WORKING PAPER

Restorative justice and responsive regulation: the question of evidence·

John Braithwaite, School of Regulation and Global Governance (RegNet), Australian National University

But does it work?

Asking 'Do restorative justice and responsive regulation work?' is like asking whether any meta-strategy (a strategy about selecting strategies) works. Consider problem oriented policing as an example of a meta-strategy. Problem oriented policing is an approach developed by University of Wisconsin professor Herman Goldstein for improving police effectiveness through examining and acting on the underlying conditions that give rise to community problems. Responses emphasise prevention, going beyond the criminal justice system alone, and engaging with other state, community and private sector actors (Goldstein 2001). The evaluation literature is encouraging that when police are trained to use problem oriented policing their average effectiveness in preventing crime improves (Braga 2002; Weisburd et al 2010).

Yet the effectiveness of problem oriented policing in practice is highly variable. Technically, the statisticians say it is hard to evaluate because it has a heterogeneity problem. Consider a local police unit's diagnosis of the crime problem in its locality as caused by young black men who sell drugs. They conclude that a good way of solving this problem is to nab a few young black men and beat them senseless in a publicly visible way. This would be a transparently ineffective strategy not only in the sense that it could increase rather than reduce crime, could even trigger city-wide race riots, but also because it could set back other policy objectives like reducing racism in the society. Hence, the massive statistical heterogeneity of problem-oriented policing, combined with the fact that quite often local police are bound to choose counterproductive local solutions, might leave us amazed that the evaluation literature shows modest effectiveness overall.

Restorative justice and responsive regulation are likewise meta-strategies for selecting strategies. Restorative justice is a relational form of justice (Llewellyn 2011; Liu 2014). It selects problem-prevention strategies that empower stakeholders by putting the problem in the centre of a circle of deliberation, rather than putting the person alleged to be responsible for it in the dock. Responsive regulation is a meta-strategy for arranging problem-solving strategies in a hierarchy of coerciveness and then implementing a presumptive preference for trying the less coercive solutions first, moving up

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the hierarchy of strategies until one of them succeeds in fixing the problem.

In this essay we argue that, as with problem-oriented policing, there is encouraging enough evidence, even in the face of heterogeneity problems, that restorative justice and responsive regulation 'work' cost-effectively in preventing a variety of injustice problems that include crime and business non-compliance with regulatory laws. This evidence is of higher quality with restorative justice than with responsive regulation. However, the really important evaluation questions around restorative justice and responsive regulation are not at the level of meta-strategy, but at the level of the particular strategies that are chosen. If a restorative justice circle in a village in a developing country decides to send a provocative, aggressive ultimatum to another village with which it has a land dispute, it may cause fighting to break out between young men of the two villages. If it decides to send a gift of reconciliation to the other village it may have a better chance of building peace between them. Whether war or peace results is driven more by the qualities of the strategy chosen than by whether the strategy of choice is a restorative justice circle or an edict of the village chief. Likewise with responsive regulation, if all the strategies at the different levels of a regulatory pyramid (see Figures 1 and 2) are counterproductive, then trying one counterproductive strategy after another will make things worse than doing nothing, worse than attacking the problem with just one counterproductive strategy.

So the argument of this paper is that it may now be time to redirect evaluation research attention onto how to improve the quality of strategy selection when we do restorative justice or responsive regulation. That goes less to whether one single strategy is better than another more to which particular combination of multiple strategies *together* secure outcomes like reducing crime or increasing environmental compliance. In the next section we first consider the latest evidence on the effectiveness of restorative justice in crime prevention. Then we consider its effectiveness in enriching democracy and improving justice in other ways beyond crime prevention, like helping child victims of violence to be safe, secure and empowered with voice within their families (Gal 2011; Nixon 2007). Then we move on to likewise evaluate the efficacy of responsive regulation for helping to solve a wide variety of injustices.

The latest evidence on restorative justice effectiveness

Restorative Justice and Responsive Regulation (Braithwaite 2002) summarizes the evidence on the effectiveness of restorative justice in realizing various justice values, including crime prevention. It is cautiously optimistic. The latest important addition to that literature is a meta-analysis for the Campbell Collaboration on the impact of restorative justice on crime by Heather Strang et al (2013). Its conclusions are fundamentally similar to the previous meta-analyses of over 30 tests of the effectiveness of restorative justice by both Latimer, Dowden and Muise (2001) and Bonta et al (2006), each conducted for the Canadian Department of Justice. Strang et al (2013) find a lesser impact of restorative justice than the 34 per cent lower reoffending for Victim Offender Mediation found in the

Bradshaw, Roseborough and Umbreit (2006) meta-analysis, or their 26 per reduction compared to controls for all kinds of restorative justice (Bradshaw and Roseborough 2005), notwithstanding three studies in which outcomes were worse for restorative justice. Some of the strength of the latter results was driven by a 46 per cent reduction in reoffending for studies that compare those who accepted restorative justice and those who declined it, a comparison biased by the likelihood that more compliant offenders accept restorative justice. Strang et al (2013) evaluate the effect of random assignment to restorative justice, counting cases where the offender declines restorative justice as restorative justice cases. All four meta-analyses found a statistically significant effect across combined studies in lower reoffending for restorative justice cases (compared to controls). The difference in the Strang et al (2013) study is greater selectivity, more exacting methodological standards for inclusion in the meta-analysis. Only 10 studies were included, all randomised controlled trials. The overall result was the same - a modest but statistically significant crime reduction effect.

None of those most intimately involved in the development of restorative justice ever predicted huge crime reduction effects because we all saw badly managed conferences that made things worse rather than better. A banal kind of counterproductive restorative justice, for example, is where either the victim or the offender did not turn up, pulling out at the last moment, leaving the other side angrier than they would have been had reconciliation never been attempted (Strang 2002). We were disappointed in the extreme weakness of the effectiveness of restorative justice in preventing property crime in the Strang et al (2013) evaluation as those results started to come in, with one Canberra experiment actually finding slightly more crime for the property offenders who went to restorative justice (though not a statistically significant difference). At the same time we were amazed at more than a 40 per cent reduction in reoffending (compared to controls randomly assigned to court) in the first year outcomes of the RISE youth violence experiment in Canberra (which reduced in year two), and even more surprised when a reduction in reoffending in one of the British violence experiments also achieved a 45 per cent fall in offending over two years. The reductions in the other violence and mixed violence and property experiments in the Strang et al review are still very substantial, but at about half this level.

What we have is some studies (mainly with property crimes) showing disappointingly inconsequential effects of restorative justice and others (mainly with violent crimes) showing surprisingly large effects. The puzzle lies before us to explain why restorative justice interventions often disappoint and often surprise with the size of their effects. It was a great surprise to me as the person who initiated the invitation to Lawrence Sherman and Heather Strang to conduct this independent evaluation of what we were doing in Canberra that a two-hour intervention could ever produce a huge reduction in reoffending. How could it be that just two hours in a life is not overwhelmed by all the other things that happen to a person in all the other hours that pass in successive years?

Criminologists in my lifetime became cynical, overly cynical, that even rehabilitative interventions that ran for days, weeks and years could not have a substantial impact on lives overwhelmed by all

manner of toxic elements that are present every day, every week. So what foolishness led us to believe that a two-hour intervention could make a difference? I return to that after first balancing the narrative by pointing out that not all literature reviews conclude that restorative justice is effective. Indeed restorative justice sceptics still abound. The most recent important contribution of that kind is by Weatherburn and Macadam (2013). Weatherburn and Macadam (2013) do not consider my own more wide ranging review of the literature (Braithwaite 2002)[1] but begin their analysis by concluding that many of the early studies have methodological limitations and that the earlier reviews (pointing to Latimer, Dowden and Muise (2001), Bonta et al (2006) and Sherman and Strang (2007)) show only modest effects on reduced reoffending). No great disagreement there.

