Two Chapters in the GIGO Mess Epic

Author : Steve Gold

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- Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 **J. Legal Stud.** 419 (2018).
- Richard L. Revesz, *Regulation and Distribution*, 93 **N.Y.U. L. Rev.** 1489 (2018).

There are two problems with cost-benefit models for environmental policymaking: the model inputs and the model outputs. This is not exactly news. Researchers and reporters have documented honest overestimates of regulatory costs, honest undercounts of regulatory benefits, and dishonest attempts to cook the cost-benefit books.[1] The authors of the articles reviewed here avoid such easy targets. Instead, they strike at the heart of the welfarist policymaking preference that promotes and privileges cost-benefit analysis.

Richard Revesz challenges the orthodoxy that distributional effects should not motivate regulatory choices*.* Bernard Harcourt assails the myth that cost-benefit analysis offers an objective motivation for regulatory choices.

Revesz has long argued that proponents of environmental regulation must learn to love, or at least to live with, cost-benefit analysis. He readily concedes that "all other things being equal," regulations should be designed to maximize net benefits, that is, to be economically efficient. (Revesz, P. 1490.) But in *Regulation and Distribution*, Revesz reminds us that inequity prevents all other things from being equal—and that profoundly unequal distributive effects demand corrective action.

Regulation and Distribution does not bother with the simplistic claim that inequity can be ignored because welfare maximization trumps all other social goals. Instead, Revesz grapples with the more nuanced argument of Louis Kaplow and Steven Shavell: that redress for distributional effects of regulatory action should occur only through the tax code rather than through regulatory decisions themselves.[2]

Revesz replies that using the tax code, however attractive in theory, is impossible in practice. Redistribution through provisions of tax law requires legislative action, but such legislation seems exceedingly unlikely in today's extended period of hyper-partisan legislative gridlock.

Even if redistributive legislation were possible, a system of taxation and money transfers is ill-suited to address many types of environmental injustice. In one of the most persuasive parts of *Regulation and Distribution*, Revesz analyzes the deficiencies of using a tax-and-transfer approach to respond to the unequal distribution of exposure to toxic pollutants. With higher exposures come a people who confront a greater risk of becoming sick, more eventual cases of disease, and more premature deaths. Revesz shows that any attempt to respond to this inequity through the income tax system will inevitably result in undercompensation. Some aspects of the harm are too difficult to attribute to individual taxpayers. Others are too difficult to quantify and monetize. Therefore, Revesz concludes, regulatory agencies, and not the Internal Revenue Service, should figure out and adopt measures to counter the harmful distributive effects of their regulations.

How should they do this? Revesz's proposed solutions are interesting and thought-provoking, though they also raise questions.

Before presenting his recommendations, Revesz is careful to argue that only "*unusually*large inequities" justify intervention, lest the welfare benefits of cost-benefit analysis be overwhelmed by the routine distributional effects of regulation. (Revesz, P. 1571.) Individual regulatory agencies cannot be trusted to make the call, Revesz seems to imply, so he suggests that the Office of Information and Regulatory Affairs (OIRA) define the trigger in a guidance document. Those who are already skeptical of OIRA's outsized power might question this idea, although Revesz would doubtless answer that OIRA's central role in regulation is simply a fact of life. Unfortunately, *Regulation and Distribution* offers no advice about how large an inequity is unusually large, or even about how to begin to make that decision. This would be a nice follow-up project.

Next, Revesz proposes creation of a standing interagency working group that would craft an appropriate redistributive response to any regulation satisfying OIRA's triggering criterion. Revesz considers two types of possible responses: directly making the rule more equitable, or indirectly mitigating the rule's inequitable effects.

Of the two, Revesz pays much more attention to the indirect mitigation option. Having argued that the tax code cannot be used for this purpose because of legislative gridlock, Revesz advocates executive branch action under existing statutory authorities. Citing efforts by the Obama Administration to help dislocated coal industry workers, he argues that Presidents have a host of options for ameliorating the focused economic harm that sometimes results from regulations that benefit society as a whole. Many of these options involve the targeted award of federal grants or the redeployment of contingency funds such as those set aside for national emergencies. The breadth of the possibilities supports Revesz's proposal for an interagency working group.

Revesz's mitigation goal is laudable. As he acknowledges, however, achieving it would require concerted action centrally controlled from the White House. Revesz argues that Presidential administration is, like OIRA, a fact of life; it may as well be deployed in support of beneficial environmental regulation. On the other hand, if a President may use emergency funds to help coal miners weather the effect of greenhouse gas emission limitations, what is to stop a President from using emergency funds to build a border wall? At this moment in history, the scope of Presidential authority inherent in Revesz's proposal is arresting.

Mitigation approaches, notwithstanding the Presidential power they invoke, still amount to money transfers. Effectively, they use tax revenues (or federal borrowing) to achieve distributive goals, without requiring amendment of the tax code. Therefore, Revesz notes, these approaches are not the best way to address non-monetary harms, such as the environmental injustice of disproportionate exposures to toxic pollutants. To address inequitable non-monetary consequences of proposed rules, Revesz recommends that the interagency working group should consider directly changing the rule.

Regulation and Distribution discusses this option only briefly, leaving some interesting questions unaddressed. For example, could an agency ever justifiably reject a rule that maximizes net benefits in favor of a rule that is less efficient but more equitable? Might we be willing to accept a slightly smaller pie in exchange for keeping more people alive and healthy enough to enjoy partaking? Revesz very nearly implies an affirmative answer, but never quite says so. The follow-up question, "under what circumstances should an agency do this," would surely lead to a very interesting conversation.

