁴² Mumford, *supra* note 37, at 21.

⁴³ *Id.* at 78.

a noun and failing to anticipate how flexibility in the rules on the books might lead to changes in building practices, even to the adoption of techniques that had not been adequately tested and proven.⁴⁴

My second example also comes from Oceania, down under in Australia. During the first decade or so of this century, electricity regulators in Australia—like many of their counterparts elsewhere in the world—sought to introduce retail utility competition.⁴⁵ The nature of electricity service has historically meant that it amounted to a natural monopoly.⁴⁶ And with any monopoly—including, incidentally, the monopolies that can be created by licensing professionals—there is risk of rent-seeking behavior (basically, the overcharging for goods or services).⁴⁷ To give consumers the benefits of lower prices that can come from competitive markets, electricity regulators in various jurisdictions have found ways to introduce competition into those parts of the electricity system that can be made competitive.⁴⁸ The transmission of electricity over big power lines is not generally the place for that competition, as it is too costly to build more than one set of power lines; however, it is possible to introduce competition into power generation and, at the other end of the distribution line, in retail sales.⁴⁹

According to an account offered a few years ago in a book by Fiona Simon, when the Australian electricity regulators proceeded to open their markets to competition, they faced questions about various consumer protection rules that should apply in light of competition in the new electricity markets.⁵⁰ Would there be, for example, rules protecting consumers from deceptive practices in the retail market? How exactly should retail markets be structured? According to Simon, rather than write the rules themselves, Australian regulators opted to take a “meta-

⁴⁴ *Id.* at 30.

⁴⁵ See FIONA SIMON, *META-REGULATION IN PRACTICE: BEYOND NORMATIVE VIEWS OF MORALITY AND RATIONALITY* 58 (2017).

⁴⁶ STEPHEN BREYER, *REGULATION AND ITS REFORM*, (1st ed. 1982).

⁴⁷ *Id.*

⁴⁸ See, e.g., Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 318 (2017); Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. 643, 676–77 (2019); David Spence, *Regulating Competition, Both the Forest and the Trees*, 70 EMORY L.J. 13, 20–24 (2021).

⁴⁹ WILLIAM W. HOGAN, *COMPETITIVE ELECTRICITY MARKET DESIGN: A WHOLESALE PRIMER* 5–6 (1998).

⁵⁰ SIMON, *supra* note 45, at 58.

regulation” approach.⁵¹ Meta-regulation refers to a strategy used by regulators to induce private firms to create their own internal “regulations.”⁵² Sometimes meta-regulation has been referred to as management-based regulation or as “regulation of self-regulation.”⁵³ Much as with performance-based regulation, meta-regulation gives regulated entities flexibility to craft their own self-regulatory solutions.⁵⁴ But, unlike with complete self-regulation, under meta-regulation firms are mandated to come up with their own management plans, their own form of self-imposed regulations, and then to follow them.⁵⁵ On Simon’s account, what electricity regulators in some Australian states did, under the banner of meta-regulation, was basically nothing.⁵⁶ Any policies that were needed to structure a competitive retail environment were “non-existent,” she observed.⁵⁷ The government “provided no direction for the industry.”⁵⁸ According to Simon, “[t]he industry as a whole seemed confused” and “no one seemed to know what was required of the business or of the market.”⁵⁹

Eventually, some regulators—as well as officials from a separate utility commission—stepped in and tried to make some ground rules for competition.⁶⁰ But these regulators took a light-touch approach, opting to work through a consultative process to craft rules satisfactory to different industry and consumer groups.⁶¹ As a result, according to Simon, these consultations “often meant trading off different stakeholders’ claims to arrive at some reasonable middle ground, and the ‘middle’ would shift depending on the weight of opinion.”⁶² Some decisions were “only

⁵¹ *Id.*

⁵² Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in *THE OXFORD HANDBOOK OF REGULATION* 146, 146 (Robert Baldwin et al. eds., 2010).

⁵³ *Id.* at 147.

⁵⁴ Cary Coglianese, *Regulatory Abdication in Practice*, 79 *PUB. ADMIN. REV.* 794, 794–98 (2019) (reviewing SIMON, *supra* note 45).

⁵⁵ *Id.*

⁵⁶ SIMON, *supra* note 45, at 58.

⁵⁷ *Id.*

⁵⁸ *Id.* at 59.

⁵⁹ *Id.* at 61.

⁶⁰ *Id.* at 65.

⁶¹ *Id.* at 70–71.

⁶² *Id.* at 71.

symbolic, provided to placate particularly strong stakeholder views.”⁶³ Too often, “regulatory decision-making . . . relied on trading off assertions and finding middle ground,”⁶⁴ rather than showing the fortitude needed to provide the industry with what meta-regulation really entails: direction and active oversight.⁶⁵ Various regulatory failures detailed in Simon’s book came about from a plug-and-play version of regulating—from treating “meta-regulation” as a solution and simply announcing that industry would have to figure out the rules of competition on their own.⁶⁶ In reality, this was meta-regulation in name only. It was not only regulation as a noun, but an abdication of responsibility.⁶⁷

Let me be clear: I am not saying that meta-regulation is fundamentally flawed or to be avoided. On the contrary, I have spent more than the last quarter century researching and writing about meta-regulation or, what I think is the better term, management-based regulation.⁶⁸ Seeing meta-regulation as fundamentally flawed, though, is

⁶³ *Id.*

⁶⁴ *Id.* at 92.

