

# FASKEN LECTURE

## THE ESSENCE OF RESPONSIVE REGULATION

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Regulation that is responsive to the moves regulated actors make, to industry context and to the environment seems a complex task. The argument of this essay is that it is complex in the sense that being a parent regulating children is complex. Yet unsophisticated people can be successful parents by contemplating some simple heuristics of family regulation. This essay seeks to reduce the complexities of responsiveness to nine heuristics that state regulators, businesses, and NGOs can apply in seeking to regulate one another. The ideas of pyramids of supports and of sanctions are at the heart of this project. Partnership with those one intends to regulate is possible in the process of designing regulatory pyramids. The paradox of responsive regulation is that by having a capability to escalate to tough enforcement, most regulation can be about collaborative capacity building. Most of the action can fall within a strengths-based pyramid, a pyramid of supports for business compliance and continuous improvement. Finally, the essay considers how we can know that responsive regulation has worked.

Responsive regulatory theory has been a cumulative creation. Theories that are developmentally responsive to evidence and dialogue among scholarly and practice communities seem preferable to static theories. Responsive regulation started out as a theory of business regulation and has now been

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applied to crime, peacebuilding, and a wide range of other private and public governance applications.

People new to the theory may struggle to discern its essence through the accumulation of debate, and a thicket of creative implementation and refinement. It seems timely to provide a clarification of the core of the theory. To that end, this essay attempts a simple reformulation of the theory as nine principles of responsive regulation:

1. Think in context; don't impose a preconceived theory.
2. Listen actively; structure dialogue that:
  - gives voice to stakeholders;
  - settles agreed outcomes and how to monitor them;
  - builds commitment by helping actors find their own motivation to improve;
  - communicates firm resolve to stick with a problem until it is fixed.
3. Engage those who resist with fairness; show them respect by construing their resistance as an opportunity to learn how to improve regulatory design.
4. Praise those who show commitment:
  - support their innovation;
  - nurture motivation to continuously improve;
  - help leaders pull laggards up through new ceilings of excellence.
5. Signal that you prefer to achieve outcomes by support and education to build capacity.
6. Signal, but do not threaten, a range of sanctions to which you can escalate; signal that the ultimate sanctions are formidable and are used when necessary, though only as a last resort.
7. Network pyramidal governance by engaging wider networks of partners as you move up a pyramid.
8. Elicit active responsibility (responsibility for making outcomes better in the future), resorting to passive responsibility (holding actors responsible for past actions) when active responsibility fails.
9. Learn; evaluate how well and at what cost outcomes have been achieved; communicate lessons learned.

## I. A COLLECTIVE CREATION: THE BEGINNINGS OF RESPONSIVE REGULATORY THEORY

The most important moment in the development of responsive regulatory theory was the publication of a book I co-authored with Ian Ayres.<sup>1</sup> For both Ian and me, that book was just one moment along a journey to develop the ideas it encapsulated. Ian's key influences were Paul Joskow and his dissertation advisors, and Richard Schmalensee, whose work and teaching impressed him on the twin dangers of public capture and private collusion/opportunism. He came of age during the moment when game theory was swallowing all of microeconomics.<sup>2</sup> So it was natural for him to try to embed responsive ideas in a game-theoretic apparatus.

My work on responsive regulation started with the influence of many master practitioners of escalated enforcement of the late 1970s and early 1980s in the pharmaceutical industry (such as Bud Loftus), but especially practitioners of coal mine safety enforcement such as Ron Schell of the (then) Mine Safety and Health Administration. The ideas of these practitioners led to early published engagements with the ideas that became responsive regulation.<sup>3</sup> Colleagues in the consumer movement in the 1980s were a great influence, particularly Allan Asher, Robin Brown, Russel Mokhiber, Yong Sook Kwok, Ralph Nader, Louise Sylvan, and John Wood. Colleagues with whom I served as a part-time Commissioner at the Trade Practices Commission (now the Australian Competition and Consumer Commission) between 1985 and 1995 were also important, including Allan Asher (again), Bill Dee, Allan Fels, and Delia Rickard. My work on Australian business regulation with Peter Grabosky<sup>4</sup> developed the idea of the benign

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<sup>1</sup> Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992).

<sup>2</sup> Ian Ayres, "Playing Games with the Law" (1990) 42:5 Stan L Rev 1291.

<sup>3</sup> John Braithwaite, "Enforced Self-Regulation: A New Strategy for Corporate Crime Control" (1982) 80 Mich L Rev 1466; John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University of New York Press, 1985) [Braithwaite, *To Punish or Persuade*].

<sup>4</sup> See Peter Grabosky & John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne: Oxford University Press, 1986).

big gun. Then, in the late 1980s, there were many master practitioners of regulation and self-regulation in the nursing home industry who had a huge influence, such as Martin Derkeley. The biggest step forward was the book with Ian Ayres,<sup>5</sup> which reconciled the ideas with economic theories of regulation and added major insights that Ian had been developing separately in the years before we met in 1987, particularly on game theory as discussed above. Other co-authors, mostly affiliated in one way or another with the Regulatory Institutions Network (RegNet) group at the Australian National University, had important effects on refining the ideas.<sup>6</sup>

Though Ian and I had written three-quarters of *Responsive Regulation* before Ian came up with that label for it, this choice forced us to begin to contemplate the body of work on responsive law developed by Philip Selznick and his collaborators.<sup>7</sup> In subsequent years that became a rewarding engagement, further enriched by conversations with our colleague Martin Krygier.

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<sup>5</sup> Ayres & Braithwaite, *supra* note 1.

<sup>6</sup> These included Eliza Ahmed, Valerie Braithwaite (especially Valerie, I should say), Hilary Charlesworth, Peter Drahos, Graham Dukes, Brent Fisse, Gil Geis, Diane Gibson, Nathan Harris, Judith Healy, Janet Hope, Anne Jenkins, Niki Lacey, David Levi-Faur, Toni Makkai, James Maloney, Joseph Murphy, Dianne Nicol, Christine Parker, Debra Rickwood, Declan Roche, Clifford Shearing, Lawrence Sherman, and Heather Strang. Philip Pettit was the most important non-RegNet influence at ANU, as we contemplated a civic republican framework of designing regulation to maximize freedom as non-domination. Other RegNet colleagues or Visiting Fellows who had especially significant effects in developing the ideas through strategic conversations, even though they were not co-authors, were Steve Bottomley, Geoffrey Brennan, Scott Burris, Bruce Carruthers, Hugh Collins, Sasha Courville, Michael Dowdle, Wendy Espeland, Lars Feld, Jo Ford, Bruno Frey, Tony Freyer, Neil Gunningham, Fiona Haines, Terry Halliday, Carol Heimer, Kersty Hobson, Christopher Hood, Anna Hutchens, Jenny Job, Susanne Karstedt, Doreen McBarnet, Kylie McKenna, Imelda Maher, Errol Meidinger, Brenda Morrison, Kristina Murphy, Vibeke Neilsen, Sol Picciotto, Michael Power, Greg Rawlings, Joseph Rees, Colin Scott, Neal Shover, David Soskice, Malcolm Sparrow, Art Stinchcombe, John Scholz, Veronica Taylor, Tom Tyler, Viv Waller, Helen Watchirs, Michael Wenzel, Jen Wood, and John Wright. Most importantly, there were dozens of PhD students whose work influenced my own thinking as I helped them struggle with their own data.

<sup>7</sup> That subsequent engagement was particularly rich with Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992).

There are many further influences beyond these.<sup>8</sup> So it becomes clear what a collective creation responsive regulation has been. I apologize to others I should have thought to mention, especially the vast number of practitioners and scholars who influenced my restorative justice work, which in turn shaped responsive regulation thinking. As all of these contributors have refined the ideas, I do think they have developed, even as some of these folk would hardly endorse the amalgam to which their thinking contributed so much. Most of all, Ian Ayres and I are grateful to the wonderful range of insights in a growing body of critical literature on responsive regulation.<sup>9</sup>

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<sup>8</sup> Some were really notable—when I think of the writing of Rob Baldwin, Julia Black, Cary Coglianese, Keith Hawkins, and Bob Kagan, for example, and all the people who had a huge influence on Ian rather than me.

<sup>9</sup> See Julia Black, *Rules and Regulators* (Oxford: Oxford University Press, 1997); Fiona Haines, *Corporate Regulation: Beyond "Punish or Persuade"* (Oxford: Clarendon Press, 1997); Fiona Haines, *Globalization and Regulatory Character: Regulatory Reform After the Kader Toy Factory Fire* (Aldershot: Ashgate, 2005); Frank Pearce & Steve Tombs, "Hazard, Law and Class: Contextualizing the Regulation of Corporate Crime" (1997) 6:1 Soc & Leg Stud 79; Neil Gunningham & Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); Harry Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002); Steve Tombs, "Understanding Regulation?" (2002) 11:1 Soc & Leg Stud 113; Peter Vincent-Jones, "Value and Purpose in Government: Central-Local Relations in Regulatory Perspective" (2002) 29:1 J.L. & Soc'y 27; Colin Scott, "Regulation in the Age of Governance: The Rise of the Post Regulatory State" in Jacint Jordana & David Levi-Faur, eds, *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham: Edward Elgar, 2004) 145; Karen Yeung, *Securing Compliance: A Principled Approach* (Oxford: Hart Publishing, 2004); Barry Barton, "The Theoretical Context of Regulation" in Barry Barton et al, eds, *Regulating Energy and Natural Resources* (Oxford: Oxford University Press, 2006) 11; John W Maxwell & Christopher S Decker, "Voluntary Environmental Investment and Responsive Regulation" (2006) 33:4 Envtl & Resource Econ 425; Vibeke Lehmann Nielsen, "Are Regulators Responsive?" (2006) 28:3 Law & Pol'y 395; Christine Parker, "The 'Compliance Trap': The Moral Message in Responsive Regulatory Enforcement" (2006) 40:3 Law & Soc'y Rev 591; Lars P Feld & Bruno P Frey, "Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation" (2007) 29:1 Law & Pol'y 102; Neil Gunningham, *Mine Safety: Law, Regulation, Policy* (Sydney: Federation Press, 2007); Gregory Rawlings, "Taxes and Transnational Treaties: Responsive Regulation and the Reassertion of Offshore Sovereignty" (2007) 29:1 Law & Pol'y 51; Vivienne

### A. MORE THAN PYRAMIDS

The aspect of responsive regulatory theory that most captures the imagination of practitioners is the idea of the responsive regulatory pyramid. One reason for this is that when one gives an introductory talk on responsive regulation to practitioners, one tends to end by asking them to choose a regulatory challenge they are finding difficult and then inviting them to attempt a quick preliminary design of a pyramid. This gets the practitioners more actively engaged with the pyramidal aspect of the theory than with its other ideas. In the months after such practitioner engagement, dozens of agencies have gone on to refine pyramids as representations of their regulatory policy.<sup>10</sup> The purpose of this paper is to simplify all the principles underpinning the theory—not just those of the pyramid. Nevertheless, we start with explaining the pyramid idea, which does provide a context for the pluralist, dynamic, deliberative quality of the other features of responsiveness.

A private or public regulator concerned to improve the environmental, consumer protection, safety, prudential, or other performance of a societal actor should first look to its strengths, and then seek to expand them. A strengths-based pyramid, represented on the left side of Figure 1, seeks to try one strategy after another that might further build strengths on a foundation achieved at lower levels of the pyramid of supports. The idea is that most environmental, healthcare, or safety problems, for example, get solved by expanding the managerial capacities of regulated actors to solve them for themselves. Strengths expand to absorb weaknesses. Put another way, regulators should not rush to law enforcement solutions to problems before considering a range of approaches that support capacity-building. As some regu-

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Waller, "The Challenge of Institutional Integrity in Responsive Regulation: Field Inspections by the Australian Tax Office" (2007) 29:1 Law & Pol'y 67; Jennifer Wood & Clifford Shearing, *Imagining Security* (Portland: Willan, 2007); Peter Mascini & Eelco Van Wijk, "Responsive Regulation at the Dutch Food and Consumer Product Safety Authority: An Empirical Assessment of Assumptions Underlying the Theory" (2009) 3:1 Regulation & Governance 27; Vibeke Lehmann Nielsen & Christine Parker, "Testing Responsive Regulation in Regulatory Enforcement" (2009) 3:4 Regulation & Governance 376.