Bernard Harcourt, it seems, would eagerly join such a conversation. For if *Regulation and Distribution* challenges one pillar of cost-benefit orthodoxy without quite trying to bring down the whole edifice, Harcourt's *The Systems Fallacy* has no such compunctions.

The Systems Fallacy argues persuasively that the claim that cost-benefit analysis provides policymakers with neutral, scientific, or objective guidance, is false. Harcourt contends that any cost-benefit analysis necessarily embodies normative political values and then, by guiding policymaking, in turn reshapes normative political values.

Harcourt traces the origins of cost-benefit analysis not to welfare economics but to military operations research and systems analysis. Systems analysis approaches worked well enough, he says, for military or engineering problems addressing the performance of tangible objects. But social policy problems do not define themselves. Before even confronting the problem of determining the values and functions to use in a policy analysis, Harcourt explains, an analyst must make a series of decisions about the scope of the analysis.

Harcourt identifies and illustrates five critical choice-of-scope decisions: conceptualizing the metaphorical social system to be analyzed, defining the system's boundaries, determining the system's objectives, selecting policy alternatives to be analyzed within the system, and choosing criteria to evaluate system performance under the various policy alternatives. With hypotheticals and real-world examples, Harcourt shows that each of these decisions "entail[s] normative choices about political values." (Harcourt, P. 421.)

Although Harcourt concedes that systems analysis and cost-benefit analysis are not identical, it is easy to see – and Harcourt demonstrates—that cost-benefit analysis requires the same set of value-laden choice-of-scope decisions. Moreover, he contends, once those decisions produce a policy outcome, a feedback loop engages: cost-benefit analysis determines policies; the policies dictate allocations of social resources; the allocations of social resources affect people's lived reality, altering the society's balance of political values. This is what Harcourt finds most offensive about allowing cost-benefit analysis to set social policy: a supposedly objective analytical tool, often entrusted to technocrats, "silently impose[s] political values on society." (Harcourt, P. 422.)

Harcourt acknowledges that smart welfare economists, again exemplified by Kaplow and Shavell, among others, have a response. If welfare is defined broadly enough to include people's desires to implement political values such as fairness, then cost-benefit analysis can maximize welfare while including society's political preferences, rather than privileging only some political values through choice-of-scope decisions. But Harcourt responds, devastatingly, that this catholic vision of welfare and welfare maximization exists only in theory. A real cost-benefit analysis inevitably addresses a particular, selected social problem. Therefore, a real cost-benefit analysis inevitably makes the normative choice-of-scope calls Harcourt describes. And, Harcourt notes, maximizing net benefits within the arbitrarily-defined metaphorical system being analyzed may not actually maximize overall social welfare, broadly defined to include political values.

The Systems Fallacy is not an article about environmental law. Harcourt's arguments are general; his illustrations concern policies aimed at crime reduction. But any environmental lawyer will recognize at once that Harcourt's argument applies strongly to environmental policy. Pollution control regulations, which so often promise benefits that are broadly dispersed and hard to quantify in exchange for costs that are concentrated and monetary, seem to face particularly stringent cost-benefit scrutiny from all three branches of government. And the problem Harcourt identifies goes beyond pollution regulation to pervade all environmental policy. The choice-of-scope decisions Harcourt describes, for example, are awfully familiar to anyone who has ever been involved with an environmental impact statement under the National Environmental Policy Act.

If there is a weak spot in *The Systems Fallacy*, it is the discussion of what to do about the problem the article identifies. Harcourt quite properly insists that he is not opposed to analytical rigor or to quantifying what can be quantified. But, he asserts, policy analysis should be limited to a single dimension, thereby evading the systems fallacy by avoiding the normative choices embedded in the construction of metaphorical systems to analyze. That solution seems unconvincing and unrealistic. Choosing the dimension for analysis would also be fraught with political value judgments, and the functional relationships between variables usually would turn a unidimensional metric into a multidimensional system.

Alternatively, Harcourt argues, the solution is to politicize cost-benefit analysis and policymaking, wresting back normative power from the technocrats. It is hard to argue with Harcourt's objective; assuring political accountability for inherently political judgments is a good idea. But at this moment in history, when alternative facts are spun to serve political agendas, overbearing technocrats may not be society's biggest problem.

Late in 2018, law professor and former OIRA administrator Cass Sunstein, in a keynote address at a conference of Revesz's Institute for Policy Integrity, said: "We often think that the issues that divide us are issues of values. But the fundamental divisions involve issues of fact, not values."[3] No doubt that is true, sometimes. Not always, though. Sometimes, different people really do hold different values. Sometimes, even agreed-upon facts produce different policy positions in different people. Sometimes, different values even drive different perceptions of facts.

In distinct ways, both *Regulation and Distribution* and *The Systems Fallacy* teach us to be vigilant for those possibilities. Richard Revesz and Bernard Harcourt offer new reasons to be skeptical of cost-benefit policy prescriptions. They show us that cost-benefit analysis has limits that cannot be overcome by attacking the "garbage in" problem, by collecting more data, by refining functional models. Their work should inspire us to think outside the cost-benefit box. If we pay heed, we may be able to use cost-benefit analysis more wisely and to avoid the problem of policy "garbage out."

1. *See*, *e.g.*, Lisa Friedman, *E.P.A.'s Reckoning Is a Rosier View of Air Pollution*, **N.Y. Times**, May 21, 2019, at A1.
2. Louis Kaplow & Steven Shavell, **Fairness versus Welfare** (2002).
3. News Release, N.Y.U. Inst. for Pol'y Integrity, *The Institute for Policy Integrity Brings Economic Sense to Regulatory Debates* (Nov. 30, 2018).

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