⁶⁵ On the need for regulatory fortitude, see Neil Gunningham, *Compliance, Enforcement, and Regulatory Excellence*, in *ACHIEVING REGULATORY EXCELLENCE* 188, 191 (Cary Coglianese ed., 2017); Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policy Making*, in *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 69 (Rosemary O’Leary & Lisa Bingham eds., 2003).

⁶⁶ Coglianese, *supra* note 54, at 796–97.

⁶⁷ *Id.* at 797.

⁶⁸ See Cary Coglianese & Shana M. Starobin, *Management-Based Regulation*, in *POLICY INSTRUMENTS IN ENVIRONMENTAL LAW* 292, 293 (Kenneth R. Richards & Josephine van Zeben eds., 2020); Cary Coglianese, *Management-Based Regulation: Implications for Public Policy*, in *RISK AND REGULATORY POLICY: IMPROVING THE GOVERNANCE OF RISK* 159, 160 (Org. for Econ. Co-op. & Dev. ed., 2010); Coglianese & Lazer, *supra* note 41, at 691; Cary Coglianese, *Management-Based Regulation: Implications for Public Policy*, in *ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT REPORT NO. GOV/PGC/REG(2008)5 4* (Working Party on Regul. Mgmt. & Reform ed., 2008); Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, in *REGULATORY POLICY PROGRAM REPORT NO. RPP-04-2002*, at 4 (2002); CARY COGLIANESE & JENNIFER NASH, EDS., *LEVERAGING THE PRIVATE SECTOR: MANAGEMENT-BASED STRATEGIES FOR IMPROVING ENVIRONMENTAL PERFORMANCE* (2006); Cary Coglianese & Jennifer Nash, *Compliance Management Systems: Do They Make a Difference?*, in *THE CAMBRIDGE HANDBOOK OF COMPLIANCE* 571, 575 (Benjamin
(continued)

the conclusion that Simon apparently wanted her readers to draw from her account.⁶⁹ Reaching that conclusion, though, is itself to succumb to a regulation-as-a-noun mindset. Meta-regulation is not a product that either works or does not work. It is an activity, a practice. It represents an ongoing posture taken by regulators. It is a way to approach regulatory *action*. What went wrong in Australia was a failure to appreciate how, just as with performance-based regulation, meta-regulation (or management-based regulation) requires an active regulator.⁷⁰ Meta-regulation is not, as I have written elsewhere, a set of “inchoate actions or proposals that may have the byproduct of motivating firms to self-regulate.”⁷¹ Rather, “[m]eta-regulation refers to ways that outside regulators deliberately—rather than unintentionally—seek to induce targets to develop their own internal, self-regulatory responses to public problems.”⁷² As I explained in reviewing Simon’s book, “regulators cannot just passively go through the motions and then be said to have opted for meta-regulation.”⁷³ Meta-regulation, in other words, is all about *regulating* rather than *regulation*.

B. Five Reasons to Treat Regulation as a Verb

The need for ongoing vigilance and action underlying meta-regulation applies just as well for any approach to regulation. This is because regulating any part of an economy is all about trying, first, to modify human behavior so as, second, to improve outcomes in the world.⁷⁴ Note, by the way, the verbs: *modify* and *improve*. The first objective of regulation—to modify human behavior—must be a verb because human behavior is inherently dynamic and in motion.⁷⁵ And yet we often talk about behavior in static terms, specifically in terms of

van Rooij & D. Daniel Sokol eds., 2021); Cary Coglianese, *Pledging, Populism, and the Paris Agreement: The Paradox of a Management-Based Approach to Global Governance*, 34 MD. J. INT’L L. 139, 139 (2019).

⁶⁹ SIMON, *supra* note 45, at 93.

⁷⁰ *Id.* at 59–60.

⁷¹ Coglianese & Mendelson, *supra* note 52, at 162.

⁷² *Id.* at 150.

⁷³ Coglianese, *supra* note 54, at 797.

⁷⁴ Coglianese, *Building Better Compliance*, *supra* note 2, at 200 (describing regulation as an active process involving the steps of adopting rules, changing behavior, and improving the world).