<sup>10</sup> For several examples of this, see Charlotte Wood et al, "Applications of Responsive Regulatory Theory in Australia and Overseas" (Occasional Paper 15, Australian National University, Regulatory Institutions Network, June 2010).

lated actors see their strengths expand to levels not previously conceived possible, regulators celebrate their innovation, publicize it, and support its extension with research grants or by other creative means. The idea of the pyramid of supports is not just about pulling the performance of the most innovative actors up through new ceilings; it is also about those players finding better ways of solving problems that make it easier to increase demands upon laggards. This is the great insight of John Mikler's study of the considerable improvements to the fuel economy of cars that have been achieved in recent decades.<sup>11</sup> He found that Japanese regulation has been more effective than European regulation, and much more so than American regulation, in reducing the environmental damage that cars cause. This is in spite of the fact that Japanese environmental enforcement has been legislatively and punitively weak. The key to Japanese success has been encouraging competition in engineering excellence to take fuel economy up through new ceilings. Then, when one of its carmakers breaks through the old ceiling, the state calls the other carmakers in to make it very clear that they are also expected to reach that ceiling, by buying the new technology of the leader if necessary or by inventing their own technologies to beat it. In a world where Japanese carmakers receive various kinds of support from their state, as is the case with carmakers of all nations, they mostly respond to these demands. Responsive regulation is also about what regulators can do when carmakers do not respond.

The first idea, therefore, is to move up a pyramid of supports that allows strengths to expand to solve more and more problems of concern to the regulator; when that fails to solve specific problems sufficiently, the regulator moves to the right of Figure 1 and starts to move up a pyramid of sanctions.

At the base of the pyramid of sanctions is the most restorative, dialogue-based approach we can craft for securing compliance with a just law. Of course, if it is a law of doubtful justice, we can expect the dialogue to be

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<sup>11</sup> John Mikler, *Greening the Car Industry: Varieties of Capitalism and Climate Change* (Cheltenham: Edward Elgar, 2009).

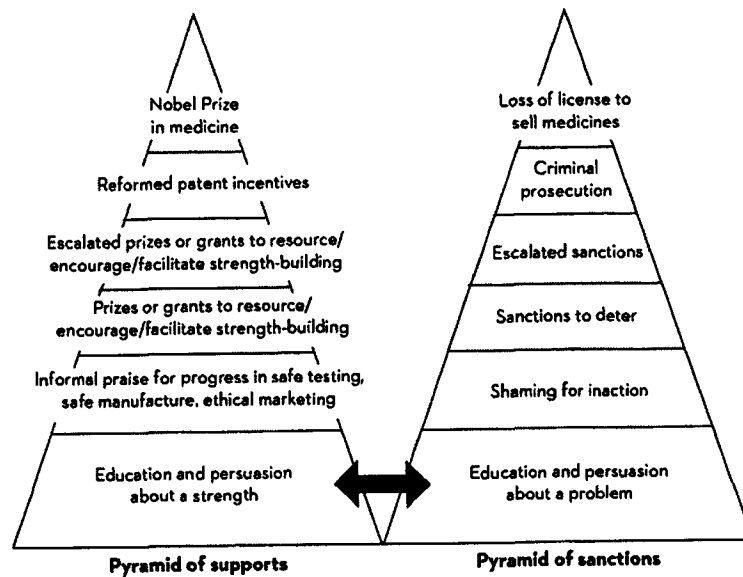
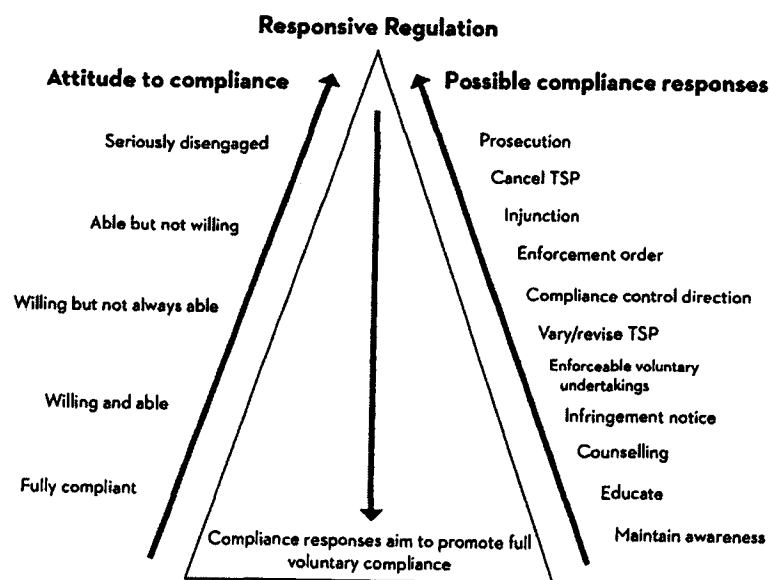


Figure 1: Pyramids of supports and sanctions being developed in John Braithwaite's current work with Graham Dukes and James Maloney on the regulation of medicines.

As we move up the sanctions pyramid, increasingly demanding interventions are involved. The idea of the pyramid is that our presumption should always be to start at the base of the pyramid first. Then escalate to somewhat punitive approaches only reluctantly and only when dialogue fails. Then escalate to even more punitive approaches only when more modest sanctions fail. A regulator might escalate with a recalcitrant company from persuasion to a warning to civil penalties to criminal penalties and ultimately to corporate capital punishment—permanently revoking the company's licence to operate. Figure 2 is a practical example of a pyramid of sanctions in use by the Australian Office of Transport Security.<sup>12</sup>

<sup>12</sup> Office of Transport Security, *Our Regulatory Philosophy* (Canberra: Department of Infrastructure, Transport, Regional Development and Local Government, 2008) at 6, online: <<http://www.infrastructure.gov.au>>.





*Figure 2: Australian Office of Transport Safety Responsive Regulatory Philosophy (TSP: Transport Safety Plan).*

Strategic use of the pyramid requires the regulator to resist categorizing problems into minor matters that should be dealt with at the base of the pyramid, more serious ones that should be in the middle, and the most egregious ones for the peak of the pyramid. Even with the most serious matters—flouting legal obligations for operating a nuclear plant that risks thousands of lives, for example—we stick with the presumption that it is better to start with dialogue at the base of the pyramid. A presumption means that however serious the problem, our normal response is to try dialogue first for dealing with it, to only override the presumption if there are compelling reasons for doing so. Of course there will be such reasons at times—a violent first offender who during a trial vows to pursue the victim again and kill her may have to be locked up.

As we move up the pyramid in response to a failure to elicit reform and repair, we often reach the point where finally reform and repair are forthcoming. At that point, responsive regulation means that escalation up the

pyramid is put into reverse; the regulator de-escalates down the pyramid. The pyramid is firm yet forgiving in its demands for compliance. Reform must be rewarded just as recalcitrant refusal to reform is ultimately punished.

Responsive regulation has been an influential policy idea because it formulated a way of reconciling the clear empirical evidence that sometimes punishment works and sometimes it backfires—and likewise with persuasion.<sup>13</sup> The pyramidal presumption of persuasion gives the cheaper, more respectful option a chance to work first. More costly punitive attempts at control are thus held in reserve for the minority of cases where persuasion fails. When it does fail, the most common reason is that an actor is being a rational calculator about the likely costs of law enforcement compared with the gains from breaking the law. Escalation through progressively more deterrent penalties will often take the rational calculator up to the point where it will become rational to comply.

Quite often, however, business regulators find that they try restorative justice and it fails; then they try escalating up through more and more punitive options and they all fail to deter. This happens for a number of reasons. One is the so-called deterrence trap, where no level of financial deterrent can make compliance economically rational.<sup>14</sup> Another, and perhaps the most

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<sup>13</sup> See Braithwaite, *To Punish or Persuade*, *supra* note 3; Ayres & Braithwaite, *supra* note 1.

<sup>14</sup> See John C Coffee Jr, "No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment" (1981) 79:3 Mich L Rev 386 at 389–93. Precisely when the stakes are highest with a crime, the law enforcer is likely to fall into what Coffee labels the "deterrence trap". Because of the inherent and contrived complexity associated with the biggest abuses of organisational power, probabilities of detection and conviction fall. The deterrence trap is the situation where the only way to make it rational to comply with the law, given the low probability of detection and potential for large financial gain, is to set penalties so high as to jeopardize the economic viability of corporations vital to the economy. Imagine, for example, that the risks of conviction for insider trading are only one in a hundred for a corporate stock market player that can afford quality legal advice. Imagine that the average returns to insider trading are \$1 million. Under a crude expected utility model, it will then be rational for the average insider trader to continue unless the penalty exceeds \$100 million. This would be a large enough penalty to bankrupt many medium-sized companies, leaving innocent workers unemployed, creditors unpaid, and communities deprived of their financial lifeblood. This is what is required to deter the average insider trader under these crude assumptions.

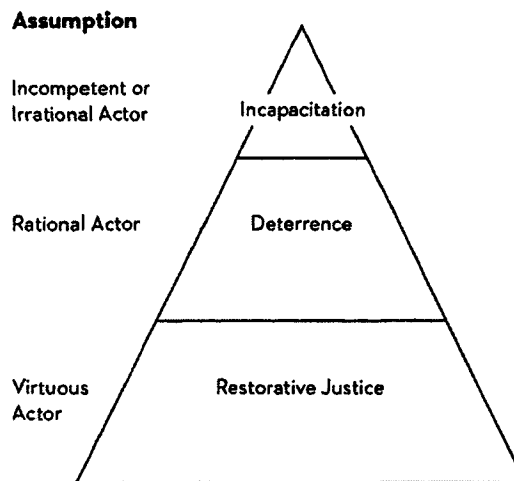
common, reason in business regulation for successive failures of restorative justice and deterrence is that management simply does not have the competence to comply. Non-compliance in this scenario is neither about a lack of goodwill to comply nor about rational calculation to cheat. The managers of a nuclear plant simply do not have the engineering knowhow to take on a level of responsibility this demanding. They must be removed from the job. Indeed, if the entire management system of a company is not up to the task, the company might lose its licence to operate a nuclear power plant. So, when deterrence fails, the idea of the pyramid of sanctions is that incapacitation is the next port of call (see Figure 3).

Restorative justice is an approach where at the base of a pyramid of sanctions, all the stakeholders affected by an injustice have an opportunity to discuss how they have been hurt by it, their needs, and what might be done to repair the harm and prevent recurrence. It is also an approach informed by a set of values that define not only a just legal order, but a caring civil society. These values are for me derived from the foundational republican value of freedom as non-domination,<sup>15</sup> though others who share the same restorative justice values motivate them from different foundations, including spiritual ones.<sup>16</sup> The design of Figure 3 responds to the fact that restorative justice, deterrence, and incapacitation are all limited and flawed theories. The pyramid seeks to cover the weaknesses of one theory with the strengths of another.

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<sup>15</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002) at 12–16 [Braithwaite, *Restorative Justice*].

<sup>16</sup> See e.g. Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990); Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002).