Having concluded that there is nothing up to 2007 to suggest that restorative justice works very well, Weatherburn and Macadam proceed to review studies since 2007. Of the 14 studies that passed their tests of methodological adequacy, only 8 from 2007 reported any statistically significant reduction in reoffending.[2] None of these studies concluded that restorative justice made things significantly worse (a different result from earlier reviews that concluded some interventions had made things worse). If one added the results of Weatherburn's post-2006 studies with the numbers from the earlier meta-analyses of Latimer et al (2001), Bonta et al (2006) and Sherman and Strang (2007), the fundamental result would be unchanged – a modest but statistically significant effect overall. That is, the pattern of results in these studies from 2007 on is a rather similar pattern to the earlier work. Indeed, a higher proportion of Weatherburn and Macadam's post-2006 single studies are reporting a statistically significant effect and a lower proportion (zero) a counterproductive effect. Wong et al's (2016) meta-analysis included even more recent studies and added search for studies published in French, reinforcing this repeatedly similar pattern of results regardless of which review methods are adopted. Of the only 21 studies that passed Wong et al's (2016) criteria for methodological quality, only 15 found a reduction in recidivism for juveniles and only 12 a statistically significant reduction. Overall the reduction in reoffending was again modest but statistically significant.

So I read Weatherburn and Macadam as providing a broadly similar reading of the facts on a narrower set of findings to the Braithwaite (2002) review. Weatherburn, Macadam and I also share some cynicism about meta-analysis in comparison with qualitative diagnosis of many individual studies. Perhaps I go even further than Weatherburn and Macadam in that regard, in that I am prepared to interpret non-quantitative data, such as that in Braithwaite and Gohar (2014), as providing strong qualitative evidence that restorative justice can reduce serious violence with extremely high cost-effectiveness in the most difficult of conditions.

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[1] They do refer to Braithwaite (1989) as reviewing evidence on the effectiveness of restorative justice, which it does not.

[2] Four of out of 10 if a higher standard of methodological stringency is applied, and then Weatherburn and Macadam (2013) argue that the correct interpretation of one of these is that it is only significant at the .01 level. If we buy 3 out of 10 as the best descriptive statistic, my conclusion in the text continues to hold.

Those of us who see limits of a myopic focus on meta-analysis of randomised controlled trials, as in the Cochrane and Campbell collaborations, must concede, however, some important strengths to that approach. One was revealed right at the beginning when I first recruited Lawrence Sherman in 1993 to conduct an independent randomised controlled trial of the restorative justice innovations Terry O'Connell, John McDonald, David Moore, Peta Blood and others were refining with me in Australia. Sherman asked what my theoretical predictions would be about percentage impacts at different times of follow-up. It was 23 years ago so I do not remember exactly the numbers I proffered, though I am sure it was a lower effect size than actually found in Strang et al (2013).[3] What I remember is Sherman's response—'If you only expect an impact as small as that, we will need to randomize many thousands of cases to deliver the statistical power capable of detecting such a small effect.' But of course that is a way meta-analysis comes into its own twenty years later. You can end up with a situation decades on that is exactly the current state of play with the evidence on the effectiveness of restorative justice. Many studies are so methodologically flawed that they should be simply dismissed; many useful studies show statistically insignificant reductions of reoffending on sample sizes too small to have the statistical power required; yet when these data sets are combined, the meta-analysis shows a modest statistically significant reduction of offending from the combined data sets. One study at a time, the Strang et al (2013) studies actually show a lower success rate for restorative justice than Weatherburn and Macadam (2013) when 'vote counting' based on statistical significance is the approach adopted. It is the combined data sets with their greater statistical power that detects a significant reduction of reoffending.[4]

Weatherburn and Macadam also implicitly agree with Braithwaite's (2002:95-102; Braithwaite and Braithwaite 2001: 62-69) view that the most important thing about restorative justice is whether it puts offenders (and victims) into follow-up rehabilitation programs that make things better or worse.[5] One

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[3] I think it may have been 10 per cent lower crime in the first year, eroding to a zero effect in the course of a decade.

[4] Weatherburn and Macadam (2013: 14) disagree, concluding that 'Pooling data from separate studies is unwise where there is any reason to believe that program effect estimates may be biased in a particular direction. Since RJ is generally reserved for offenders who are not as serious or persistent as those referred to court and the controls in many RJ studies are weak, estimates of the effectiveness of RJ in reducing re-offending are likely to be biased upwards'. This is an odd conclusion in relation to the Sherman and Strang (2007) analyses, which are limited to randomised controlled trials where there should not be (and in the event is not) the kind of bias which Weatherburn and Macadam (2013) give as a reason for ignoring pooled results.

[5] Though Don Weatherburn does have a tendency in his writing and media discussion of his findings to see restorative justice 'dogma' as a competitor with other rehabilitation programs rather than a delivery vehicle for those very programs. Oblivious to the restorative justice literature, he wants to position two hours of restorative justice as less effective than sustained investment in repeated rehabilitation sessions of various kinds. This because the best rehabilitation programs report more consistently statistically significant results. In contrast, Lawrence Sherman (personal communication) reads the effect size for crime reduction in the 2013 restorative justice Campbell Collaboration review as similar to that in the in the 2012 Campbell review by Anthony Braga et

of the many ways restorative justice can make things worse is by putting young people into programs like boot camps and scared straight programs that worsen reoffending. The most important finding of the original Latimer, Dowden and Muise (2001) meta analysis was that by far the largest effect size of restorative justice was not on reoffending, but on completion of whatever is agreed by the restorative justice conference. Counterintuitively, if a court orders the payment of compensation to a victim, attendance at a drug rehabilitation or anger management program, this is much less likely to actually happen (or be completed) than if it is agreed by a restorative justice conference. It is a counterintuitive result because if you fail to do what a judge orders, you are in contempt of court, which can be sanctioned by imprisonment. In contrast, almost everywhere there are no legal consequences if you fail to complete a restorative justice agreement; it is just a voluntary agreement.

Probably the reason for this result is that families are more effective in informally enforcing voluntary agreements they sign than police are in enforcing orders that judges sign. At least that has been my interpretation of the data (Braithwaite 2002). Both a weakness and a strength of restorative justice follows. If restorative justice conferences agree on the remedy that the theory and evidence indicates is counterproductive (like a shoplifter wearing an "I am a thief" t-shirt outside the shop, as happened once in the Canberra program), this is more likely to actually happen than if it is ordered by a court. Conversely, if the restorative justice conference agrees on completion of a drug rehabilitation program that actually works, the offender is more likely to complete the program as agreed than if she is ordered to do so by a judge.