⁷⁵ *Id.*

“compliance”—another noun.⁷⁶ Do not get me wrong: compliance is again of vital importance.⁷⁷ But it is also a concept that, by dint of its part of speech, implies a static “state” in which regulated individuals or entities find themselves either in or out. Compliance exists when those subject to regulation are in a state in which their behavior conforms with the rules.⁷⁸

⁷⁶ Notably, “compliance” even shows signs of emerging as its own defined subfield within law and regulation studies, with conferences, courses, textbooks, and a growing literature organized around the noun. *See, e.g.*, THE CAMBRIDGE HANDBOOK OF COMPLIANCE 2 (Benjamin van Rooij & D. Daniel Sokol eds., 2021); BABAK BOGHRATY, INTRODUCTION TO ORGANIZATIONAL COMPLIANCE AND ETHICS (2018); GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE (2nd ed. 2017); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 253 (2020). An important interdisciplinary network of scholars called ComplianceNet is led by a steering committee of impressive and thoughtful scholars, including Benjamin van Rooij, Yuval Feldman, J.S. Nelson, Colin Provost, and Melissa Rorie. COMPLIANCE.NET, <https://www.compliancenet.org/> [<https://perma.cc/C5W8-W9GP>]. I certainly do not mean to imply that these or other compliance-oriented scholars do not recognize that compliance is actually an active process rather than a static state—far from it. *See, e.g.*, BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE (2021); Jennifer Arlen & Lewis A. Kornhauser, *Does the Law Change Preferences?*, 22 THEORETICAL INQUIRIES L. 175 (2021); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 838 n.16 (1994); J.S. Nelson, *Corporate Criminal ESG*, 109 IOWA L. REV. 1429 (2024). Nor do I wish, in calling attention to the use of “compliance” as a noun, to be construed as diminishing in any way the systematic inquiry into why people comply with the law and how to foster greater compliance. After all, I have contributed some of my own work along these lines. *See, e.g.*, Coglianese & Nash, *Compliance Management Systems*, *supra* note 68, at 572; Jennifer Howard-Grenville, Jennifer Nash & Cary Coglianese, *Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions*, 30 L. & POL’Y 73, 74 (2008). Rather, my point is simply to observe that the language used to describe academic and professional inquiry in this domain—specifically, the word “compliance”—obscures what is acknowledged to be a dynamic social and psychological process of seeking to change behavior to conform more closely with rules.

⁷⁷ *See* Coglianese, *Building Better Compliance*, *supra* note 2, at 195 (noting “the pivotal role that compliance plays within a much larger, society- and economy-wide perspective of law and its role in delivering public value”).

⁷⁸ *Id.* at 200.

But what if regulated entities act strategically and find ways to avoid being caught for being out of compliance? Or what if they are actually “in” compliance—at least technically—but the outcomes in the world are not at all what is desired, just as happened in New Zealand?⁷⁹

That is why, when we look at the first of the two essential elements of what all regulators seek to do—modify behavior—we can see that regulation must be a verb. No one should be satisfied just with compliance (a noun) if outcomes in the world remain unacceptable. Action is still called for. Indeed, it is with regulators’ second and ultimate objective—namely, improving the world—that it becomes fully apparent that regulation must be conceived in terms of constant action, continuous improvement, and persistent striving. The world, after all, is complex and constantly changing in ways that affect regulatory outcomes.⁸⁰ This is why it is inherent in regulating—and definitely inherent in any effort to regulate well—that regulators must be dynamic, too. Standing still is no pathway to regulatory success.

To keep moving forward in a strategic and effective manner, regulators must be attentive to *five types of changes* that drive their need to be active and agile—that is, their need to treat regulation as a verb. Some of these types of changes have been implicit in what I have already noted, and perhaps few will come as a surprise to most regulators. But it is helpful to lay them out explicitly, essentially creating a checklist for what regulators should be attuned to on a regular basis.

The first are what I call *changes in the world*. Changes in the world bring with them new risks that can call for new regulatory action.⁸¹ Sometimes these changes take the form of technologies that have never existed before. Think of social media and the various harms that have come to light from its use by teens and others and by its role in propagating misinformation.⁸² Or consider a new problem called cyber-

⁷⁹ See generally Mumford, *supra* note 37.

⁸⁰ See, e.g., CRISTIE FORD, *INNOVATION AND THE STATE: FINANCE, REGULATION, AND JUSTICE* (2017).

⁸¹ See, e.g., SHEILA JASANOFF, *THE ETHICS OF INVENTION: TECHNOLOGY AND THE HUMAN FUTURE* (2016); *INNOVATIVE GOVERNANCE MODELS FOR EMERGING TECHNOLOGIES* 1–2 (Gary E. Marchant et al. eds., 2013).

⁸² TIMOTHY J. HEAPHY, *HARBINGERS: WHAT JANUARY 6 AND CHARLOTTESVILLE REVEAL ABOUT RISING THREATS TO AMERICAN DEMOCRACY* (2025); *Just How Harmful Is Social* (continued)

sickness, which is a type of motion sickness that can be brought on by journeying into the metaverse with augmented or virtual reality devices.⁸³ Societies never had to think about these problems in the past because the technologies spawning them simply did not exist.

Regulated professions and industries are constantly changing, with new practices and processes being continuously tried and implemented. Regulators confront what is known as a “pacing problem”⁸⁴—simply trying to keep pace with changes in industry practices and technology. Perhaps nowhere is this challenge more profound today than with artificial intelligence.⁸⁵ Among the countless ways that people are using AI tools based on machine-learning algorithms and large language models, myriad AI applications are changing the work of professionals. Doctors

Media? Our Experts Weigh-In, COLUMBIA MAILMAN SCH. OF PUB. HEALTH (Sept. 27, 2021), <https://www.publichealth.columbia.edu/news/just-how-harmful-social-media-our-expertsweigh> [https://perma.cc/B6EJ-NDAJ].