*Figure 3: Toward an integration of restorative, deterrent and incapacitative justice.*

Ordering of strategies in the pyramid is not just about putting less costly, less coercive, more respectful options lower down in order to save money and preserve the republican value of freedom as non-domination. It is also that by only resorting to more dominating, less respectful forms of social control when more dialogic forms have been tried first, coercive control comes to be seen as more legitimate. When regulation is seen as more legitimate and more procedurally fair, compliance with the law is more likely.<sup>17</sup> Astute business regulators often set up this legitimacy explicitly. During a restorative justice dialogue over an offence, the inspector will say there will be no penalty this time, but she hopes the manager understands that if she returns and

<sup>17</sup> See Tom R Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); Tom R Tyler & Steven L Blader, *Cooperation in Groups: Procedural Justice, Social Identity, and Behavioral Engagement* (Philadelphia: Psychology Press, 2000); Tom Tyler & Robyn M Dawes, "Fairness in Groups: Comparing the Self-Interest and Social Identity Perspectives" in Barbara A Mellers & Jonathan Baron, eds, *Psychological Perspectives on Justice: Theory and Applications* (Cambridge: Cambridge University Press, 1993) 87; Tom Tyler & Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russel Sage Foundation, 2002).

finds the company has slipped back out of compliance again, under the rules she will have no choice but to refer it to the prosecutions unit. When the manager agrees that yes, this is understood, a future prosecution will likely be viewed as fair. Under this theory, therefore, privileging restorative justice at the base of the pyramid builds legitimacy and therefore compliance.

There is also a rational-choice account of why the pyramid works. System capacity overload<sup>18</sup> results in a pretence of consistent law enforcement when the reality is that enforcement is spread around thinly and weakly. Unfortunately, this problem will be at its worst where lawbreaking is worst. Hardened offenders learn that the odds of serious punishment are low for any particular infraction. Tools like tax audits that are supposed to be about deterrence frequently backfire by teaching hardened tax cheats just how much they can get away with.<sup>19</sup> The reluctance to escalate under the responsive pyramid model means that enforcement has the virtue of being highly selective in a principled way. Moreover, the display of the pyramid itself channels the rational actor down to the base of the pyramid. Non-compliance comes to be seen (accurately) as a slippery slope. In effect what the pyramid does is solve the system capacity problem by making punishment cheap. The pyramid says “unless you punish yourself for law-breaking through an agreed action plan near the base of the pyramid, we will punish you more severely higher up the pyramid (and we stand ready to go as high as we have to).” So it is cheaper for the rational firm to punish itself (as by agreeing to payouts to victims, community service, or paying for new corporate compliance systems). Once the pyramid succeeds in creating a world where most punishment is self-punishment, there is no longer a crisis of capacity to deliver punishment where it is needed. One of the messages the pyramid gives is that “if you violate it is going to be cheap for us to hurt you (because you are going to help us hurt you).”<sup>20</sup>

Paternoster and Simpson’s research on intentions to commit four types of corporate crime by MBA students reveals the inefficiency of going straight to

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<sup>18</sup> See Henry N Pontell, “Deterrence: Theory Versus Practice” (1978) 16:1 *Criminology* 3.

<sup>19</sup> See Karyl A Kinsey, “Theories and Models of Tax Cheating” (1986) 18 *Criminal Justice Abstracts* 402 at 416.

<sup>20</sup> Ayres & Braithwaite, *supra* note 1 at 44.

a deterrence strategy.<sup>21</sup> Paternoster and Simpson found that where the MBAs held personal moral codes, these were more important than rational calculations of sanction threats in predicting compliance (though the latter were important too). It follows that for the majority of these future business leaders, appeals to business ethics (as by confronting them with the consequences for the victims of a corporate crime) will work better than sanction threats. So it is best to try such ethical appeals first and then escalate to deterrence for that minority for whom deterrence works better than ethical appeals.

According to responsive regulatory theory, what we want is a legal system where citizens learn that responsiveness is the way our legal institutions work. Once they see law as a responsive regulatory system, they know that there will be a chance to argue about unjust laws (as opposed to being forced into a lower court production line or a plea bargain). But they will also see that game-playing to avoid legal obligations, and failure to listen to arguments about the harm their actions are doing and what must be done to repair it, will inexorably lead to regulatory escalation. The forces of law are listening, fair, and therefore legitimate, but also seen as somewhat invincible. The deterrence superiority of the active deterrence of the pyramid, as opposed to the passive deterrence of a fixed scale of penalties that are consistently imposed for different offences, is developed in *Restorative Justice and Responsive Regulation*.<sup>22</sup>

In the punishment versus persuasion debates among regulatory scholars, advocates of consistent punishment argued that cynical businesses abuse offers of cooperation (which they do if cooperation is not backed up by enforcement capability), while advocates of consistent persuasion argued that punishment and persuasion involve incompatible imperatives. Theorists of this second sort believe that threat and coercion undermine goodwill and, therefore, the trust that makes cooperative compliance work. This indeed can also be pointedly true. How can we but corrupt restorative justice values if we seek to coerce them? The first point to make is a factual one. Very few

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<sup>21</sup> Raymond Paternoster & Sally Simpson, "Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime" (1996) 30:3 Law & Soc'y Rev 549.

<sup>22</sup> See Braithwaite, *Restorative Justice*, *supra* note 15 at 73–136.

criminal offenders who participate in restorative justice processes would be sitting in the room absent a certain amount of coercion. Without their detection and/or arrest, without the spectre of the alternative of a criminal trial, they simply would not cooperate with a process that puts their behaviour under public scrutiny. No coercion, no restorative justice (in most cases).

The question seems not one of how to avoid coercion, but how to minimize the escalation of coercion and how to avoid threats. A paradox of the pyramid is that to the extent that we can absolutely guarantee a commitment to escalate if steps are not taken to prevent the recurrence of lawbreaking, then escalation beyond the lower levels of the pyramid will rarely occur. This is the image of invincibility making self-regulation inevitable. Without locked-in commitment to escalation where reform does not occur to fix the problem, the system capacity crisis will rebound. The fundamental resource of responsive regulation is the belief of citizens in the inexorability of escalation if problems are not fixed.

Restorative justice works best with a spectre of punishment, threatening in the background but never threatened in the foreground. Where punishment is thrust into the foreground even by implied threats, other-regarding deliberation is made difficult because the offender is invited to deliberate in a self-regarding way—out of concern to protect the self from punishment. This is not the way to engender empathy with the victim, internalization of the values of the law, and the values of restorative justice. In contrast, contingent threats could at best only change lives in immediately contingent ways. The job of responsive regulators is to treat offenders as worthy of trust, because the evidence is that when they do this, regulation more often achieves its objectives.<sup>23</sup>

In the responsive regulation literature, the basic idea of pyramids of supports and sanctions can be elaborated into pyramids of regulatory strategies.<sup>24</sup> Each layer of the pyramid might have many dimensions. For example, a state

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<sup>23</sup> See John Braithwaite, "Institutionalizing Distrust, Enculturating Trust" in Valerie Braithwaite & Margaret Levi, eds, *Trust and Governance* (New York: Russell Sage Foundation, 1998) 343 [Braithwaite, "Institutionalizing Distrust"]; John Braithwaite & Toni Makkai, "Trust and Compliance" (1994) 4:1 *Policing and Society* 1.

<sup>24</sup> Ayres & Braithwaite, *supra* note 1 at 38–40.

might decide to privatize civil aviation—allowing international competition of airlines from other nations to persuade consumers with better prices, services, and safety performance—but with tough new regulation of the private airlines that enter the market. In time, bad outcomes might lead to further escalation of that regulation and limits on entry of further international competitors, and if that fails, to re-nationalization of the airline industry. Alternatively, better-than-expected outcomes might lead to relaxation of the tough regulatory standards that accompanied privatization, and the licensing of even more international competitors.

Responsive regulators seek contextual, integrated, joined-up strategies that will work in synergy. Gunningham, Grabosky, and Sinclair<sup>25</sup> are the leading scholars of how to craft such synergies and avert incompatible combinations of strategies. They conceive of different sides of the pyramid representing strategies of different players of the regulatory game.<sup>26</sup>

Let us now attempt to encapsulate all the core ideas of pyramidal regulation within our simple set of nine principles of responsive regulation.

#### 1. THINK IN CONTEXT; DON'T IMPOSE A PRECONCEIVED THEORY

Responsive regulation asks regulators not to be dogmatic about any theory, including responsive regulation itself. Be persistently attentive to and responsive to contextual insight. Responsiveness is about flexibility in a much more radical sense than flexible choice among a range of sanctions arrayed in a pyramid. In Chapter 5 of *Responsive Regulation* on “Partial-Industry Intervention,” Ian Ayres showed that fully deregulated private markets in some

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<sup>25</sup> See Neil Gunningham, Peter N Grabosky & Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998).

<sup>26</sup> I prefer not to assume the levels of coordination between, for example, a state environmental regulator and a green NGO, where both would agree to take a certain action at one level of the pyramid in response to certain behaviour from industry. Ideally, regulators, a regulated industry, and an NGO player each design their own pyramids with participation of the other players, and then independently move up and down their respective pyramids in ways they consider responsive to how well the other players are behaving. Players form alliances with others who might support them as they reach each level of the pyramid. But they do not design their pyramids on the assumption that joint action can be achieved on any rung.



contexts are less competitive than they would be were the state to nationalize or bail out a strategic player in the market—to replace a private with a mixed private-public market structure.<sup>27</sup> In that chapter, Ian developed an insightful, creative case for asymmetric regulation at which I still marvel. We saw a dramatic illustration of the virtues of openness to the effective nationalisation of selected private firms in the US and UK finance sectors and in Detroit during the global financial crisis of 2008–2009. President Obama demanding the replacement of Chuck Wagoner as the CEO of General Motors was hardly regulation by rules, but it can be argued that it was regulation that saved a once-great industry that had become complacent that its lobbying could deliver the right to a taxpayer bailout on its own terms. Arguably, it also saved the state of Michigan which depended on that industry, and it was responsive to a good diagnosis of a crisis context.<sup>28</sup> In retrospect, we can appreciate that bailout-contingent regulation did not fall equally on all banks or all car companies—because that very diversity reduces the chance of captured or benighted government regulation, while at the same time reducing the chance of collusive or benighted private decision-making. Especially in a period of radically high uncertainty, systems that regulate different firms in diverse ways are most likely to steer clear of severe failure.<sup>29</sup>

Hence, we did not see accepting a set of rules that applies symmetrically to all as the starting point of responsive regulation, followed by monitoring compliance with those rules as the first stage of a responsive process.<sup>30</sup> By our

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<sup>27</sup> Ayres & Braithwaite, *supra* note 1 at 133–57.

<sup>28</sup> Neil King Jr & John D Stoll, “Government forces out Wagoner at GM”, *The Wall Street Journal (Eastern Edition)* (30 March 2009) A1.

<sup>29</sup> Thanks to Ian Ayres for his feedback with this insight. With the benefit of hindsight, we might also ask if there would be a great deal less unemployment in the world today if the (George W) Bush Administration had temporarily nationalized Lehman Brothers in an attempt to avert the collapse of the international credit market in 2008 instead of allowing Lehman Brothers to fail. See Eric A Posner & Adrian Vermeule, “Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008” (2009) 76:4 U Chicago L Rev 1613 at 1624.

<sup>30</sup> Partial-industry intervention meant applying a “monopsony standard” to decide that certain rules would apply to some firms in a market, but not to others. See Ayres & Braithwaite, *supra* note 1 at 134.

lights, that involves too strong a theoretical commitment to the idea that regulation is defined by rules. In different contexts from 2008, privatizing firms or whole markets that had previously been public could be what is commended by thinking responsively about that market during that period of history. In some contexts, abolition of the entire industry is the best regulatory response, as with some large industries such as the nuclear and chemical weapons industries, the land mines industry, the gambling and casino industry, the global pedophilia trade, the market in slaves, and the market in certain illicit drugs. In other contexts, creation of an industry that did not really exist before is cleverly responsive to context, as was the case with the Australian Trade Practices Commission of the 1980s and 90s showing the lead toward creating a new corporate compliance consulting industry in Australia.<sup>31</sup> In some contexts, writing rules about (for example) carbon emissions may be less central as a regulatory strategy than putting a price on carbon.<sup>32</sup>

History is a very important part of context. What is a sound regulatory policy in one period of a nation's history will be unsound during another. Responsive regulators must therefore "think in a stream of time" as the historians Richard Neustadt and Ernest May argue.<sup>33</sup> They are detectives who ask a lot of journalists' questions—what, who, how, when, where, why—to get the time line of the story clear.