Braithwaite (2002: 95-102) and Braithwaite and Braithwaite (2001: 62-69) argue that potentially the greatest strength of restorative justice is as a superior delivery vehicle for rehabilitation programs that work. Then the challenge becomes one of communicating to families that they need to own the rehabilitation options they choose for the family. At the same time, facilitators should put families in touch with experts they might listen to about what works (and who around here can help put you into it) and what is counterproductive. In this we learnt so much from the empirical work of Joan Pennell and Gale Burford with their family group decision making approach in both Canada and the United States (Burford and Pennell 1998; Pennell and Burford 1995, 1996, 1997, 2000). In their programs, families make the final decisions to commit to rehabilitative and preventive programs, but professionals are on tap to be called into family group decision making meetings to write options and local service providers up on butcher paper as required. Braithwaite (2002:95) agreed with Ken Pease (1998) that criminology's problem is not in knowing what works in preventing crime, but in motivating stakeholders to implement what works. Restorative justice is one of the most promising approaches

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al. and other meta analyses of hot spots policing (eg Braga 2005; Braga and Weisburd 2012)—the innovation for which Sherman's work is best known. Sherman is critical of reviews such as that of Weatherburn and Macadam (2013) (and indeed my own) for 'vote counting' that puts too much emphasis on significance and not enough on effect sizes. For me the critical effects of restorative justice are about what it enables more than these direct effects.

we have for solving this problem. Notwithstanding the paradigmatic advances in the work of scholar-practitioners like Burford and Pennell, we are only at the beginning of learning how to redesign restorative justice so that it improves the quality of the choices empowered families make in how to respond to injustice.

Widening the lens

So while Don Weatherburn presents himself as a restorative justice sceptic, he actually substantially shares in the consensus about the pluses and minuses of restorative justice that continues to be surprisingly accurately captured by the qualitative review in *Restorative Justice and Responsive Regulation* (Braithwaite 2002). One of the many ways that literature review was more exhaustive was that crime prevention was not seen as the most important outcome of restorative justice. By civic republican lights, the most promising thing about restorative justice is that it conceives the judicial branch of governance, rather than the executive and legislative branches, as the best venue for renewing the democratic spirit among citizens who are jaded about the democratic project, who have lost trust in government. Restorative justice gives adult citizens a genuine say in something they deeply care about – what the state is to do about their children when those children suffer some abuse, or perpetrate some abuse, that gets them into serious trouble with the state.

Restorative and responsive justice in schools not only works in preventing school bullying, thereby preventing future crime (for a review, see Morrison 2007). When it teaches children how to confront problems like bullying in their school dialogically and democratically, it teaches children how to be democratic citizens. We are not born democratic. We must learn to be democratic in families and schools. For many of us, that is what restorative justice is most virtuously about. For a complementary paper that assesses this democracy-building potential of restorative justice, see Braithwaite (forthcoming).

Because of that democratic empowerment quality of restorative justice, the evidence suggests that restorative justice helps victims of crime more powerfully than it helps offenders (Strang 2002; Strang et al 2013; Strang 2012; Braithwaite 2002; Poulson 2003; Angell et al forthcoming), even though a minority of victims are left worse off as a result of restorative justice. Victims are disempowered by the justice systems of modernity (compared with many systems of pre-modern and early modern centuries). Restorative justice reduces victim fear, post-traumatic stress symptoms, victim anger, vengefulness, victim beliefs that victim rights have been violated and increases victim feelings of personal safety and their belief that justice has been done. A problem is that the system has become excessively captured by justice professionals in the interests of justice professionals. Hence, discourtesies as basic as not informing victims of the date of their offender's trial, or what happened in that trial, are endemic.

Whether it is self-harm by victims, offenders, mothers or children of offenders or other third players caught up in justice processes, it is more important to evaluate restorative justice in terms of the contribution it makes to reducing self-harm than harm against others. This is because criminal justice practices are major causes of self-harm and self-harm is a bigger problem than violence in all developed societies. The United States has two and a half suicides to every homicide; the United Kingdom 12; Japan, South Korea and Slovenia more than 30.[6] And suicide is more widely underreported than homicide. This goes to the importance of work like that of Sherman and Harris (2014) in showing a 64 per cent increase in death rates for all causes among misdemeanor domestic violence victims over 23 years after their abusers were randomly assigned to arrest, in comparison to the police issuing a warning but not arresting the abuser.

Reclaiming voice for families, friends and victims in justice processes is an important democratic project. Justice professionals retort that they are not in the business of revitalizing democracy or doing justice therapeutically; rather they are in the business of doing justice justly/effectively and that is all they are given taxpayer funding to do. Here is where we should go back to the British work of Joanna Shapland et al (2008), discussed in the Strang et al (2013) review. Shapland et al found that benefits of restorative justice exceeded costs by a ratio of eight to one. The likelihood is that if we divert many of the resources currently going into the pockets of justice professionals to restorative justice programs that empower communities, we can enrich the democracy and reduce the cost of the justice system, while also advancing narrowly conceived justice objectives like crime prevention.

Restorative justice is not just about strengthening justice systems or strengthening democracy. It is also about strengthening communities, families and schools, which have profound value in themselves independent of the contributions they make to democracy or justice. We have a long way to go in learning how to evaluate how restorative justice can be improved so as to be more effective in strengthening individual people as human beings, as well as the families, schools and communities that nourish their humanness (Braithwaite 2002). My current work is beginning to show that criminal justice systems can do less harm as one cause of civil war in conditions of modernity and can actually make a contribution to reducing prospects of civil war in difficult environments like the northwest frontier of Pakistan with Afghanistan, through indigenous justice that is restorative combined with state protections of rights (Braithwaite and Gohar 2014; Braithwaite 2002: Chapter 6).

Is responsive regulation effective?

Responsive regulation locates restorative justice as just one strategy in a hierarchy of strategies for regulating a problem of concern. In terms of the shift in evaluation strategy advocated here, the evidence that restorative justice is effective is the most important kind of evidence to attend to for the

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[6] These comparisons are derived from an internet search of 'suicide rate by country' and 'homicide rate by country' for the latest World Heath Organization and United Nations Office of Drugs and Crime data respectively for the most recent year available (2011 or 2012 at the time of search in 2014).

evaluation of responsive regulation. Normally, restorative justice is privileged as a preferred strategy to more interventionist and punitive ones based on incapacitation or deterrence (See Figure 1). The idea of the responsive regulatory pyramid is to have a presumption in favour of solving problems at lower levels of the pyramid if possible. Figure 1 implies that in addition to evaluating whether responsive regulation can be effective in terms of whether restorative justice works, it is also important to evaluate it in terms of whether deterrence and incapacitation can be effective as strategies integrated with restorative justice. This is the subject of complementary paper (Braithwaite 2016). That paper argues that deterrence and incapacitation effects are not large, but that dynamic deterrence embedded in pyramidal escalation is more effective and legitimate than passive deterrence.

<INSERT FIGURE 1 HERE>

Responsive regulation generated interest as a 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 (Braithwaite 1985; Ayres and Braithwaite 1992). The pyramidal presumption for persuasion initially 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 persuasion fails, a 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, a business regulator finds that they try restorative justice and it fails; they try escalating up through increasingly 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 (Coffee 1981: 389-93).[7] Perhaps the most common reason in business regulation for successive failure of restorative justice and deterrence is that non-compliance is neither about a lack of goodwill to comply nor about rational calculation to cheat. It is about management not having the competence to comply. The managers of

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[7] Precisely when the stakes are highest with a crime, the law enforcer is likely to fall into what Coffee (1981) 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 jeopardise 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 player that can afford quality legal advice. Imagine that the average returns to insider trading are $3 million. Under a crude expected utility model, it will then be rational for the average insider trader to continue unless the penalty exceeds $300 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 status.

a nuclear plant simply do not have the engineering knowhow for the demands of safe nuclear production. They must be removed from their position of control. Indeed if the entire management system of a company is not up to the task, the company might lose its license to operate a nuclear plant. So when deterrence fails, the idea of the pyramid of sanctions is that incapacitation is the next port of call (see Figure 1).