⁸³ Heeseok Oh & Wookho Son, *Cybersickness and Its Severity Arising from Virtual Reality Content: A Comprehensive Study*, 22 SENSORS 1314 (2022).

⁸⁴ Gary E. Marchant, *The Growing Gap Between Emerging Technologies and the Law*, in THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND LEGAL-ETHICAL OVERSIGHT: THE PACING PROBLEM 19, 20–23 (Gary E. Marchant, Braden R. Allenby & Joseph R. Herkert eds., 2011).

⁸⁵ See generally VIKTOR MAYER-SCHÖNBERGER & KENNETH CUKIER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK 12 (2013); Patrick Hodge, *Foreword* to THE CAMBRIDGE HANDBOOK OF THE LAW OF ALGORITHMS, at xix (Woodrow Barfield ed., 2021); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019); Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695 (2019) (reviewing VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018)); Omri Ben-Shahar & Ariel Porat, *How to Evaluate Personalized Law*, U. CHI. L. REV. ONLINE, Mar. 9, 2022, at *7; Cary Coglianese & David Lehr, *Regulating by Robot: Administrative Decision Making in the Machine-Learning Era*, 105 GEO. L.J. 1147 (2017); Cary Coglianese, *Regulating New Tech: Problems, Pathways, and People*, TECHREG CHRONICLE, Dec. 2021, at 2, 3–4; Cary Coglianese, *Regulating Machine Learning: The Challenge of Heterogeneity*, TECHREG CHRONICLE, Feb. 2023, at 2, 3; MICHAEL KEARNS & AARON ROTH, THE ETHICAL ALGORITHM: THE SCIENCE OF SOCIALLY AWARE ALGORITHM DESIGN 1–2 (2019); STUART RUSSELL, HUMAN COMPATIBLE: ARTIFICIAL INTELLIGENCE AND THE PROBLEM OF CONTROL, at xi (2019); GARY MARCUS & ERNEST DAVIS, REBOOTING AI: BUILDING ARTIFICIAL INTELLIGENCE WE CAN TRUST 9–10 (2019).

are using artificial intelligence tools for a range of diagnostic and treatment purposes. Lawyers are starting to use them for summarizing documents, analyzing contracts, and drafting correspondence.

Artificial intelligence is raising profound policy questions, including for the regulation of professions. What will it mean to regulate a traditional profession when important work professionals have performed in the past will increasingly be handled by computers? When computers running AI-based expert systems or agentic models perform professional tasks, are they practicing without a license? Will regulators of professions need to become regulators of AI-based expert systems? These are all questions arising from changes in the world.⁸⁶

Another obvious example of a change in the world comes from the recent global experience with COVID-19.⁸⁷ With COVID-19, the world did not face a new technology but a new, unknown public health threat.⁸⁸ The risks that emerged in the face of the global pandemic necessitated reconsidering existing regulations about in-person health care and other services.⁸⁹ We saw, for example, many jurisdictions providing at least temporary authorization of telemedicine practices that had previously been prohibited.⁹⁰ Regulators needed to adapt—sometimes rapidly—in the face of new conditions in the world.

⁸⁶ Some of these questions in the context of the legal profession are being explored at the University of Pennsylvania as part of our law school's Future of the Professions Initiative. *Future of the Profession Initiative*, UNIV. OF PA. CAREY L. SCH. <https://www.law.upenn.edu/futureprofessioninitiative/> [<https://perma.cc/FRZ4-R8SP>]. See also Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, THE PRACTICE (Mar. 2023), <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generativeai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/> [<https://perma.cc/94UJ-F97X>]; Gary E. Marchant, *Artificial Intelligence and the Future of Legal Practice*, THE SCITECH LAWYER, Summer 2017, at 20, 20–23; Mark A. Cohen, *How Transformative Will Generative AI and Other Tools Be for the Legal Industry?*, FORBES (Jan. 23, 2023, 7:37 AM) <https://www.forbes.com/sites/markcohen1/2023/01/23/how-transformative-will-generative-ai-and-other-tools-be-for-the-legal-industry/> [<https://perma.cc/8CA8-63TK>].

⁸⁷ Cary Coglianese, *What Regulators Can Learn from Global Health Governance*, 16 GLOB. HEALTH GOVERNANCE 1, 14–15 (2021).

⁸⁸ *Id.* at 14.

⁸⁹ See, e.g., Julia Shaver, *The State of Telehealth Before and After the COVID-19 Pandemic*, 49 PRIMARY CARE: CLINICS OFF. PRAC. 517, 519 (2022).

⁹⁰ *Id.*

Today, the global pandemic may have subsided, but other changes in the world are constantly occurring. Climate change, for example, is continuing to pose new risks.⁹¹ The ancient Greek thinker Heraclitus wrote that we can never step into the same river twice.⁹² Today, with increasing frequency and severity, rivers are literally overflowing and inundating adjacent communities with floodwaters, and we are witnessing similarly large losses from other climate-related events, such as storms, wildfires, and extreme heat.