Responsiveness to context means not taking any theory too seriously, including the theory of the pyramid. The pyramid is a useful heuristic. It is a good discipline to be required to consider all lower levels of a pyramid before contemplating a rush to a high level such as nationalization or privatisation of a troubling organization. But the theory simply creates a presumption that

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<sup>31</sup> Christine Parker, *The Open Corporation* (Melbourne: Cambridge University Press, 2002) at 247–52.

<sup>32</sup> See William D Nordhaus, "A Review of the Stern Review on the Economics of Climate Change" (2007) 45:3 *Journal of Economic Literature* 686; Martin L Weitzman, "A Review of the Stern Review on the Economics of Climate Change" (2007) 45:3 *Journal of Economic Literature* 703; William D Nordhaus, "To Tax or Not to Tax: Alternative Approaches to Slowing Global Warming" (2007) 1:1 *Review of Environmental Economics and Policy* 26.

<sup>33</sup> See Richard E Neustadt & Ernest R May, *Thinking in Time: The Uses of History for Decision Makers* (New York: Free Press, 1986).

less interventionist remedies at the base of pyramids are normally the best place to start. Normatively justified responsiveness to context does at times require us to go straight to the peak of a pyramid. Execution of a criminal offender without trial is justified in the context of that offender being a suicide bomber about to detonate in a crowded market—if a sniper has a clear shot.

2. LISTEN ACTIVELY; STRUCTURE DIALOGUE THAT:

- gives voice to stakeholders;
- settles agreed outcomes and how to monitor them;
- builds commitment by helping actors find their own motivation to improve; and
- communicates firm resolve to stick with a problem until it is fixed.

Listening is the key not only to eliciting change in actors, but also to understanding a regulated industry and the regulatory environment to which regulators must be responsive. The 2008 Wall Street crash was preventable by regulators who had their ears open. Not all of the structural drivers of the crisis were preventable in any straightforward way. Yet the epidemic of defaulting housing loans in the US that was the principal proximate cause most certainly was.<sup>34</sup> Wall Street had been awash with rumours of what was coming long before the crash descended. The FBI issued a public warning as early as 2004 on an epidemic of mortgage fraud.<sup>35</sup> Statistical collections such as the 2006 federal Financial Crimes Enforcement Network (FinCEN) report showed a 1,411 per cent increase in mortgage-related suspicious activity re-

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<sup>34</sup> Tomson H Nguyen & Henry N Pontell, "Mortgage Origination Fraud and the Global Economic Crisis: A Criminological Analysis" (2010) 9:3 *Criminol & Pub Pol'y* 591; William K Black, "Echo Epidemics: Control Frauds Generate 'White-Collar Street Crime' Waves" (2010) 9:3 *Criminol & Pub Pol'y* 613; John Braithwaite, "Diagnostics of White-Collar Crime Prevention" (2010) 9:3 *Criminol & Pub Pol'y* 621; John Braithwaite, "Restorative Justice for Banks Through Negative Licensing" (2009) 49:4 *Brit J Crim* 439.

<sup>35</sup> Bill Moyers, *CSI Bailout Interview With William K Black* (3 April 2009), online: Public Broadcasting System <<http://www.pbs.org>>.

ports between 1997 and 2005, with 66 per cent of them involving material misrepresentation or false documents.<sup>36</sup>

Of course, prudential regulators do not always pay attention to FBI press releases and to statistical series on the housing industry. But had they been more genuinely conversationally engaged with Wall Street, there were plenty of interlocutors who would have told them about those red flag statistical series, those FBI warnings, and the rumours that top ratings agencies like Standard & Poor's had executives who could say "let's hope we are all wealthy and retired by the time this house of cards falters"; or another who said "[w]e rate every deal. It could be structured by cows and we would rate it".<sup>37</sup> Quality intelligence comes from good relationships. The problem, as I have argued elsewhere, was a regulatory culture of quantitative risk analysis as opposed to a more old-fashioned style of regulation where street-level regulators "kick the tires" as a precursor to conversation about what the problem is with that wobbly wheel.

Restorative and responsive regulatory theory also argues on the basis of growing empirical experience that non-punitive restorative justice at the base of a regulatory pyramid, backed by punitive escalation for non-cooperation with the restorative justice, is the best regulatory design for increasing detection of the most covert forms of law-breaking and thereby eliciting early warning of wider structural problems.<sup>38</sup> That experience teaches us that actors as diverse as pilots and paedophiles admit to near-misses and sexual abuse of children if they can feel secure that full cooperation with restorative justice will protect them from punitive justice at the same time as they feel

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<sup>36</sup> The BasePoint Analytics work on 3 million loans was another early warning, suggesting 70 per cent of early payment defaults had fraudulent misrepresentations on their original loan applications. See BasePoint Analytics, *New early payment default: Links to fraud and impact on mortgage lenders and investment banks* (Carlsbad, CA: Basepoint Analytics, 2007) at 2.

<sup>37</sup> Justin O'Brien, *Engineering a Financial Bloodbath* (London: Imperial College Press, 2009) at 75.

<sup>38</sup> See Braithwaite, *Restorative Justice*, *supra* note 15; John Braithwaite, "Between Proportionality and Impunity: Confrontation, Truth, Prevention" (2005) 43:2 *Criminol* 283; John Braithwaite, "Restorative Justice for Banks through Negative Licensing" (2009) 49:4 *Brit J Crim* 439.

threatened by the prospect that failure to do so could lead to punishment that would turn their lives upside down.

The demeanour of the responsive regulator is to be a listener, but one who listens while communicating resolve that they will persist with this problem until it is no longer a problem. The pyramid (Figures 1–3) communicates that resolve in a very explicit way. We are willing to listen and discuss endlessly, try countless different approaches, yet at the end of the day we will escalate to more and more interventionist strategies until the problem is fixed.

We know from the child development literature that parents who “natter” at their children (rather than confronting them with firm resolve against bad behaviour) are ineffective at preventing behaviour such as violence.<sup>39</sup> Such nattering parents will shout at their son “stop hitting your sister!” on the run as they move from dining room to kitchen, without even pausing to ensure that the violence does cease, let alone eliciting understanding of why violence is so disapproved.

From the large evaluation literature on motivational interviewing, which is a clinical method for motivating individuals to overcome ambivalence about changing behaviours such as drug use, we know that to change behaviour we must genuinely listen to narratives of non-compliance.<sup>40</sup> More than

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<sup>39</sup> See Gerald R Patterson, *Coercive Family Process* (Eugene, OR: Castalia, 1982); Gerald R Patterson, John B Reid & Thomas J Dishion, *Antisocial Boys* (Eugene, OR: Castalia, 1992); J Mark Eddy, Leslie D Leve & Beverly I Fagot, “Coercive Family Processes: A Replication and Extension of Patterson’s Coercion Model” (2001) 27:1 *Aggressive Behavior* 14; Robert M Regoli, John D Hewitt & Matt DeLisi, *Delinquency in Society* (Sudbury, MA: Jones and Bartlett, 2009) at 277–78.

<sup>40</sup> There have been more than eighty randomized controlled trials that have been mostly supportive of the efficacy of motivational interviewing. See Brian L Burke, Hal Arkowitz & Marisa Menchola, “The Efficacy of Motivational Interviewing: A Meta-Analysis of Controlled Clinical Trials” (2003) 71:5 *Journal of Consulting and Clinical Psychology* 843; Brad W Lundahl et al, “A Meta-Analysis Of Motivational Interviewing: Twenty-Five Years Of Empirical Studies” (2010) 20:2 *Research on Social Work Practice* 137. Client outcomes can be substantially improved or degraded depending on therapist style and practice. Therapist interpersonal skills have been found to directly facilitate client collaboration during motivational interview sessions for substance abuse problems. See Theresa B Moyers, William R Miller & Stacey ML Hendrickson, “How Does Motivational Interviewing Work? Therapist Interpersonal Skill Predicts Client Involvement

that, the listening must lead to agreement on desired outcomes, and self-monitoring and/or external monitoring of progress toward them. That commitment is secured in the motivational interviewing method by helping people to find their own motivation to attain an outcome. This approach to motivation is defined in the early clinical work on motivational interviewing.<sup>41</sup> In the translation of his approach to regulation, we replace “clinician” with “regulator”, and “client” with “regulatee”:

- Regulation should be collaborative, where the regulator assumes the regulatee has what it needs to achieve change, and the regulator draws on the regulatee’s values, motivations, abilities, and resources to help the regulatee bring about the desired change.
- The regulator seeks to evoke and explore the ambivalence of the regulatee to change in order to help the regulatee resolve its ambivalence and move in the direction of positive change.
- The regulator should focus on the statements of the regulatee and emphasize the “change talk” in those statements to strengthen the regulatee’s motivation to bring about change.

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Within Motivational Interviewing Sessions” (2005) 73:4 *Journal of Consulting and Clinical Psychology* 590 at 595.

<sup>41</sup> Motivational interviewing is defined by Miller and Rollnick as a directive, person-centered clinical method for helping clients resolve ambivalence and move ahead with change. See William R Miller & Stephen Rollnick, “Talking Oneself Into Change: Motivational Interviewing, Stages of Change, and Therapeutic Process” (2004) 18:4 *Journal of Cognitive Psychotherapy* 299. Motivational interviewing was originally developed to assist problem drinkers. See William R Miller, “Motivational Interviewing With Problem Drinkers” (1983) 11:2 *Behavioural Psychotherapy* 147. However, research and theory suggests motivational interviewing may be effective for clinical areas beyond addictions such as alcoholism. Over 200 clinical trials of motivational interviewing have been published with positive trials for target problems including cardiovascular rehabilitation, diabetes management, dietary change, illicit drug use, problem drinking, problem gambling, smoking, and management of chronic mental disorders. See William R Miller & Gary S Rose, “Toward a Theory of Motivational Interviewing” (2009) 64:6 *American Psychologist* 527 at 528–29. Further, when combined with another active treatment motivational interviewing has achieved larger and longer lasting effects. See *ibid*; Jennifer Hettema, Julie Steele & William R Miller, “Motivational Interviewing” (2005) 1 *Ann Rev Clin Psychol* 91 at 103.

