Alternatives to Regulation by Michael S. Baram

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BOOK REVIEW


Reviewed by Sheldon Krimsky*

A leading target of reform for the Reagan administration is the role of the federal government in regulating industry. According to the conservative view, the federal role in protecting society from the adverse effects of a free market may start with good intentions, but eventually the programs became self-serving and place industry in a maze of irrational constraints. Remove the yoke of regulatory bureaucracy and there will be a more competitive climate for business, greater inducement for domestic investment, a rise in productivity, and a reduction in the high costs of senseless litigation. All in all, the argument continues, the consumer benefits by the elimination of the inefficiencies of production and a reduction in the size and complexity of government.

But what about the health and environmental consequences of technology? How should society protect itself from the short-sighted actions of an anarchy of private interests? Despite its title, Alternatives to Regulation is not a treatise on the elimination of regulation. It examines a variety of policy instruments that have been used in lieu of or as a complement to federal intervention. The alternatives are in the form of indirect controls. These include the application of common law in cases where negligence or liability can be

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demonstrated, insurance mechanisms, and the power of government to influence the adoption of voluntary industrial standards.

Two important features stand out in this work. First, it effectively dispels the myth that regulation is synonymous with federal rules and bureaucracies. Second, it is not a crass ideological defense of less government. There are areas where additional federal intervention is supported. Baram establishes his goal in the introduction: "This is not an attempt to undermine the need for health, safety, or environmental regulation by government. Indeed the government's continuing responsibility to deal with such risks is assumed." In this work, the author hopes to reopen the debate over regulatory policy from a nonsectarian standpoint where consideration is given to what works. Toward this end, Baram and his staff of legal researchers have compiled an inventory of examples where public health and safety are promoted without complex and burdensome governmental rules.

The book reads like a series of legal briefs with summaries of court actions and analyses of federal regulatory law. Half of it is devoted to three chapters covering common law alternatives; private, voluntary self-regulation; and insurance. Another chapter examines the use of the government's procurement power to influence industrial standards. Three case studies treat high voltage transmission lines, automotive design defects, and the disposal of hazardous wastes. The cases provide a summary of the risks of each activity, the prevailing laws and regulations, and analyze the rationale and prospects for alternatives to direct federal controls.

The central argument in the book is embodied in the term regulatory flexibility, according to which more options must be available to federal regulators and policymakers. The agencies of government should operate with a full menu of alternatives to direct federal controls which Baram contends "could result in fewer economic dislocations, less federal intrusion and better risk management." Perhaps because the author takes a narrow legalistic approach to the problems of regulation and exhibits little awareness of the political economy of the U.S. regulatory system, he is oblivious to a fatal flaw in the book’s central thesis. The flexible, more cost efficient, alternatives to direct government intervention suggested by the work for general applicability are reasonable in a non-politicized

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1 M. BARAM, ALTERNATIVES TO REGULATION 7 (1982).
2 Id. at 150.
regulatory bureaucracy — the type of professional civil service characteristic of the British system. Our current regulatory structure, unlike that of Great Britain, responds like a sensitive barometer to political currents irrespective of rationality, public health, or the desires of Congress. Progress was made in slowing down the rapid decay of air and water quality in the 1970's precisely because the laws enacted included specific attainment goals, and a framework for implementation.

Two important effects are likely to occur if we expand the discretion of regulatory agencies to include the use of indirect controls and incentives. First, the courts will be dragged in to resolve policy disputes even more complex and intractable than those of recent years. Regulatory agencies can more easily pass the buck to the insurance industry or professional associations when more alternatives to rulemaking are available. Second, discretion will eventually favor the more stable and powerful economic interests, which are not necessarily compatible with the public welfare.

The fallacy of using strict liability as a nonregulatory model for managing risk is best illustrated by the current problems in the asbestos industry. For over half a century, tens of thousands of asbestos workers in the U.S. were exposed to the dust of this natural fiber while it was being mined, processed and applied. Years after their exposure, some workers contracted severe respiratory diseases or lung cancer. Over ten thousand suits have been filed charging that companies were negligent in protecting workers from asbestos-related diseases. Recently, the largest of these companies, the Manville Corporation, filed for bankruptcy to avoid paying costly lawsuits. Because of the long latency period between exposure and the onset of asbestos-related disease, the litigation and high insurance costs came too late to have any influence on establishing better working conditions in the industry. Furthermore, events in the asbestos industry seem to have little bearing on the safety conditions in the chemical industry as a whole. In the best of all circumstances, where the etiology of occupational disease can be determined, where those harmed have resources to initiate litigation, where the latency period between exposure to agents and symptoms of disease is short, companies can decide it is in their interest to pay high insurance premiums and settle litigation rather than improve the standards of an industry. That may be rational from the standpoint of business efficiency but it treats the health of workers as a neutral entry in the balance sheets. The asbestos story makes a very clear argument that the industry, the government and the workers would have all
benefited over the long run from strict federal regulations on the exposure to asbestos before all the epidemiological data were in.

Although I find the book's central thesis calling for regulatory flexibility unconvincing when applied to health and safety issues, the case studies and inventory of alternatives provide useful lessons to policy makers on the successes and failures of direct governmental intervention. In this respect the book is a valuable addition to the new generation of regulatory literature.