If changes in the world itself were not enough, a second set of changes that affect the work of regulators are *changes in goals and values*. These are, in effect, also changes in the world, only they are not changes that bring about new risks or changing physical conditions.⁹³ Rather, they are changes in the perception of risks and conditions in the world, such as about which aspects of a new technology are valued and which are problematic. What should regulators' goals be? How should they make tradeoffs between different goals and values? Society's answers to these questions can change even without any other underlying changes in the world. And when society's values change, that affects what regulators are charged with undertaking.⁹⁴

The conditions of racial inequality in the United States, for instance, had not suddenly changed in 2020 in the wake of George Floyd's murder by police officers in Minnesota.⁹⁵ But the tremendous outpouring of

⁹¹ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 15 (Core Writing Team et al. eds., 2023).

⁹² *Heraclitus*, STANFORD ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/heraclitus> [<https://perma.cc/ZT6L-9MA3>] (Dec. 8, 2019).

⁹³ Of course, this is also not to deny that what counts as a "risk" is a judgment that can be imbued with value choices. See MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS 1 (1982); SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 207 (1995).

⁹⁴ Cary Coglianese, *Climate Change Necessitates Normative Change*, THE REGUL. REV. (Jan. 27, 2020), <https://www.theregview.org/2020/01/27/coglianese-climate-change-necessitates-normative-change> [<https://perma.cc/RTZ7-TFLG>].

⁹⁵ Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/J5RY-K3HC>]; Tracy Wilkinson, *Massive Protests Fill Washington to Decry Killing of George Floyd*, L.A. TIMES (June 6, 2020, 9:17 AM), <https://www.latimes.com/politics/story>
(continued)

public support for racial justice around the world that followed his murder signaled important changes in values about racial justice—or at least in their salience and priority.⁹⁶

Similar changes in societal norms have arisen with respect to other issues.⁹⁷ Consider issues of workplace discrimination and harassment and their increased salience following the #MeToo movement.⁹⁸ Or consider the rising attention in recent years to issues of dignity and respect for members of the LGBTQIA community or for Indigenous peoples.⁹⁹

Of course, norm changes do not always move smoothly or in one direction. The United States has most recently experienced negative reactions to diversity, equity, and inclusiveness bubble up within some quarters of the U.S. population, with some politicians and media outlets fueling a backlash against policies based on these values. These reactions might not ultimately result in a permanent backsliding in norms, but, for regulators, the general lesson is to see that norms can change. As societal norms change, so, too, can the goals and work of regulators change, even without any other changes in the world.

/2020-06-06/george-floyd-washington-dc-protest [https://perma.cc/5MW7-HWZQ]; Jon Emont & Philip Wen, *How Protests Over George Floyd's Killing Spread Around the World*, WALL ST. J., <https://www.wsj.com/articles/social-media-helps-spur-global-protests-over-george-floyds-death-1159188085> [https://perma.cc/9GXS-SAAV] (June 11, 2020, 10:02 AM).

⁹⁶ Cf. NAT'L ACAD. PUB. ADMIN., *supra* note 14, at 7 (noting “[i]ncreased recognition of the importance of diversity, equity, inclusion, and accessibility at all levels of society”).

⁹⁷ *Id.*

⁹⁸ Jamillah Bowman Williams et al., *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, 2019 U. CHI. LEGAL F. 371, 377 (2019); Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RSCH. CTR. (Oct. 11, 2018), <https://www.pewresearch.org/short-reads/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [https://perma.cc/HW4U-PQRE].

⁹⁹ Adam Nagourney & Jeremy W. Peters, *A Half-Century On, an Unexpected Milestone for L.G.B.T.Q. Rights*, N.Y. TIMES, <https://www.nytimes.com/2020/06/15/us/politics/supreme-court-lgbtq-rights.html> [https://perma.cc/6VKD-6PJR] (Feb. 25, 2021); Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexuality Persists*, PEW RSCH. CTR. (June 25, 2020), <https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/> [https://perma.cc/Y6RN-LHCA]; José Francisco Calí Tzay (Special Rapporteur on the Rights of Indigenous Peoples), *Protected Areas and Indigenous Peoples' Rights: The Obligations of States and International Organizations*, ¶ 58, U.N. Doc. A/77/238 (July 19, 2022).

A third set of changes can also arise without any changes to the world itself. These are *changes in knowledge*. As scientists and other experts learn more about the world—how it operates, what risks it contains—then the work of regulators can change as well.