- The regulatee, rather than the regulator, should voice the arguments for change.
- The regulator's role is to elicit and strengthen change talk.
- The regulator is to roll with the resistance that emerges from the regulatee and to focus on change talk.
- Developing a plan for change is the role of the regulatee, who decides what is needed, and when and how to proceed. The regulator offers advice cautiously when asked by the regulatee.
- Commitment for change must come from the regulatee. The role of the regulator is to listen for whether the regulatee is ready to commit to the change plan based on the "commitment language" of the regulatee.
- To effect this change in approach, the regulator should listen with empathy, minimize resistance, and nurture hope and optimism.<sup>42</sup>

The motivational interviewing literature mirrors much of what the RegNet research group at ANU discovered along a different path during the past three decades about the limits of regulators being prescriptive and combative as opposed to empathic and eliciting. Motivational interviewing's three key dimensions of motivation (Figure 4) mirror much of what emerges

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<sup>42</sup> These bullet points are adapted from a presentation by Dr Stan Steindl to RegNet colleagues. In addition to Dr Steindl, I am grateful for conversations with Mary Ivec, Nick Kitchin, Mark Nolan, and Nathan Harris on motivational interviewing that have informed the content of this section of the essay. The following publications were also important in formulating this section: William R Miller & Theresa B Moyers, "Eight Stages In Learning Motivational Interviewing" (2006) 5:1 Journal of Teaching in the Addictions 3; Miller & Rollnick, *supra* note 41.

in Valerie Braithwaite's work on motivational posturing and regulation,<sup>43</sup> on trust and governance,<sup>44</sup> and on hope and governance.<sup>45</sup>

Three Key Dimensions

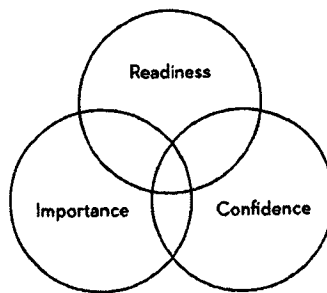


Figure 4: Three Key Dimensions of Motivation.<sup>46</sup>

Ann Jenkins's PhD research on our 1988–1991 nursing home regulation data showed the importance of “confidence” or “self-efficacy” in regulatory compliance.<sup>47</sup> It is easy to grasp the intuition that we achieve more toward

<sup>43</sup> See Valerie Braithwaite, “Games of Engagement: Postures Within the Regulatory Community” (1995) 17:3 *Law & Pol’y* 225 [Braithwaite, “Games of Engagement”]; Valerie Braithwaite, “Dancing with Tax Authorities: Motivational Postures and Non-Compliant Actions” in Valerie Braithwaite, ed, *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot: Ashgate, 2003) 15 [Braithwaite, “Dancing with Tax Authorities”]; Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Cheltenham: Edward Elgar, 2009) [Braithwaite, *Defiance in Taxation*].

<sup>44</sup> See Braithwaite & Levi, *supra* note 23.

<sup>45</sup> See Valerie Braithwaite, “Preface: Collective Hope” (2004) 592 *Ann Amer Acad Polit & Soc Sci* 6.

<sup>46</sup> Courtesy of Dr. Stan Steindl.

<sup>47</sup> See Anne Jenkins, “The Role of Managerial Self-Efficacy in Corporate Compliance with the Law” (1994) 18:1 *Law & Hum Behav* 71 [Jenkins, “Managerial Self-Efficacy”]; Anne Jenkins, *The Role of Managerial Self-Efficacy in Corporate Compliance with Regulatory Standards* (PhD Dissertation, Australian National University, 1997) [unpublished] [Jenkins, PhD Dissertation].



our desired outcomes on those days when we arrive at work with a feeling of confidence. So clear empirical evidence that self-efficacy of managers predicted future regulatory compliance was not a surprise. “Importance” in Figure 4 has a much longer history of explanatory power in the regulatory literature—for example, in the consistent predictive power of commitment to obeying the law in the hundreds of empirical tests of control theory in criminology.<sup>48</sup> In the motivational posturing literature, “readiness” is operationalized by asking clients “how ready are you to make these changes?” This is based on the finding that ambivalence is the crucial dilemma we face when changing our behaviour. Because we have the feeling that life is short and there are good and bad sides to everything, we often focus on the bad side and take the lazy path of not making a change we know we should bother to make. Again, this insight comes early on in the criminological literature, in the brilliant ethnographic work of David Matza on *Delinquency and Drift*.<sup>49</sup> Delinquents are not often committed to law breaking; rather they ambivalently drift between worlds of delinquency and law abidingness. They do not think breaking society’s rules is right so much as they drift into “techniques of neutralization” that soften the moral bind of law.<sup>50</sup>

Responsive regulators are therefore skilled at what the counselling literature conceives as Rogerian reflective listening: listening that reflects back

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<sup>48</sup> See Travis Hirschi, *Causes of Delinquency* (Berkeley: University of California Press, 1969); Travis Hirschi & Michael Gottfredson, “Age and the Explanation of Crime” (1983) 89:3 *Amer J Sociology* 552; Michael R Gottfredson & Travis Hirschi, *A General Theory of Crime* (Palo Alto: Stanford University Press, 1990); Travis C Pratt & Francis T Cullen, “The Empirical Status of Gottfredson and Hirschi’s General Theory of Crime: A Meta-Analysis” (2000) 38:3 *Criminol* 931; Michael R Gottfredson, “The Empirical Status of Control Theory in Criminology” in Francis T Cullen, John Paul Wright & Kristie R Blevins, eds, *Taking Stock: The Status of Criminological Theory* (New Brunswick, NJ: Transaction Publishers, 2008).

<sup>49</sup> (New York: John Wiley & Sons, 1964).

<sup>50</sup> See Gresham M Sykes & David Matza, “Techniques of Neutralization: A Theory of Delinquency” (1957) 22:6 *Am Sociol Rev* 664. The main, repeatedly observed techniques in ethnographic work, including my own on business regulation, are: (1) denial of responsibility (e.g. “I was drunk”); (2) denial of injury (e.g. “they can afford it”); (3) denial of victim (e.g. “we weren’t hurting anyone”); (4) condemnation of the condemners (e.g. “they’re crooks themselves”); and (5) appeal to higher loyalties (e.g. “I had to stick by my mates”).

commitment to achieve outcomes grounded in motivations chosen by the speaker.<sup>51</sup> This is a very common human skill that all good parents have. It rolls with resistance rather than arguing combatively, while communicating commitment to stick with the problem until it is sorted. There is a “moral high ground” that law enforcers must enforce when faced with exceptional intransigence. This is when they must ensure that clear messages are delivered to third parties about what is morally unacceptable. In routine regulatory encounters, on the other hand, taking the moral high ground tends to be counterproductive.

This is all pretty basic stuff for social psychologists. But in the regulation game the dominant discourses are those of law and economics. Denizens of these disciplines have infected each other with their dominant myopias. Just as the lawyers need to be weaned off the obsession with regulation being only about rule compliance, economists must learn to listen to narratives of non-compliance that evince motivations beyond self-interest and rational choice. If all responsiveness achieves is to break down the myopias of dominant regulation discourses, then at least it broadens our understanding in a useful way.

3. ENGAGE THOSE WHO RESIST WITH FAIRNESS; SHOW THEM  
RESPECT BY CONSTRUING THEIR RESISTANCE AS AN OPPORTUNITY  
TO LEARN HOW TO IMPROVE REGULATORY DESIGN

Valerie Braithwaite’s research on motivational postures concludes that resistance is a good thing in a regulatory regime.<sup>52</sup> It is what creates the best opportunities for improving it. The character with which democratic governance responds to resistance is vital to the quality and resilience of a democ-

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<sup>51</sup> It involves asking open questions as opposed to rhetorical questions or questions that evoke yes/no answers—questioning that shows respect for the person, and active listening that summarizes back to the speakers ways they are saying that they might like to steer their own journey to change. See Carl R Rogers, *Client-Centered Therapy* (Cambridge, MA: Houghton Mifflin, 1951).

<sup>52</sup> See Valerie Braithwaite et al, “Regulatory Styles, Motivational Postures and Nursing Home Compliance” (1994) 16:4 *Law & Pol’y* 363; Braithwaite, *Defiance in Taxation*, *supra* note 43; Braithwaite, “Games of Engagement”, *supra* note 43; Braithwaite, “Dancing with Tax Authorities”, *supra* note 43.

racy. As discussed in the last section, regulators can learn adaptation through the skill of rolling with resistance. Empirically, in both nursing home and tax compliance, the motivational posture that Valerie Braithwaite labels “resistance” was comparatively easy to flip into commitment to improvement. The tough nut is “disengagement”. Regulatees who opt out of the regulatory game are much harder to deal with than those who stay in the game to resist the regulator. As with the problem of underperforming employees in workplaces, a starting point is in being interested in what people *are* good at. That provides a point of entry to getting them engaged with projects of continuous improvement that regulator and regulatee can begin to see as shared projects. And that is why we seek first to pick strengths and expand them by moving up the pyramid of supports.

Responsive regulatory theory is also about the idea that all these empathic attempts at engagement will often fail. That failure is an opportunity too. It provides an opportunity to escalate to deterrence and incapacitation at the high reaches of regulatory pyramids. One way of looking at that escalation is that it involves a kind of giving up on collaboration at a particular phase of a history of encounters. The tough, public punishment that occurs then underwrites the whole responsive pyramid. Other regulatees look on at the drama of the slippery slope down which unresponsiveness can lead. They are likely to draw a different lesson from the drama if part of its story is repeated efforts of the regulator to offer an alternative path to resistance or disengagement by the lawbreaker, to try a pyramid of supports first, to give the lawbreaker repeated chances at lower levels of the pyramid of sanctions, and to be procedurally fair in what was done at each rung.<sup>53</sup>

#### 4. PRAISE THOSE WHO SHOW COMMITMENT:

- support their innovation;
- nurture motivation to continuously improve; and
- help leaders pull laggards up through new ceilings of excellence.

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<sup>53</sup> This feature of responsive regulation is informed by the literature of the social psychology of procedural justice. See Tyler, *supra* note 17; Tyler & Blader, *supra* note 17; Tyler & Dawes, *supra* note 17; Tyler & Huo, *supra* note 17.

While responsive regulatory theory says there is no such thing as a standard pyramid that could apply to all the contexts any single regulator must cover, it is hard to imagine why any regulator would neglect to include informal praise among the range of tools they frequently use. No tool is cheaper to implement. The evidence of the effectiveness of informal praise in improving nursing home quality of care outcomes in the two years following an inspection was strong.<sup>54</sup> Yet we found in the state of California (and many other places) systematic indoctrination of inspectors away from the very natural human propensity to say “well done” when things were put right.<sup>55</sup> The reason was fear that the evidence of praise would be used as a defence (should the firm subsequently be taken to court). Responsive regulatory theory interprets this as a most misguided policy.

Regulation based on static rules ossifies industry standards as of the time the rules were written. Responsive regulation is regulation that expects, encourages, and sometimes requires continuous improvement. That means continuous improvement in discovering lower-cost ways to achieve regulatory outcomes and continuous improvement in achieving better outcomes.<sup>56</sup> It is rarely a good path to innovation for states to set standards and tell industry exactly how to achieve them. We have seen that John Mikler’s study found that the greater success of Japanese auto regulators in reducing emissions compared to their colleagues in the US and Europe was based on imposing expectations on other automakers that they would have to innovate to reach or exceed a new ceiling as soon as another Japanese manufacturer took environmental engineering of motor vehicles up through an old ceiling.<sup>57</sup>

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<sup>54</sup> See Toni Makkai & John Braithwaite, “Praise, Pride and Corporate Compliance” (1993) 21:1 Int’l J Soc L 73 [Makkai & Braithwaite, “Praise”].

<sup>55</sup> See John Braithwaite, Toni Makkai & Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Cheltenham: Edward Elgar, 2007) at 103–45.

<sup>56</sup> Australian nursing home regulation has a number of standards that require homes to gather evidence that demonstrates to inspectors that they are continuing to improve on that standard—that the outcomes on this standard are better this year than they were last year. See *ibid* at 176–218.

<sup>57</sup> See John Mikler, *Greening the Car Industry: Varieties of Capitalism and Climate Change* (Cheltenham: Edward Elgar, 2009).

When we say “help leaders pull laggards up through new ceilings of excellence”;<sup>58</sup> we are conceiving all regulated actors as potential leaders. In any workplace, everyone is capable of being the leader of excellence on something. You might be the best researcher in your research group, but the most junior person in the group might be the best at organizing electronic filing systems and improving your capacity to excel in that regard. Likewise, in regulation, the RegNet research group has advocated the 1987 US nursing home regulation reforms steered by Senator Charles Grassley that required each home to have a staff and resident meeting to choose a quality of care outcome that was poor and that they wished to improve in the next year.<sup>59</sup> The law then required them to craft their own strategy for improving it and required a little study to monitor if it did improve a year later.<sup>60</sup> This allows even nursing homes that have low managerial self-efficacy,<sup>61</sup> because everyone knows they are one of the “bottom-feeders” of the industry, to build their self-efficacy by excelling in something, and on that challenge becoming role models of why everyone can improve on that particular regulatory standard. In the best possible responsive regulatory system, every single firm in the industry would be motivated to become a leader in something, dragging up the standards of the laggards across the industry on that outcome.