Please listen

The demeanor of the responsive regulator, like that of the restorative justice practitioner, 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, 2) communicates that resolve in an 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 goes away. Figure 2 illustrates the idea of responsive regulation in the pyramid that the Australian Office of Transport Safety designed with its stakeholders.

<INSERT FIGURE 2 HERE>

We know from the child development literature that parents who 'natter' at their children (rather than confront them with firm resolve against bad behaviour) are ineffective at preventing harmful behaviour such as violence (Patterson 1982; Patterson et al 1992; Eddy et al 2001: 277-278). Such nattering parents shout at a son, 'Stop hitting your sister' on the run as they move from dining room to kitchen without even pausing to ensure that the violence ceases, let alone eliciting understanding of why violence is so disapproved.

From the large evaluation literature on motivational interviewing we know that to change behaviour one of the things we must do is genuinely listen to narratives of non-compliance. There have been more than 80 randomised controlled trials that have been mostly supportive of the efficacy of motivational interviewing (Burke et al 2003; Lundahl et al 2010; Regoli 2007).[8] Most critically in the motivational interviewing evidence, the listening must lead to agreement on desired outcomes and self-monitoring and/or external monitoring of progress toward outcomes. That commitment is secured in the motivational interviewing method by helping people to find their own motivation to attain an outcome. Responsibility for arguing for change passes to clients; it is the client who must come to believe they have the resources and capabilities to overcome the barriers preventing them from changing their behaviour. Miller defined this approach to motivation in the early clinical work on motivational interviewing.[9] In the translation of his approach to regulation (broadly conceived to

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[8] 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 Moyers et al 2005).

[9] Motivational interviewing is defined by Miller and Rollnick (2004) as a directive, person-centered clinical method

include crime control), we replace 'clinician' with 'regulator' and 'client' with 'regulatee':

- Regulation should be collaborative; the regulator values the strengths of the regulatee in the journey to achieve change; the regulator draws on the regulatee's values, motivations, abilities and resources to help the regulatee to 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 their ambivalence and move in the direction of positive change

- The regulator focuses their conversations with the regulatee on the statements of the regulatee and emphasises the 'change talk' in those statements to strengthen the regulatee's motivation to bring about change

- 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 regulate and then to commit to a joint regulator-regulatee plan for monitoring progress.

- To effect this change in approach: listen with empathy; nurture hope and optimism[10]

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for helping clients resolve ambivalence and move ahead with change. Motivational interviewing was originally developed to assist problem drinkers (Miller 1983). 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 (Miller and Rose 2009). Further, when combined with another active treatment motivational interviewing has achieved larger and longer lasting effects (see Hettema et al 2005).

[10] These dot points are adapted from a Powerpoint presentation by Stan Steindl. 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. Miller and Moyers (2006) and Miller and Rollnick (2004) were also important in formulating them

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 3) mirror much of what emerges in Valerie Braithwaite's work on motivational posturing and regulation (1995, 2003 and 2009), on trust and governance (1998) and hope and governance (2004).

<INSERT FIGURE 3 HERE>

Ann Jenkins (1994) research on our 1988-91 nursing home regulation data showed the importance of 'confidence' or 'self-efficacy' in regulatory compliance. It is easy to grasp the intuition that we achieve more against our outcomes on those days when we arrive at work with a feeling of confidence that we can tackle them. So clear empirical evidence that self-efficacy of managers predicted future regulatory compliance was not a surprise. 'Importance' in Figure 3 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 (Hirschi 1969; Hirsch & Gottfredson 1983; Gottfredson and Hirschi 1990; Pratt & Cullen 2000; Gottfredson 2009). In the motivational interviewing literature, 'Readiness' is operationalised 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. We have the feeling that life is short and there are good and bad sides to everything. So we often focus on the bad side and take the lazy path of not making a change we know we should bother to make. This insight comes early on in the criminological literature in the brilliant ethnographic work of David Matza (1964) on *Delinquency and Drift.* Delinquents often have little commitment 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 drifting into 'techniques of neutralisation' that soften the moral bind of law (Sykes and Matza 1957).[11]

Responsive regulators are therefore skilled at what the counseling literature conceives as Rogerian reflective listening, listening that reflects back commitment to achieve outcomes grounded in motivations chosen by the speaker (Rogers 1951).[12] This is a very common human skill that good parents have. It rolls with resistance rather than arguing combatively, while communicating commitment to stick with the problem until it is sorted. Though there is a 'high moral ground' that law enforcers must enforce when faced with exceptional intransigence to ensure that clear messages are

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[11] The main repeatedly observed techniques in ethnographic work, including my own on business regulation (eg Braithwaite et al 2007), are: (1) denial of responsibility (eg 'I was drunk'); (2) denial of injury (eg 'they can afford it'; (3) denial of victim (eg 'we weren't hurting anyone'); (4) condemnation of the condemners (eg 'they're crooks themselves'); (5) appeal to higher loyalties (eg 'I had to stick by my mates').

[12] 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 (Rogers 1951).

delivered to third parties about what is morally unacceptable, in routine regulatory encounters taking the moral high ground tends to be counterproductive.

Nurture motivation to continuously improve

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 and legal compliance in the two years following an inspection was strong (Makkai and Braithwaite 1993). 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 (Braithwaite et al 2007: chapter 4). The reason was fear that the evidence of praise would be used as a defense (should the firm subsequently be taken to court). Responsive regulatory theory interprets this as a most misguided policy. In response to this evidence, recent years have seen the development of a pyramid of supports to complement a pyramid of sanctions (Braithwaite 2008).

Regulation based on static rules ossifies industry standards at the state of the art at the time 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.[13] These objectives are intertwined because when compliance costs fall, compliance tends to rise. It is rarely a good path to innovation for states to set standards and tell industry exactly how to achieve them. 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 Braithwaite et al 2007). 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 cars up through an old ceiling (Mikler 2009).

When we say 'help leaders pull laggards up through new ceilings of excellence',[14] we are conceiving all regulated actors as potential leaders. In any workplace, everyone is capable of being the leader of

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[13] Australian aged care 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 Braithwaite et al 2007).

[14] For the most interesting empirical study of leaders and laggards and the empirical limitations of this approach see Gunningham & Sinclair (2002).

excellence on something. You might be the best researcher in your research group, but the most junior person in the group might be 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 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 (NCCNHR 1987). 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 (Braithwaite et al 2007). This allows even nursing homes that have low managerial self-efficacy—because everyone knows they are 'bottom-feeders' of the industry—to build their self-efficacy by excelling in something (Jenkins 1994). On that challenge, they can become 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 champion in something, dragging up the standards of the laggards across the industry on that outcome (see the responsive South Australian environmental regulatory strategy in Figure 4).

<INSERT FIGURE 4 HERE >

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 (Ayres and Braithwaite 1992: Chapter 2). Braithwaite (2002: 106-109) argues that escalating up the pyramid to deterrent sanctions can often make things worse, especially at the middle levels of a pyramid, before they get better. 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.