Human knowledge about the effects of climate change and other environmental harms has increased dramatically over the last half century, which has led to calls for corresponding changes in regulatory standards.¹⁰⁰ In the United States, several major environmental laws require the U.S. Environmental Protection Agency to reconsider evidence of harms from pollutants on a periodic basis and then to update regulatory standards in the face of expanding understanding of the risks of these pollutants.¹⁰¹ When it comes to climate change, experts conclude that both domestic and international regulatory responses are still too slow—but, nevertheless, the establishment of regular international climate change meetings and periodic updating of scientific reports by the Intergovernmental Panel on Climate Change are examples of institutionalized practices aimed at tapping into expanding knowledge.¹⁰²

Even outside of global climate change, most regulatory domains experience changes in knowledge that necessitate active responses. An important additional facet of changed knowledge should always be knowledge of how well existing regulations and regulatory strategies are working.¹⁰³ When regulators learn that what they are doing is not working, they need to try to do better. Active learning is key to treating regulation as a verb.¹⁰⁴

This leads to a fourth and very significant type of change: *changes in behavior*. When regulation is needed, it is because existing incentives for industry and professional behavior are not aligned with social

¹⁰⁰ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/> [<https://perma.cc/2AX6-4CTE>].

¹⁰¹ Clean Air Act §§ 108–09, 812, 42 U.S.C. §§ 7408–09, 7612; Clean Water Act §§ 117–18, 33 U.S.C. §§ 1267–68.

¹⁰² INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 100.

¹⁰³ Cary Coglianese, *Evaluating Regulatory Performance*, 8 J.L. & PUB. AFF. 47 (2023); Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. REGUL. ONLINE 57, 61 (2013); Lori Snyder Benneer & Cary Coglianese, *Evaluating Environmental Policies*, 47 ENVIRONMENT 22, 23 (2005).

¹⁰⁴ CARY COGLIANESE, LISTENING, LEARNING, AND LEADING: A FRAMEWORK FOR REGULATORY EXCELLENCE, at xi (2015).

objectives.¹⁰⁵ Regulation presents regulated individuals and businesses with new incentives that aim to alter behavior.¹⁰⁶ But rarely does regulation change those regulated entities' preexisting interests.¹⁰⁷ As a result, it is predictable that regulated entities—even those that follow the rules—will nevertheless try still to achieve their preexisting goals. The interests that the regulated entities had before the creation of a regulatory program have not disappeared. As a result, regulated individuals and entities may very well come into compliance but do so in ways that still create the same problems that regulators sought to solve—or they might do so by creating new problems altogether.¹⁰⁸ When it comes to professional licensing, for example, the mere fact that professionals have met specified qualifications for training and passed an entrance exam does not mean that they will all act responsibly and knowledgably in practice.¹⁰⁹ Although many professionals will take requirements for continuing education seriously, for example, others—due to lack of time, commitment, or other reasons—view requirements for ongoing training as a nuisance to be endured rather than an opportunity to keep improving the delivery of professional services.¹¹⁰ This

¹⁰⁵ CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 11 (1990); BREYER, *supra* note 46, at 15; EDWARD L. RUBIN, *MAKING REGULATION WORK: POLICIES, TECHNIQUES AND THE ABOLITION OF PROPERTY RESTRICTIONS* 15 n.61 (2021); THOMAS A. LAMBERT, *HOW TO REGULATE: A GUIDE OF POLICYMAKERS* 8 (2017).

¹⁰⁶ COGLIANESE, *supra* note 104, at 15.

¹⁰⁷ *Id.* at 48–49.

¹⁰⁸ See generally Coglianese, *The Limits of Performance-Based Regulation*, *supra* note 39.

¹⁰⁹ See, e.g., Christine Hauser & Maggie Astor, *The Larry Nassar Case: What Happened and How the Fallout Is Spreading*, N.Y. TIMES, <https://www.nytimes.com/2018/01/25/sports/larry-nassar-gymnastics-abuse.html> [<https://perma.cc/9JCE-DKHM>] (Jan. 25, 2018).

¹¹⁰ See, e.g., Inst. of Med. Comm. on Planning a Cont'g Health Prof'l Educ. Inst., *REDESIGNING CONTINUING EDUCATION IN THE HEALTH PROFESSIONS* 3 (2010) (“Health professionals and their employers tend to focus on meeting regulatory requirements rather than identifying personal knowledge gaps and finding programs to address them.”); *id.* at 79 (noting “[h]ealth professionals who view CE merely as a mechanism for meeting regulatory requirements” and thereby pass up “the opportunity to attain goals of continued learning for improved practice”); Odette Griscti & John Jacono, *Effectiveness of Continuing Education Programmes in Nursing: Literature Review*, 55 J. ADVANCED NURSING 449, 452 (2006) (citing research indicating that “while the majority of people in a professional group are interested in advancing their education, as in any other profession, there are a number of ‘laggards’ who do not show any interest at all.”).

is sometimes called “pencil-whipping” behavior, as regulated entities go through the motions of complying without really taking mandated responsibilities very seriously.¹¹¹

The prospect for unanticipated behaviors, with unanticipated and undesirable outcomes, is especially acute when regulators adopt so-called flexible forms of regulation, such as principles-based regulation, performance-based regulation, or management-based regulation.¹¹² Remember the performance-based building code standards in New Zealand. Builders met those standards, but did so by substituting new, cheaper techniques that met the performance standard for structural integrity but left much to be desired in terms of moisture resistance.¹¹³ The builders’ interests in keeping building costs low to remain competitive had not changed. Builders just found new ways of building that met the letter of the law but not its spirit. Regulators in New Zealand did eventually gain knowledge of builders’ behavior—but only after too much time had elapsed and after massive amounts of building stock had been constructed in ways that led to devastating accretions of mold and mildew.¹¹⁴