5. SIGNAL THAT YOU PREFER TO ACHIEVE OUTCOMES BY SUPPORT AND EDUCATION TO BUILD CAPACITY

This is the principle of the pyramid of supports that seeks to pick strengths and expand them. It urges collaborative crafting of a pyramid in the form of the left side of Figure 1. Signal that you would prefer to make progress on a

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<sup>58</sup> For the most interesting empirical study of leaders and laggards and the empirical limitations of this approach, see Neil Gunningham & Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Sheffield: Greenleaf, 2002).

<sup>59</sup> See National Citizens' Coalition for Nursing Home Reform, *Campaign for Quality Care in Nursing Homes* (Washington, DC: National Citizens' Coalition for Nursing Home Reform, 1987) [copy on file with author].

<sup>60</sup> Braithwaite, Makkai & Braithwaite, *supra* note 55 at 307–08.

<sup>61</sup> Jenkins, “Managerial Self-Efficacy”, *supra* note 47; Jenkins, PhD Dissertation, *supra* note 47.

problem if you can by moving up the pyramid of supports first. If that fails, as it often will, move to the pyramid of sanctions. When an organization has been so irresponsible that a regulator is punishing it at the peak of its regulatory pyramid for a particular form of conduct, there is no inconsistency in lauding the same organization by moving it to the top of the pyramid of supports on some other issue. Indeed, the plaudits in one domain can build confidence that a firm can crack the problems that are landing it in hot water in another domain. Regulators often worry about giving the public mixed messages about how a particular organization should be viewed. Yet we should not want the public to stigmatize or essentialize a whole organization, or worse, a whole country (such as Iraq), because one part of it has done something terrible. The best way to transcend that is to help responsible actors within the organization get the upper hand over its criminals. When readers ponder the good and bad bits within the organizations where they work, should there be any surprise that a regulator might on one hand be prosecuting criminally over the behaviour of the people in one part of the organization, while presenting an award for the excellence of the work of the folk responsible for fixing some problem elsewhere in the same organization?

6. SIGNAL, BUT DO NOT THREATEN, A RANGE OF SANCTIONS TO WHICH YOU CAN ESCALATE; SIGNAL THAT THE ULTIMATE SANCTIONS ARE FORMIDABLE AND ARE USED WHEN NECESSARY, THOUGH ONLY AS A LAST RESORT

This is the principle of the pyramid of sanctions, as in the right side of Figure 1. The responsive regulator wants regulated actors to understand that the pyramid exists, to feel that if they dismiss concerns of the environmental regulator over environmental protection, there will inevitably be escalation that will get increasingly punitive and bite deeper into the organization until there is no choice but to conclude that fixing the problem is a less painful response than persisting with resistance or disengagement. The aim is to secure the attitude of “let’s avoid all that conflict by fixing it now at the base of the pyramid, but make our case about what would be more and less reasonable ways of fixing it.”

The paradox of the pyramid is that by being able to escalate to really tough responses at the peak of the pyramid, more of the regulatory action can be driven down to the deliberative base of the pyramid.<sup>62</sup> I have argued why escalating up the pyramid to deterrent sanctions can often make things worse, especially at the middle levels of a pyramid, before they get better.<sup>63</sup> One reason is that punishment, according to responsive regulatory theory, simultaneously increases deterrence and defiance (see Figure 5). At low levels of punishment defiance is likely to exceed deterrence. Figure 5 expresses this as the resistance effect exceeding the capitulation effect at lower levels of coercion. The dotted line is the net compliance effect represented as a sum of the resistance score and the capitulation score. Only when punishment bites very deeply at the peak of the pyramid, resulting in many giving up on resistance, does the deterrence effect exceed the defiance effect. Yet one reason that escalation only as far as the lower levels of the pyramid often elicits compliance is that the first step up the ladder is a signal of willingness of the regulator to redeem its promise to keep climbing until the problem is fixed. Put another way, the first escalation up the pyramid becomes a wake-up call that engages more senior people who begin to ponder a slippery slope.

Hence, the redundancy idea of the pyramid can remain valid even when defiance effects of punishment initially exceed deterrence effects. The redundancy idea is that all regulatory tools have deep dangers of counter-productivity. Therefore, one must deploy a mix of regulatory tools; the best way to do so is dynamically—so that, in sequence, the strengths of one tool can be given a chance to cover the weaknesses of another tool.

The risks of defiance exceeding deterrence is one reason that the peak of the pyramid should always be threatening in the background but not directly threatened in the foreground. Making threats increases defiance, turning the defiance curve in Figure 5 more steeply downwards.

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<sup>62</sup> Ayres & Braithwaite, *supra* note 1 at 39.

<sup>63</sup> Braithwaite, *Restorative Justice*, *supra* note 15 at 106–09.

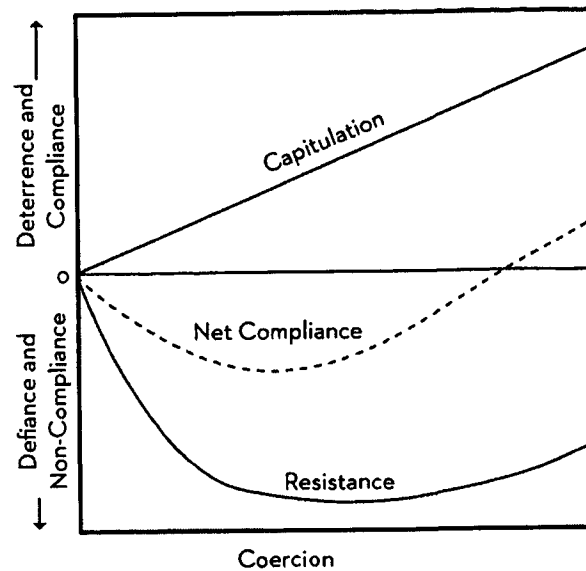


Figure 5: A theory of the effect of coercion on compliance as the net result of a capitulation effect and a defiant resistance effect. Based loosely on the experiments summarized by Brehm and Brehm.<sup>64</sup>

How then can one be threatening in the background without making threats? One way is being transparent that the pyramid is your new policy in advance of escalating for the first time. Responsive regulators want the industry to be open with them and they want to convince the industry that openness with them does pay.<sup>65</sup> Regulators must be the change they want to see by communicating openly with the industry. More than that, they do best to include the industry in their processes of pyramid design. Pyramid design workshops that are inclusive of the industry, the regulator, and NGOs that

<sup>64</sup> Sharon S Brehm & Jack W Brehm, *Psychological Reactance: A Theory of Freedom and Control* (New York: Academic Press, 1981).

<sup>65</sup> See Debra Rickwood & John Braithwaite, "Why Openness With Health Inspectors Pays" (1994) 18:2 *Australian Journal of Public Health* 165.



are critics of both can do a lot to improve regulatory outcomes even in advance of a pyramid being deployed. At the regulator's pyramid design workshop, when the three kinds of players describe the pyramid of escalations they would plan to deploy in response, all three begin to see that they are likely to be better off playing the game at the base of the pyramid. So the regulator and the industry listen to the NGO saying they will escalate to a complaint to the minister responsible, issue a press release, and then start a broad-based community campaign if confronted with captured regulation. The industry says that if it faces unfair or vexatious enforcement it would escalate to complaining to the minister, to a media campaign, to funding opposition political parties. Participating in a collaborative design workshop of what would be a reasonable pyramid for the regulator to deploy can dampen the defiance effects in Figure 5 because the industry is more likely to say "well, we did all agree that this escalation is exactly what would be right for them to do in response to what we have tried to get away with here." Secondly, if the pyramid of sanctions has been designed collaboratively, it will not be necessary for the regulator to make threats, because the pyramid has been constituted as threatening by the process of the collaborative design workshop itself. All the regulator need do is act to redeem the promises of the pyramid and of the workshop. Threats are not needed, just action. Restrained reminders that this is an example of the kind of conduct we must monitor until it ceases are also important.

#### 7. NETWORK PYRAMIDAL GOVERNANCE BY ENGAGING WIDER NETWORKS OF PARTNERS AS YOU MOVE UP A PYRAMID

The partnership principle of pyramidal escalation reflects the reality that regulators do not stand alone in their concerns that consumers be protected, environments preserved, corruption prevented. While responsive regulation is designed to make effective state regulatory law practicably enforceable by allowing most regulation to be transacted cheaply at the base of the pyramid, nevertheless many states, especially poor ones, lack the resources to escalate to more expensive measures. Here is where the pyramid of escalated network-

ing inspired by Peter Drahos comes into its own (Figure 6, below).<sup>66</sup> Instead of a weak state regulator escalating by upping state intervention, it can instead escalate by networking in more regulatory partners to put pressure on the regulated firm. Actually, even well resourced regulators find that on particular issues at particular places and times there are network partners better positioned than them to call a regulatee to account. So our argument is that regulators who are gifted at the responsive craft assiduously resort to networked escalation. Instead of escalating to increasingly interventionist sanctions that the regulator mobilizes itself, the regulator enrolls increasing numbers of more potent network partners to escalate pressure on the regulated firm. For example, a securities regulator in a developing country might enrol a multinational accounting firm to produce a report on the compliance of one of its client firms and then monitor implementation of responsive reform to fix the problems revealed by the monitoring, including monitoring of whether managers are disciplined or dismissed when they fail to act. A weak developing country regulator can enrol (and be enrolled by) both transnational and village networks, private and other public sector organizations, NGOs, professions, creatively disparate types of network partners. Empirically, Braithwaite, Makkai, and Braithwaite found British nursing home inspectorates to be weak regulatory agencies, in both legal powers and resources.<sup>67</sup> Yet they accomplished a great deal of improvement in quality of care by creative networking even of organizations as powerful as banks. Banks become reluctant to lend money to homes when inspectors put excoriating inspection reports on the internet.

When the terrorist pulls the gun to shoot the hostage, our responsive regulation texts always said the best option might be to short-circuit any thought of dialogue and have the sniper take him out. Yet that work also said “don’t automatically think that because this person is a terrorist with a gun and a hostage that a fatal bullet is mandated.” If you talk to him, you might discover that your intelligence is wrong and that he is innocent. Never dismiss the possibility that having the right kinds of conversations might per-

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<sup>66</sup> Peter Drahos, “Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach” (2004) 77:2 Temp L Rev 401.

<sup>67</sup> See Braithwaite, Makkai & Braithwaite, *supra* note 55 at 146–75.

suade you to reframe the normative objectives that should be salient in the situation. It might be that allowing the wife of a violent man talk to him with love about surrender will better serve public safety.<sup>68</sup>

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<sup>68</sup> In response to Jennifer Wood & Clifford D Shearing, *Imagining Security* (Portland: Willan, 2007), which urges responsive regulation to get more rigorous about lateral scanning, I developed the following "nodal governance" guidelines for responsive regulation, which apply as much to civil society regulators as to state regulators:

1. Never escalate to hard options without considering all the available softer regulatory interventions. If the situation gives you time, engage in a brainstorming dialogue to discover them. Be open to reframing the norm to be secured on the basis of that dialogue.
2. Use restorative justice dialogue to bubble up norm improvement, including law reform and radical deregulation.
3. Have a preference for "governing by providing" over "governing by regulating". Try to solve problems by providing resources to the potential target of regulation when those gifts might motivate them to govern themselves.
4. Jump immediately to a coercive option when quick diagnosis suggests this will achieve the result with less force overall than a sequence of failed escalations.
5. When you do not yourself have the power to control the situation, consider networking with partners horizontally, or better still with partners who can *de-escalate* coercion, before considering vertical escalation.
6. If you need to escalate vertically, but lack the power resources to do that, scan creatively and optimistically for potential network partners with resources you lack. Search also for other weak actors whose combined power tied in a node governs the situation with greater power than the sum of its parts.
7. If you want to regulate to achieve a result with minimum force, belong to an organization with symbols that signify a capability and resolve to escalate right up to the peak of a regulatory pyramid that is threatening in the background (but rarely threatened in the foreground). Belong to an organization that both *walks softly* and carries a big stick. If you do not belong to such an organization, network with someone who does.