<INSERT FIGURE 5 HERE>

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 contextual counterproductivity. Therefore one must deploy a mix of regulatory tools; and the best way to do so is dynamically, so, in sequence, the strengths of one tool can be given its 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. 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, as it does (Rickwood and Braithwaite 1999). Regulators must be the change they want to see by communicating openly with stakeholders. More than that, they do best to include the industry and other stakeholders in their processes of pyramid design. This is of a piece with Pennell and Burford (2000) including families in restorative processes of family group decision-making. Pyramid design workshops that are inclusive of the industry, the regulator and NGOs that 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 with a challenge like the regulation of prostitution, the regulator and the industry listens to an NGO (such as a sex worker's union or a feminist group) saying they will escalate to a complaint to the minister, then a press release, then a broad-based community campaign if confronted with captured regulation. The industry says if it faces unfair or vexatious enforcement it would escalate to complaint 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 defiance effects in Figure 5 because the industry is more likely to say, 'We all did agree that this escalation is exactly what would be right for the regulator to do in response to what my staff have tried to get away with here'.

Second, 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.

Unfortunately we have no research that randomly assigns regulatory agencies or individual regulators to regulate responsively as opposed to controls who follow some more standardised 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 post- (responsive) versus the pre- (non-responsive) period (Braithwaite 2005). Valerie Braithwaite and I tried in vain to persuade that regulator to randomly assign companies to the pyramidal versus the standardised approach. Until that is done, the warrant for confidence in responsive regulation as a general strategy will remain limited.

That said, in 2016 the non-experimental evidence based on comparisons with control groups became much stronger that having a responsively mixed set of strategies is much more effective than having a single punishment or persuasion strategy. Choi, Chen, Wright, and Wu (2016) set out to test the effectiveness of the historical construction between 1992 and 2006 of the Australian Securities and Investment Commission's (ASIC) responsive regulatory pyramid. The Choi et al (2016) analysis showed that as successive law reforms progressively equipped ASIC with new layers of more varied arrows in its law enforcement quiver, the effectiveness of ASIC enforcement progressively increased. A difference-in-difference analysis with the impact of New Zealand securities and financial market regulation as a control reinforced this result. Choi et al. were interested in the effectiveness of securities regulation in making markets more transparent to investors and therefore more efficient and hopefully less prone to artificial bubbles that burst. The ASIC outcome of concern was whether the market was fully informed. Did regulation produce an improved information environment and market liquidity? Hence, Choi et al. measured the impact of the Australian and New Zealand financial disclosure regimes by variables such as reduction in financial analysts' forecast errors, forecast dispersion, bid–ask spread, and increase in the turnover rate from the market liquidity test. The ASIC budget and enforcement intensity (measured by prosecution counts) helped analysts to reduce forecast errors for future profits. The responsive regulation effect more strongly increased predictive accuracy over and above those impacts on the integrity of markets. The leverage in such data was formidable with an Australian sample of 148,498 firm-month observations (with each observation based on the median for a number of analysts) and a New Zealand sample of 116,585.

The Choi et al (2016) research has the strength of a multiconstruct, multimethod move to a pooled time-series, cross-sectional analysis of all major corporations in an economy on an outcome that securities enforcement is designed to deliver, combined with a difference-in-difference analysis of two whole economies. It delivers a larger *n* of observations than research in the criminological paradigm could ever manage while going to questions of central criminological relevance.

The second important contribution of 2016 did not include the first, but did embrace in the most comprehensive way to date the entire vast literature on corporate deterrence, or at least that sub-set of it that can meet the standards of a Campbell Collaboration meta-analysis. Natalie Schell-Busey, Sally Simpson, Melissa Rorie, and Mariel Alper (2016) found no evidence for the effectiveness in reducing crime of any single measure of corporate deterrence. Like Choi et al (2016) they did find evidence for the regulatory effectiveness of a mix of different forms of punishment and persuasion:

> Our results suggest that regulatory policies that involve consistent inspections and include a cooperative or educational component aimed at the industry may have a substantial impact on corporate offending. However, a mixture of agency interventions will likely have the biggest impact on broadly defined corporate crime. . . . Single treatment strategies . . . have minimal-to-no deterrent impact at the individual and company levels. However, studies examining multiple treatments produce a significant deterrent effect on individual- and corporate-level offending. . . . Based on

our results, we determine that a mixture of agency interventions is apt to have the biggest impact. (Schell-Busey et al., 2016)

Braithwaite (2016) argues and cite evidence that had the Schell-Busey et al (2016) outcomes of interests been broadened beyond 'reducing crime' to reducing workplace deaths, reducing environmental protection and like regulatory outcomes, which are actually the outcomes more commonly and more importantly measured in the public policy literature, the Schell-Busey et al (2016) conclusion about the imperative for a mix of strategies is even more convincingly reached.

The imperative now is for research that tests small elements of the approach, and several of them in combination, such as the proffering of praise (Braithwaite and Makkai 1993), eliciting pride (Ahmed and Braithwaite, 2011), eliciting trust (Braithwaite 1998; Braithwaite and Makkai 1994; Murphy 2004), building self-efficacy (Jenkins 1994, 1997), open communication (Braithwaite 1985), eliciting of responsive motivational postures (Braithwaite 1995, 2003, 2009), engagement of third parties such as trade unions in safety regulation (Braithwaite1985), proffering procedural justice and restorative justice Braithwaite 2002: 78- 79; Makkai & Braithwaite 1996), reintegrative shaming and avoidance of stigmatisation (Makkai & Braithwaite 1994a)., movement in tit-for-tat fashion between one level of a pyramid and the next (Nielsen & Parker 2009: 3; Parker, 2006), and projection of deterrence from the peak of a pyramid (Braithwaite & Makkai, 1991; Makkai & Braithwaite 1994b). The ultimate conclusion of this essay is, nevertheless, that this kind of evidence on what works at different layers of the pyramid is more important in any case. This is because there is ultimately a degree of self-evident truth in the proposition that if we stick with a problem by trying one prevention strategy after another until the problem disappears, we will have caused the problem to disappear. Only a degree of truth, as I now explain.

Criminologist John Eck has considered research that makes general claims. Then he distinguishes this from contextual research that concludes a problem has been fixed in a particular context. Then in the following quote he considers the communication of 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 program. . . [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 heavy reliance on theories of physics and materials, plus pre-implementation analysis and planning, coupled with evaluations of catastrophic failures (Eck 2002).[15]

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, grounded in a body of practical experience, yet also grounded in a responsive analysis of the context is likely to succeed more often than a guess. Listening and learning helps spread news of types of interventions that have often been associated with a problem disappearing in the past. That makes 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 assume it will work in future and we hedge its promise with other layers of the pyramid that hold out different theoretical bases for their promises of effectiveness.

Randomised controlled trials showing that a particular kind of intervention makes things worse means that experts must be given voice in the deliberative process to argue against deploying this strategy. Evidence-based theories provide an array of generative metaphors to guide disparate, redundant attempts to improve things through a variety of approaches that the evidence suggests can be encouraging at least in some contexts. 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.

Epistemological and methodological challenges

The evidence is convincing that both restorative justice and responsive regulation can be powerfully effective as regulatory strategies. At the same time, the evidence is limited that these strategies are *consistently* effective as regulatory strategies. It seems likely that this pattern will always prevail even as the empirical evidence becomes more illuminating about the limits and strengths of restorative justice and responsive regulation. Why is this?

First, they are general strategies of regulation where regulation is conceived very broadly as 'steering the flow of events' (Parker and Braithwaite 2003). By my theoretical lights, restorative justice and

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[15] In this work Eck relies on the research of Dorner (1997) and Petroski (1992).

responsive regulation are conceived as relevant to micro behaviours such as bullying in schools and workplaces, to intra-family relationships, to intermediate forms of regulation such as the regulation of gangs that engage in crime, of small businesses paying tax or complying with environmental laws, up to the macro regulation of capitalism, its commanding heights, global financial crises and up to the regulation of international conflicts between states and the global war on terror. But they are unlikely to be relevant to all kinds of micro and macro problems. Reviews of the evidence for the effectiveness of general strategies of this kind can only be systematic if they are focused.