To regulate well—and to treat regulation as a verb—regulators must be attentive to how those being regulated are behaving. Regulation taken as a noun too often can lull regulators into thinking that a problem has been solved just because a rule has been put in place.¹¹⁵ Since a regulator’s fundamental task is to change outcomes by altering behavior, regulators must be vigilant about whether behavior is changing as intended.¹¹⁶

¹¹¹ NAT’L ACADS. OF SCI., ENG’G, & MED., DESIGNING SAFETY REGULATIONS FOR HIGH-HAZARD INDUSTRIES, 111 (2018).

¹¹² Coglianese, *The Limits of Performance-Based Regulation*, *supra* note 41, at 531–38; Cary Coglianese & Jennifer Nash, *The Law of the Test: Performance-Based Regulation and Diesel Emissions Control*, 34 YALE J. ON REGUL. 33, 37 (2017).

¹¹³ May, *supra* note 37, at 393; Mumford, *supra* note 37, at 15; Gill, *supra* note 37.

¹¹⁴ Mumford, *supra* note 37, at 194.

¹¹⁵ See, e.g., Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. REV. 2295, 2308 (2020) (arguing that the financial crisis was aided by regulators who did not “coordinate their regulation or supervision”).

¹¹⁶ Coglianese & Nash, *Compliance Management Systems*, *supra* note 68, at 576–77 (discussing the importance of monitoring regulation to ensure it is leading to the intended outcomes). See also Cary Coglianese, *Regulatory Vigilance in a Changing World*, THE REGUL. REV. (Feb. 25, 2019), <https://www.theregreview.org/2019/02/25/coglianese-innovation->
(continued)

Finally, the fifth type of change that drives the need for active regulating relates to *tools and tactics*. Just as technologies and other innovations change what regulated entities do (which in turn can create demands for new or different regulatory efforts), new technologies and innovative tools are continuously becoming available for use by regulators themselves.¹¹⁷ For regulators, sometimes new tools and tactics follow from new knowledge about human behavior.¹¹⁸ For example, advances in behavioral economics research are teaching us about new ways of designing regulatory defaults and using other tools categorized as “nudges.”¹¹⁹ At other times, new tools and tactics involve the use of new technology, whether for reporting and monitoring or for triaging complaints.¹²⁰ Some regulators are starting to use machine-learning algorithms—artificial intelligence—to decide how best to deploy limited resources for inspections or follow-ups.¹²¹

The best regulators are open to new tactics and tools—but not just because they are new. Regulation as a verb does not mean simply chasing the next shiny object that comes along. It means being open to new ideas and new ways of working if doing so will lead to better outcomes. It means always trying to do better.

Ultimately, regulation as a verb means being attentive to the five kinds of changes that affect what regulators do: changes in the *world*, changes in *societal goals and values*, changes in *knowledge*, changes in *behavior*, and changes in *tools and tactics*. These changes make it imperative that regulators think more about *regulating* than about *regulation*.

regulatory-vigilance/ [https://perma.cc/A4H8-G8WH] (reviewing FORD, *supra* note 80).

¹¹⁷ Coglianese & Lehr, *supra* note 85, at 1147–48.

¹¹⁸ *See id.* at 1152, 1154.

¹¹⁹ *See, e.g.*, Shlomo Benartzi et al., *Should Governments Invest More in Nudging?*, 28 PSYCH. SCI. 1041, 1041 (2017); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (2008).

¹²⁰ CYNTHIA GILES, NEXT GENERATION COMPLIANCE: ENVIRONMENTAL REGULATION FOR THE MODERN ERA 9 (2022).

¹²¹ *See e.g.*, DAVID FREEMAN ENGSTROM ET AL., GOVERNMENT BY ALGORITHM: ARTIFICIAL INTELLIGENCE IN FEDERAL ADMINISTRATIVE AGENCIES 9 (2020); Cary Coglianese & Lavi M. Ben Dor, *AI in Adjudication and Administration*, 86 BROOK. L. REV. 791, 814 (2021).

IV. ADOPTING A VERB MINDSET

Some years ago, I led a major study of regulatory excellence, asking both what it means and how to achieve it.¹²² Our team at the Penn Program on Regulation conducted an extensive array of interviews and dialogue sessions involving a broad international assortment of regulators, regulated entities, organized groups, members of the public, and regulatory scholars.¹²³ We surveyed the existing literature, and we reviewed regulators' strategic plans from around the world.¹²⁴ The project generated more than three dozen papers and reports.¹²⁵

This work reinforced the idea that attentiveness, openness to learning, and a desire for continuous improvement are all key ingredients of regulatory excellence. But along the way, we also gathered up a wide variety of nouns and adjectives for how to define what constitutes regulatory excellence.¹²⁶ Of course, having too many qualities or characteristics to aspire toward makes it impossible for any leader to manage an organization well, so to help regulatory leaders we boiled regulatory excellence down to three essential qualities: *the utmost integrity, stellar competence, and empathic engagement*.¹²⁷