See John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar, 2008) at 99. Data collected in 2006 by John Braithwaite and Leah Dunn on police peacekeeping in war-torn Timor-Leste was used to illustrate how such guidelines might be implemented in difficult circumstances for regulating violence. See *ibid* at 87–108.

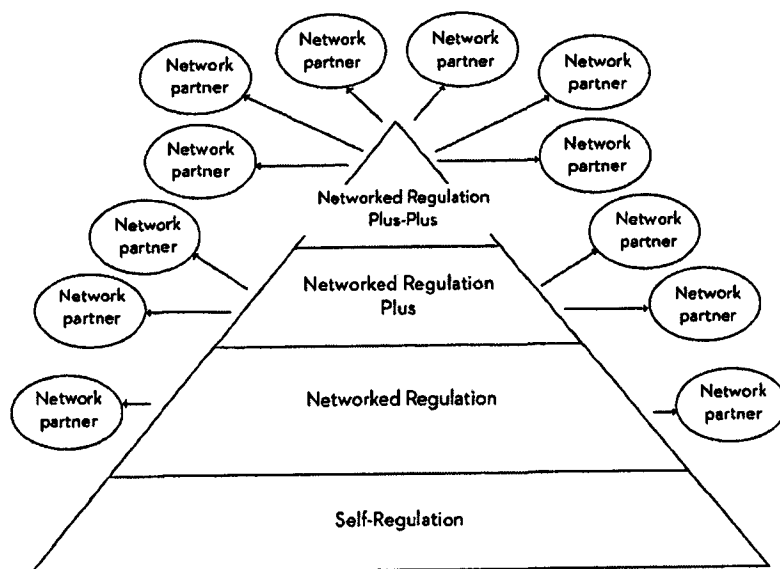


Figure 6: A pyramid of networked escalation (adapted from Peter Drahos).<sup>69</sup>

#### 8. ELICIT ACTIVE RESPONSIBILITY, RESORTING TO PASSIVE RESPONSIBILITY WHEN ACTIVE RESPONSIBILITY FAILS

The idea of distinguishing active from passive responsibility comes from Mark Bovens.<sup>70</sup> Passive responsibility means holding actors responsible for wrongs they have done in the past. Active responsibility means challenging actors to take responsibility for making things right into the future. The responsive regulation approach is to resort to passive responsibility only when active responsibility cannot be elicited. No principle of responsive regulation has more radical implications for the design of legal systems. Thirty years ago when my co-author Brent Fisse first opened conversations about the virtues of replacing causal fault with reactive fault as the keystone of responsibility in

<sup>69</sup> Drahos, *supra* note 66.

<sup>70</sup> See *The Quest for Responsibility* (Cambridge: Cambridge University Press, 1998).

criminal law, I was sceptical about such a radical reorientation of fault.<sup>71</sup> But by 1993, when we published *Corporations, Crime and Accountability*, he had persuaded me that there was an effective strategy for integrating presumptive active responsibility, with passive responsibility relegated to a backstop, in corporate criminal law.<sup>72</sup> Since then, restorative justice scholarship has deepened the furrows of this approach.<sup>73</sup> For example, from the literature on school bullying we have learnt that the bully is not necessarily the target of first choice in an effective preventive strategy. The more effective target can be respected older children who in the best circumstances can be motivated to intervene to censure victimization of younger children and to protect them, or who in the worst circumstances encourage the bully, even holding the victim to prevent her from escaping the bully. So sound anti-bullying policy is about a whole-school approach where respected older children, parents, teachers, and even janitors are all encouraged by an anti-bullying culture to take active responsibility for bullying prevention and for helping victims to heal. Because preventive capability for an organizational crime is often within the reach of many corporate actors, any one of whom could prevent recurrence of the crime, restorative justice that persists in widening the circle of agents who are given an opportunity to be actively responsible often quickly finds an individual who can be motivated by a sense of social responsibility to be the agent for reform.<sup>74</sup>

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<sup>71</sup> See Brent Fisse, "Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions" (1983) 56:6 S Cal L Rev 1141.

<sup>72</sup> Brent Fisse & John Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993).

<sup>73</sup> See e.g. John Braithwaite & Declan Roche, "Responsibility and Restorative Justice" in Gordon Bazemore & Mara Schiff, eds, *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson Publishing, 2001) 63; John Braithwaite, "Accountability and Responsibility Through Restorative Justice" in Michael W Dowdle, ed, *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006) 33.

<sup>74</sup> The method here is to try an initial circle of organizational actors with some responsibility. If they are all deniers, widen the circle, especially with more senior people than those first invited. If they too are all deniers, widen the circle again until a socially responsible

A major strength of the restorative justice tradition in the aftermath of lawbreaking is that it teaches us to practice emotionally intelligent justice,<sup>75</sup> to heal the hurts of conflict and injustice, to forgive the failings of others, to apologize for one's own, to put victims of injustice at the centre of justice processes, to listen to them, and to take justice rituals seriously when they are rituals that can signal an end to victimization. Among the things that can be accomplished by restorative justice rituals with these qualities are the engagement of the disengaged and the consolidation of commitment to the norms that underpin a particular form of regulation.<sup>76</sup>

9. LEARN; EVALUATE HOW WELL AND AT WHAT COST OUTCOMES  
HAVE BEEN ACHIEVED; COMMUNICATE LESSONS LEARNED

Regulatory practice tends to accept far too readily presumptions that extant regulatory frameworks already have the right answers. The law is often taken as self-evidently right; rational choice presumptions about how actors respond to deterrence are ingrained in the face of the evidence we have that defiance often exceeds deterrence effects (see Figure 5). While it is trite to say that regulators should be reflective practitioners<sup>77</sup> who learn, regulatory practice does not respond well to the reality that the dominant discourses of law and economics embed certain anti-learning propensities. This is not to deny that encrusted prescriptive mindsets of "thou shalt not kill" or of institutionalising deterrence for killing have value. It is to say that reflective practitioners learning from their experience of how to create a society with less killing is a rather more important policy endeavour.

On no issue have I met more resistance than in implementing randomized controlled trials of responsive justice interventions, including television

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target for restorative justice who will take active responsibility for righting the wrong is found (see Braithwaite, *Restorative Justice*, *supra* note 15 at 109–22).

<sup>75</sup> See Lawrence W Sherman, "Reason for Emotion: Reinventing Justice With Theories, Innovations, and Research—The American Society of Criminology 2002 Presidential Address" (2002) 41:1 *Criminol* 1.

<sup>76</sup> See generally Braithwaite, *Restorative Justice*, *supra* note 15.

<sup>77</sup> See Donald A Schon, *The Reflective Practitioner: How Professionals Think in Action* (New York: Basic Books, 1983).

journalists thrusting accusing microphones and front page stories in the Canberra Times alleging a “justice lottery”.<sup>78</sup> Randomized controlled trials are not always the best methodology for exploring responsive regulatory strategies. They have an important place, however, when so much of the scholarship critical of responsive regulation uses an n of 1 or data without a control group to assert confidently that this or that feature of responsive regulation clearly does not work in some more general sense. Work better than what?<sup>79</sup>

Learning what happens after a specific regulatory intervention is a rather easier challenge than understanding whether some aspect of responsive regulation “works”. In the year after fencing is placed around something dangerous, we can easily monitor for a reduction in accidents associated with that danger at that place. This kind of contextual evaluation in place is often easy to do, with costs that can involve no more than recordkeeping that is a little systematic. Yet more often than not, these costs are not met—the regulatory system simply assumes the investment in the fence was a good one. More importantly, when such simple monitoring *does* reveal a dramatic improvement in some outcome, no one invests in what Christine Parker calls double-loop learning by spreading news of this experience across all such contexts within a large organization.<sup>80</sup> And it is even rarer for triple-loop learning to occur—where lessons about how to revise regulatory goals and strategies are looped across all such organizations throughout the economy (see Figure 7). Cost-effectiveness of regulation is unlikely to be improved without learning, and a more systematic approach to tripling loops of learning could be one of the more cost-effective investments regulators can make in improvement.

At another level, this principle on evaluation and triple-loop learning always worried me. While our group always advocated the 1987 US reforms

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<sup>78</sup> For such criticism, see Peter Clack, “A Crying Shame? ACT Justice tries a New Tack”, *The Canberra Times* (26 April 1997) A1; Peter Clack, “A Shame About the System’s Equality”, *The Canberra Times* (1 February 1997) A1; Peter Clack, “Ombudsman Studies Experiment”, *The Canberra Times* (17 January 1997) A1.

<sup>79</sup> See Michael Abramowicz, Ian Ayres & Yair Listokin, “Randomizing Law” (2011) 159:4 U Pa L Rev 929.

<sup>80</sup> Parker, *supra* note 31 at 210.

that required nursing homes to pick a priority problem, design an intervention, and then measure whether the problem improved, we worried about the poor quality of the science involved. Those carrying out the studies were usually nurses with limited scientific training; sample sizes were tiny, and control groups were generally absent.

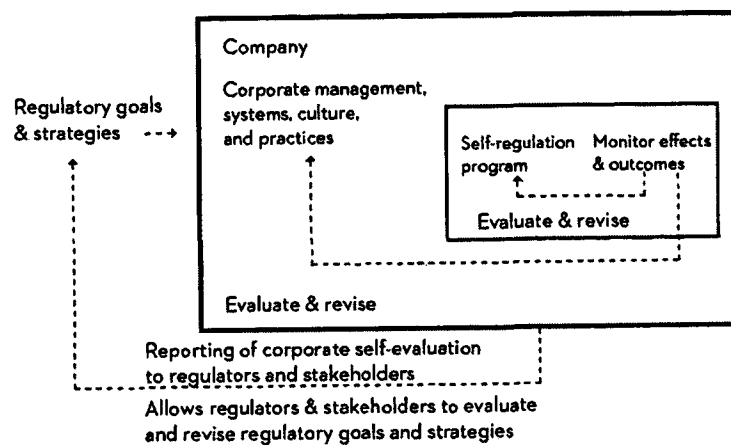


Figure 7: Triple loop learning.<sup>81</sup>

I used to have the same worry with the similar approach in the realm of problem-oriented policing, called SARA (Scanning, Analysis, Response and Assessment), where the "assessment" is conducted by police officers with limited scientific expertise.<sup>82</sup> Tripling loops of learning from bad science might be seen as a flawed kind of learning to advocate. This is not so, however, if science of high quality shows that problem-oriented police evaluating their responses under the rough and ready SARA method do better in reducing

<sup>81</sup> *Ibid* at 278.