So a review such as that of Weatherburn that counts studies assessing whether restorative justice reduces 'crime' is no longer the most useful kind of work to do because we know that the effectiveness of restorative justice on its own is weak at best with minor property crimes that account for most of the restorative justice in timid and conservative jurisdictions (such as Weatherburn's New South Wales); equally, the evidence for restorative justice being effective, even on its own, with serious crime and particularly violent crime is most encouraging (eg Strang et al 2013). Moreover, the Campbell Collaboration review suggests that restorative justice may be more effective when it is integrated with court justice (as opposed to sharply distinguished from it—as responsive regulatory theory suggests it should (Strang et al 2013). The evidence is very preliminary on this, however. The Canberra results suggest that sending a case to court blunts the 'Sword of Damocles' of future-oriented deterrence, while sending a case to restorative justice sharpens the Sword of Damocles of a future court case. Deterrence theory in criminology has slowly begun to realize that the kind of dynamic deterrence responsive regulatory escalation can deliver is superior to the static deterrence of economic and criminological theory (see Kleiman 2009; Kennedy 2009; Braithwaite 2015). Integration of dialogic and deterrent strategies in programs like Operation Ceasefire in Boston and Operation HOPE in Hawaii have encouraging evaluation support, as discussed in those works.

So we need reviews of the evidence for the effectiveness of restorative and responsive regulation on something as focused as small business tax compliance, as Valerie Braithwaite began to assemble through a hundred working papers of the Centre for Tax System Integrity,[16] of the evidence of the effectiveness of restorative justice and responsive regulation combined on something as focused as anti-bullying programs in schools, as Brenda Morrison (2007) has begun to supply in her research. Very little systematic empirical work of that kind has been done across this myriad of more focused topics. And little work has been done that compares the alternative iterations of integrated suites of strategies, as opposed to artificial experiments on one-shot strategies.

Even at that level of enhanced focus, the most useful kind of research is on the effectiveness of different kinds of rehabilitative or preventive strategies that might be selected for integration into a sequence of restorative circles for serious repeat offenders. Restorative justice and responsive regulation are strategies for choosing multidimensional approaches to solving problems. As already

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[16] http://regnet.anu.edu.au/ctsi/publications

explained with respect to restorative justice, success may depend less on those meta-strategies for the selection of strategies than on the success of the approaches they select. The same is true of the wisdom of each of the strategies deployed at different layers of a regulatory pyramid. If restorative justice and responsive regulation are applied to a particular problem with frequent agreements to do things that the evidence indicates is effective for that problem, then restorative justice and responsive regulation should be potent in reducing that problem.

Conclusion: loops of restorative and responsive learning

Responsive regulation shares with restorative justice the quality of being, well, responsive. Restorative and responsive regulation listens to the wisdom of stakeholders as to what should be done about the problem in situations where those stakeholders have a lot of contextual experience. It follows up interventions through monitoring by the stakeholders as to whether interventions are working and ideally a 'celebration conference' when an agreement is successfully completed. It is a strategy that is responsive to complexity, to constantly changing regulatory environments and frequent changes in the responsiveness of those who are regulated. The response that issues is therefore flexible, multidimensional and layered into trying one strategy after another. Some of the responsively chosen strategies will be duds, counterproductive, others will reflect brilliant contextual problem solving by the stakeholders. Again, outcomes will probably depend more on the substantive choices made at different layers of the regulatory pyramid than on whether responsiveness was the strategy for choosing them.

More profoundly, restorative and responsive regulation is a strategy that assumes that most regulatory approaches fail in most contexts of their application. Business strategy for becoming more productive and innovative has taken up this prescription in recent years with guidelines like 'fail fast, learn fast, adjust fast' and 'try, learn, improve, repeat'. Even strategies strongly supported by systematic reviews, as we know from drug therapies in medicine, can fail more often than succeed in practice because doctors do not get the diagnosis quite right, do not get the dosage quite right, get dosage right but forgetful patients take the wrong dose at the wrong time (before rather than after meals, with alcohol), the doctor prescribes the drug too early or too late, prescribes it for patients taking other drugs with which this one has adverse interactions, or simply that the side-effects also found in the systematic reviews cause a bigger problem for this patient than the treated problem. Sure doctors need to be knowledgeable scientists, but they must also be diagnostically competent at failing fast, adjusting fast and learning fast. Clinical method improvement must complement experimental method improvement.

In assuming that practitioners of and stakeholders in regulation choose ineffective strategies most of the time, that side effects like self-harm can be more important than a treated crime problem, responsive regulation amounts to a policy prescription for how to keep trying new strategies in the face of recurrent failure. Just as the way to test the effectiveness of clinical methods is not to evaluate

the impact of a single visit to the doctor, but to evaluate a sequence of clinical encounters that finally iterate to an intervention that works, so we should evaluate restorative justice at the level of a sequence of circles rather than the impact of just one circle (as all the evaluation research currently does). Likewise, the best way to evaluate a restorative and responsive meta-strategy is to test the impact of iterated moves up and down a regulatory pyramid rather than one intervention at one layer of a pyramid. Improving the quality of the deliberative interface between experts who know what the research shows to be effective/counterproductive and local stakeholders with the power to contextually attune and deliver those outcomes is one key to a future where evaluation of meta-strategies might show large effects.

We could therefore give a tautological answer to the question of whether responsive regulation works. 'Of course it works to stop using a strategy when it fails and then to replace it with another that the evidence and the contextual diagnosis suggests is more likely to work.' Yet this may be wrong because only if we had stuck with the strategy that was failing it might have been given time to work. Triple loop learning is the responsive regulatory approach to listening and learning about such mistakes (See Figure 6). So a wing of a nursing home sticks with a particular kind of infection control strategy for longer than has occurred before and completely eliminates the formerly common eye infections on its wing. In the second loop of learning, every wing of every nursing home in that chain of nursing homes eliminates eye infections by sticking with that intervention. In the third loop of learning, the nursing home regulator sends out an advisory commending this learning to all its regulatees. Then there can be a fourth loop of learning where lessons spread from government to government and corporation to corporation around the world, as happened with learnings from New Zealand about better ways of doing restorative justice. Finally, a fifth loop is that practice leads theory to motivate researchers to randomly assign nursing home wings to the intervention.

< INSERT FIGURE 6 HERE>

Restorative and responsive regulation is an approach that takes all five of these loops of learning very seriously as an integrative approach to evaluation. Scientific myopia that ossifies our justice imaginations at the fifth loop of learning can be counterproductive. Focusing quantitative evaluation on some narrowed and static conception of intervention across a whole system can help us to fail fast, learn fast and adjust fast, but less so than when this fifth loop is integrated with the four prior loops of learning through monitoring.