Readers who are perceptive grammarians will be thinking: those are all nouns. True. But the best way I found to express the relationship between these three core qualities is through the metaphor of a molecule, what I call the *RegX molecule*. In *RegX*, each quality is conceived as an atom that is tightly connected with the other qualities, which together constitute the molecule as a whole.¹²⁸ Just as atoms are constitutive of a molecule, the utmost integrity, stellar competence, and empathic engagement are ultimately constitutive of regulatory excellence. When these qualities are present and tightly linked in government agencies, regulatory authority can be exercised in a way that promotes a just and well-functioning society.

¹²² See generally COGLIANESE, *supra* note 104.

¹²³ *Id.* at i.

¹²⁴ *Id.* at i–ii.

¹²⁵ *E.g., id.* at ii. These materials can be found online at the Penn Program on Regulation's website at <https://pennreg.org/regulatory-excellence/> [<https://perma.cc/D5VK-2EVW>].

¹²⁶ *Id.*; see also Adam M. Finkel et al., *Planning for Excellence: Insights from an International Review of Regulators' Strategic Plans*, 35 PACE ENV'T L. REV. 240, 241 (2018).

¹²⁷ COGLIANESE, *supra* note 104, at ii.

¹²⁸ *Id.* at 23–24.

Importantly, what we know about molecules—admittedly, nouns—also supports the idea of regulation as a verb. This is because, at a submicroscopic level, atoms and molecules are in constant motion.¹²⁹ Remarkably, even what seems solid and stable in our world is actually based on motion.

In concluding the final report from our *RegX* project, I noted that regulatory excellence

requires constantly learning on the job. . . . [T]he excellent regulator cannot stay in one place, content to have mastered the past or the present. The world changes, its problems change, its science and technologies change, its economic conditions change, and ultimately its social fabric can change too. In such a world, regulatory excellence demands forward momentum, not static achievement.¹³⁰

Regulatory excellence requires, in other words, treating regulation as a verb.

V. CONCLUSION

Bringing together insights from our research project on regulatory excellence, it is possible to conclude by offering regulators three steps they can take to assume a “regulation-as-a-verb” mindset. First, identify the ultimate outcomes you are aiming for. Ask yourself: Who are you regulating for? An active regulator should not be moving just for moving’s sake, but for the sake of an ultimate objective. Keep in mind a lodestar so you can direct your active, agile motion in a way that creates positive public value.¹³¹

Second, constantly scan, measure, monitor, and question.¹³² Be sure to engage with others who have different perspectives and new information.¹³³ In short, be attentive to what is changing around you and maintain

¹²⁹ *Atomic Theory*, SCIENCE DIRECT, <https://www.sciencedirect.com/topics/earth-and-planetary-sciences/atomic-theory> [<https://perma.cc/SYS8-QDER>].

¹³⁰ COGLIANESE, *supra* note 104, at 79.

¹³¹ Wendy Wagner, *Regulating by the Stars*, in *ACHIEVING REGULATORY EXCELLENCE* 36, 37 (Cary Coglianese ed., 2017); NAT’L ACAD. PUB. ADMIN., *supra* note 14, at 8 (“An agency . . . needs to have a sense of what it thinks the end state should be and keep in mind how it will be achieved.”).

¹³² *See generally* Cary Coglianese, *Measuring Regulatory Excellence*, in *ACHIEVING REGULATORY EXCELLENCE* 291 (Cary Coglianese ed., 2017).

¹³³ COGLIANESE, *supra* note 104, at 37, 102–03.

vigilance to changes that might be undermining your ultimate outcome of concern.¹³⁴ In the context of regulating professionals, for example, are malpractice suits or other complaints about services rising? Are new problems emerging?

Third and finally, be open to change. Remember, the name of the game is *regulating*, not *regulation*. At times, regulators may have to impose new regulatory obligations, while at other times they may have to lift or change existing ones.¹³⁵ As a result, it helps to think of the regulatory organization's role as, in effect, a meta-manager of the individuals and entities it regulates. Although a meta-manager is not a day-to-day manager, just like any good manager, regulators need to be willing to listen, learn, and adapt as needed to shape the behavior of those they oversee.¹³⁶

So yes, regulations and licenses are nouns. You can count them. You can read them. You can turn their pages. But regulating well—that is, pursuing regulatory excellence—is so much more. It demands that regulators remain active. Regulation is a verb.

¹³⁴ Coglianesi, *Regulatory Vigilance*, *supra* note 116.

¹³⁵ Cary Coglianesi, *Obligation Alleviation During the COVID-19 Crisis*, THE REGUL. REV. (Apr. 20, 2020), www.theregreview.org/2020/04/20/coglianesi-obligation-alleviation-during-covid-19-crisis/ [<https://perma.cc/XK2R-L2KJ>].

¹³⁶ *Cf.* THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES 238–39 (Harper Bus. Essentials 2006) (1982).