<sup>82</sup> See Herman Goldstein, "Improving Policing: A Problem-Oriented Approach" (1979) 25:2 *Crime & Delinquency* 236.



crime on their beats than control-group police on other beats. And this is what the best criminological research seems to indicate.<sup>83</sup> The same is true of motivational interviewing, which, like problem-oriented policing, has much in common with responsive regulation. While motivational interviewing is a flexible, contextual and responsive practice that unfolds differently in every case, the research suggests that professionals trained to use motivational interviewing produce better outcomes than controls.<sup>84</sup>

Unfortunately we have no research that randomly assigns regulatory agencies or individual regulators to regulate responsively as opposed to controls following some more standardized prescriptive approach. We have much less persuasive evidence of, for example, a single regulator, the Australian Taxation Office, moving from a non-responsive to a responsive approach to regulating profit shifting by multinational corporations and collecting a great deal more tax in the responsive versus the non-responsive period.<sup>85</sup> Valerie Braithwaite and I tried in vain to persuade that regulator to randomly assign companies to the pyramidal versus the standardized approach. Until that is done, the warrant for confidence in responsive regulation as a general strategy will remain limited. We have to be content with evaluation research that tests small elements of the approach, such as the proffering of praise,<sup>86</sup> eliciting pride,<sup>87</sup> eliciting trust,<sup>88</sup> building self-efficacy,<sup>89</sup> open communica-

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<sup>83</sup> See David Weisburd et al, "Is Problem-Oriented Policing Effective In Reducing Crime And Disorder? Findings From A Campbell Systematic Review" (2010) 9:1 *Criminol & Pub Pol'y* 139; Anthony A Braga et al, "Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment" (1999) 37:3 *Criminol* 541; Anthony A Braga, *Problem-Oriented Policing and Crime Prevention* (Monsey, NY: Criminal Justice Press, 2002).

<sup>84</sup> See BL Burke, H Arkowitz & M Menchola, "The Efficacy Of Motivational Interviewing: A Meta-Analysis Of Controlled Clinical Trials" (2003) 71:5 *Journal of Consulting and Clinical Psychology* 843; Lundahl et al, *supra* note 40.

<sup>85</sup> John Braithwaite, *Markets in Vice, Markets in Virtue* (Oxford: Oxford University Press, 2005) at 89–100.

<sup>86</sup> Makkai & Braithwaite, "Praise", *supra* note 54.

<sup>87</sup> Eliza Ahmed & John Braithwaite, "Shame, Pride and Workplace Bullying" in Susanne Karstedt, Ian Loader & Heather Strang, eds, *Emotions, Crime and Justice* (Oxford: Hart Publishing, 2011) 55.

tion,<sup>90</sup> eliciting of responsive motivational postures,<sup>91</sup> engagement of third parties such as trade unions in safety regulation,<sup>92</sup> preferring procedural justice and restorative justice,<sup>93</sup> reintegrative shaming and avoidance of stigmatisation,<sup>94</sup> movement in tit-for-tat fashion between one level of a pyramid and the next,<sup>95</sup> and projection of deterrence from the peak of a pyramid.<sup>96</sup>

John Eck first considers research that makes general claims. Then he distinguishes this from contextual research that concludes a problem has been fixed in a particular context and then communicates useful details about how that intervention was crafted:

When dealing with small-scale, small-claim crime prevention interventions, evaluation designs with relatively weak internal validity work well enough. They need to be sufficiently rigorous to show that the problem declined following the intervention, but they need not eliminate all rival hypotheses. Indeed, there can be a great deal of doubt as to what exactly caused the decline in the crime. Simple, pre-post and short time-series evaluations that take into account the most likely rival hypotheses—short-term trends and seasonality, for example—provide sufficient evidence to make decisions about the pro-

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<sup>88</sup> Braithwaite, "Institutionalizing Distrust", *supra* note 23; Kristina Murphy, "The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders" (2004) 28:2 L. & Human Behav 187; Braithwaite & Makkai, *supra* note 23.

<sup>89</sup> *Supra* note 47.

<sup>90</sup> Braithwaite, *To Punish or Persuade*, *supra* note 3.

<sup>91</sup> Braithwaite, *Defiance in Taxation*, *supra* note 43; Braithwaite, "Games of Engagement", *supra* note 43; Braithwaite, "Dancing with Tax Authorities", *supra* note 43.

<sup>92</sup> Braithwaite, *To Punish or Persuade*, *supra* note 3.

<sup>93</sup> Braithwaite, *Restorative Justice*, *supra* note 15 at 78–79; Toni Makkai & John Braithwaite, "Procedural Justice and Regulatory Compliance" (1996) 20:1 L. & Human Behav 83.

<sup>94</sup> Toni Makkai & John Braithwaite, "Reintegrative Shaming and Regulatory Compliance" (1994) 32:3 Criminol 361.

<sup>95</sup> Parker, *supra* note 9; Nielsen & Parker, *supra* note 9.

<sup>96</sup> John Braithwaite & Toni Makkai, "Testing an Expected Utility Model of Corporate Deterrence" (1991) 25:1 Law & Soc'y Rev 7; Toni Makkai & John Braithwaite, "The Dialectics of Corporate Deterrence" (1994) 31:4 Journal of Research in Crime and Delinquency 347.

gram. . . . [U]nlike textbook rigorous evaluations, they can be accommodated within the way practitioners normally learn from experience.

How good is good enough? . . . [W]hen we are interested in small-scale, small-claim, discrete interventions . . . learning involves using theory to set boundaries on how to proceed, and then the use of imitation and trial and error to work out the details. Some hints as to how we can proceed come from civil engineering and the construction of one-of-a-kind structures. Counting the number of bridges standing and comparing this number to the number that collapsed, for example, does not make for success in bridge construction. All we know for certain about standing bridges is that they have not fallen, yet. Rather there is a heavy reliance on theories of physics and materials, plus pre-implementation analysis and planning, coupled with evaluations of catastrophic failures.<sup>97</sup>

To this, we might add monitoring for evidence of stress such as cracks, then trial-and-error repairs to prevent these getting worse, or incapacitating the bridge while building a new one. With such contextually responsive intervention, our interest is in sticking with the problem until it goes away. In the end, we might not quite understand why one of our trial-and-error interventions worked. Indeed, our initial theory may have been quite flawed and the success of the intervention might delude us into thinking we had a good theory. Even so, the hypothesis is that trial and error grounded in a theory that seems to have worked in the past, in a body of practical experience, yet also in a responsive analysis of the context, is likely to succeed more often than a guess. One of the things triple-loop learning does is spread news of types of interventions that have often been associated with a problem disappearing in the past. That makes it an intervention worth considering for insertion into a future pyramid. But because we do not really understand the causal mechanisms that made it work, if indeed it has worked, we do not as-

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<sup>97</sup> John E Eck, "Learning from Experience in Problem-Oriented Policing and Situational Prevention: The Positive Functions of Weak Evaluations and the Negative Functions of Strong Ones" (2002) 14 *Crime Prevention Studies* 93 at 108–09. Eck relies on the research of Dörner and Petroski. See Dietrich Dörner, *The Logic of Failure: Recognizing and Avoiding Error in Complex Situations* (Reading, MA: Addison-Wesley, 1997); Henry Petroski, *To Engineer is Human: The Role of Failure in Successful Design* (New York: Vintage Books, 1992).

sume it will work in the future and we hedge its promise with other layers of the pyramid that hold out different theoretical bases for their promises of effectiveness. Evidence-based theories provide an array of generative metaphors to guide disparate, redundant attempts to improve things. When we escalate through three different levels of the pyramid that fail to fix the problem and then to a fourth, after which the problem stops, we do not know if what happened at the fourth rung was a cumulative accomplishment of the three rungs below, or if what we did at the fourth rung undid damage done at the three lower rungs. All we have is a theoretically informed process of monitored trial and error.

## II. TOO HARD TO DO?

Sometimes scholars say that responsive regulation requires a discretionary competence to make judgments beyond the wisdom of the average street-level regulator. On other occasions, one gets the comment following training that responsive regulation is just common sense. The larger element of truth is to be found in the latter observation. One might run down the list of nine principles and ask if they could meaningfully be applied to good parenting. Almost all of us have experienced one or both sides of parental regulation within families. Because responsive regulatory principles are so heavily derived from what the empirical evidence says about effective parenting, it does seem like common sense to many people. Even leaders taking laggards up through new ceilings of excellence, which appears at first to connect only to the context of regulating an industry, can actually sensibly be applied to big sisters displaying to little brothers better ways to self-regulate anger and violence.

But some are bad parents much of the time, and most of us are bad parents some of the time. While good parenting mostly comes naturally to people of ordinary talents, there are moments when it is fiendishly difficult. Mostly we tend to be good parents when we do what comes naturally—when we follow the natural emotional intelligence of the good parent that we learned from having watched our own parents, our school friends' parents, and even parents on television. The natural emotional intelligence of the parent comes from allowing oneself to experience unconditional love for our child, trust with monitoring, and hope about the joyful future flourishing of the child. We are bad parents when we follow bad emotional habits such as

anger and punitive violence that we learn from experiences of the dark sides of social life that are not the stuff of good parenting. So the challenge of being a good parent is not primarily one of learning good habits but of unlearning bad ones. It is like training in the Alexander technique—which is not training in how to hold good posture, but in how to release, undo, bad habits of posture that we did not have when we were very young, but which we learned from unnatural pastimes such as sitting at a computer writing for law reviews.

Being a gardener who succeeds at the outcome of eliciting growth is a richly complex activity that requires responsiveness to the changing plant, the weather, the soil, compost, drainage, and more. Yet no one would say we cannot entrust this to people of only average ability. I marvel when I visit Melanesian villages at how everyone is a good gardener. Even westerners with their more impoverished experience of observing other good gardeners are mostly very capable of learning how to elicit growth from plants.

So we might teach responsive regulation not as rocket science but as a natural social process. The main challenge is unlearning *Going by the Book*,<sup>98</sup> unlearning training of Californian nursing home inspectors to eschew praise for improvement,<sup>99</sup> unlearning “adversarial legalism,”<sup>100</sup> unlearning intemperate issuance of directives, undoing the habit of making threats, resisting slavish adherence to protocols when our monitoring suggests they have counterproductive effects. The challenge is renouncing humiliation and habits of disrespect in a return to the more natural form of human engagement which is respectful and trusting. And hopeful about the natural educative style of eliciting motivation to learn for reasons that human beings find intrinsically

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<sup>98</sup> Eugene Bardach & Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982).

<sup>99</sup> Braithwaite, Makkai & Braithwaite, *supra* note 55.

<sup>100</sup> C Leigh Anderson & Robert A Kagan, “Adversarial Legalism and Transaction Costs: The Industrial-Flight Hypothesis Revisited” (2000) 20:1 Int’l Rev L & Econ 1; Robert A Kagan, “Adversarial Legalism and American Government” (1991) 10:3 Journal of Policy Analysis and Management 369; Robert A Kagan & Lee Axelrad, eds, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (Berkeley: University of California Press, 2000).

rewarding. The US section of Braithwaite, Makkai and Braithwaite's comparative study of nursing home regulation can be read as showing that the US inspection model deterred inspectors from detective work on behalf of abused and neglected people they were concerned to protect, enjoining inspectors to ignore such concerns in favour of following protocols and grinding through the considerable paperwork demands of inspection protocols.<sup>101</sup> It is a case study of a regulatory regime that is far too contrived, complex and non-discretionary by the lights of responsive regulation.

### III. TENDING THE GARDEN WITH STORIES OF GOOD GROWTH

A common critique of responsive regulation is that much regulatory practice is not characterized by the regular encounters needed to make the approach work. While that is right, the responsive prescription is to contrive repeated encounters where the most strategic opportunities for improvement are identified. Master gardeners are quick to instruct us that we must target those parts of the garden where iterated attention is needed to effect improvement, while other plants grow heartily without our attention. None of our analysis denies that some people are master practitioners of gardening or of responsive regulation. We watch their gardening shows on television—we attend their trainings on responsive regulation—because they have brilliant track records of eliciting growth in plants, or in corporate performance on matters like safety. The most important way we improve regulation, according to the responsive approach, is by conceiving of regulatory culture not as a rulebook but as a storybook and helping one another to get better at sharing instructive stories.<sup>102</sup>

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<sup>101</sup> Braithwaite, Makkai & Braithwaite, *supra* note 55.

<sup>102</sup> Clifford D Shearing & Richard V Ericson, "Culture as Figurative Action" (1991) 42:4 *British Journal of Sociology* 481.