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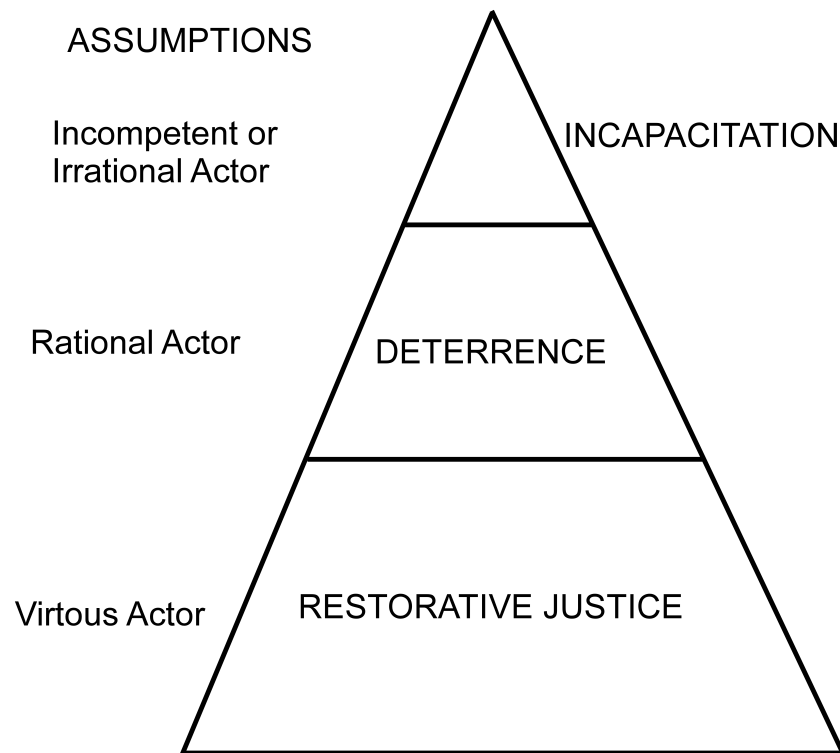Hettema, Jennifer, Julie Steele, and William R Miller 2005 Motivational interviewing. *Annu. Rev. Clin.*

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Figures

Figure 1: Toward an integration of restorative, deterrent and incapacitative justice

ASSUMPTIONS

Incompetent or
Irrational Actor

INCAPACITATION

Rational Actor

DETERRENCE

Virtous Actor

RESTORATIVE JUSTICE

Toward an integration of restorative, deterrent and incapacitative justice

Figure 2: Example of a responsive regulatory pyramid

RESPONSIVE REGULATION

Attitude to compliance   **Possible compliance responses**

Seriously disengaged   Prosecution

                                        Cancel Transport Safety Plans

Able but not willing   Injunction

                                        Enforcement order

                                        Compliance control direction

Willing but not always able   Vary / revise Transport Safety Plans

                                        Enforceable voluntary undertakings

                                        Infringement notice

Willing and able   Counselling

                                        Educate

Fully compliant   Maintain awareness

            Compliance responses aim to promote full
                    voluntary compliance

Australian Office of Transport Safety Responsive Regulatory Philosophy
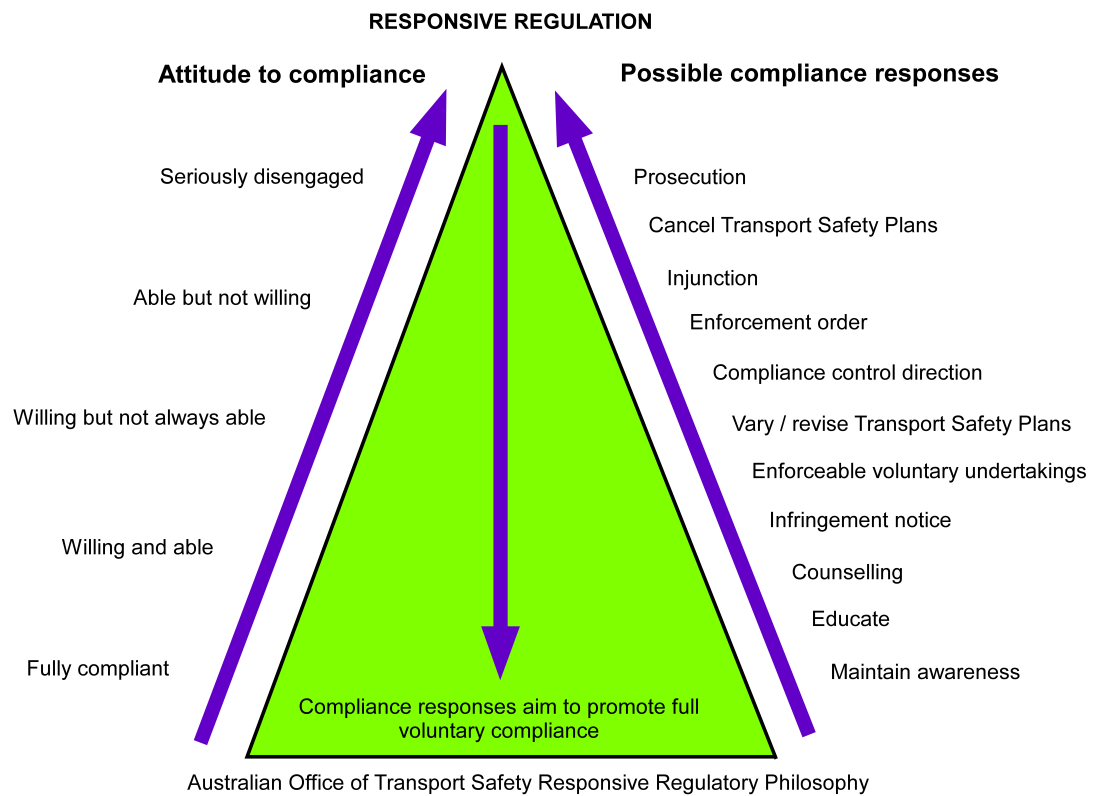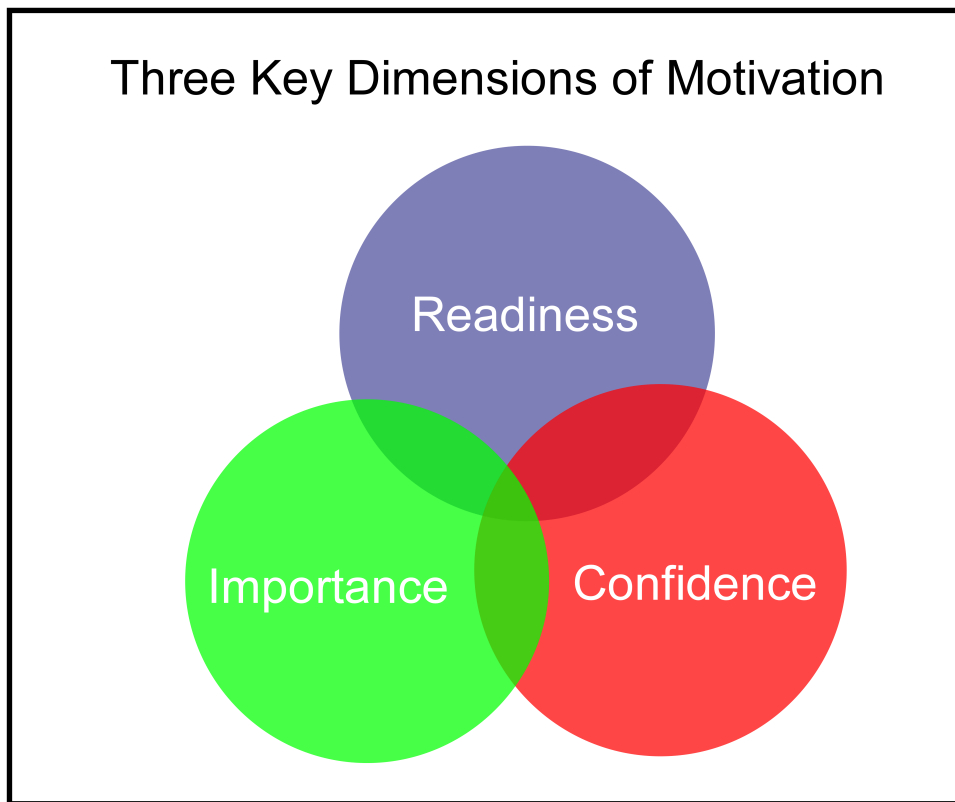
Figure 3: Three key dimensions of motivation (Source: Dr. Stan Steindl)

Source: Dr Stan Steindl

Figure 4: Supports and sanctions in the regulatory strategy of the South Australian EPA (Environmental Protection Agency)
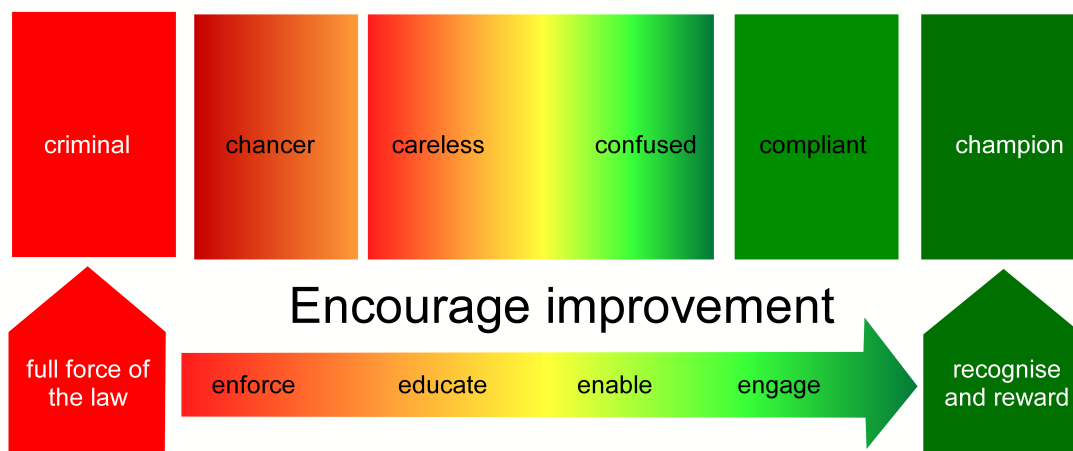
Figure 5: A theory of the effect of coercion on compliance as the net result of a capitulation effect and a defiant resistance effect. Based loosely on the experiments summarised by Brehm and Brehm 1981)
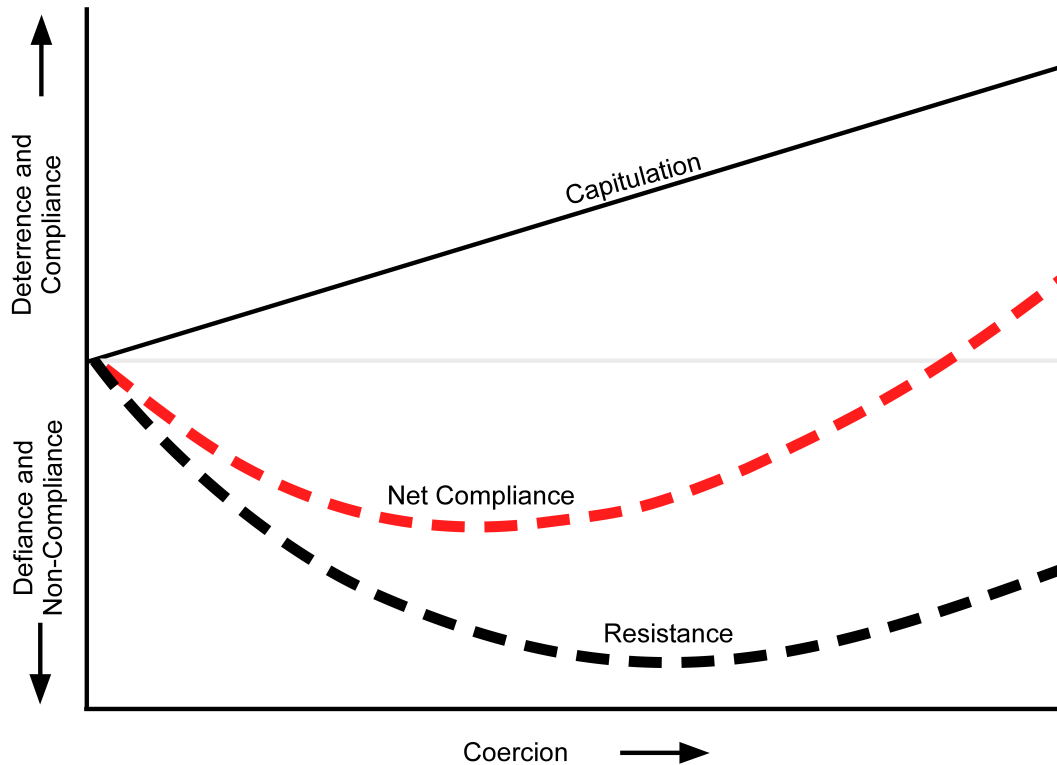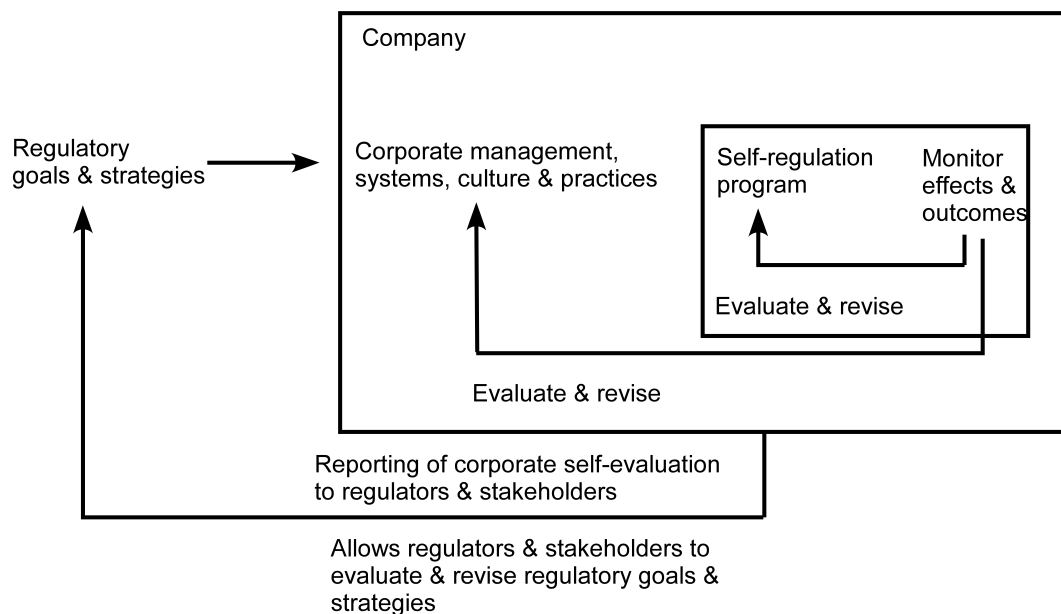

Figure 6: Christine Parker's (2002) model of triple loop learning

Source: Christine Parker, The Open Corporation (2002)