

Relational republican regulation

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Abstract

This response refutes point (i) in the Ayres comment's abstract. It argues that at its heart responsive regulation is about seeking strategies that will render regulation more relational when it counts. This is possible even in domains like tax compliance where 99 per cent of the routine regulatory action occurs without face-to-face encounter. A number of critiques in the special issue are embraced. While practitioners who reject civic republican values can learn from the responsive regulation literature, regulation conduces to tyranny if it is not explicit in a value commitment to reducing domination in the world. Concern that the republican elements of the argument have been insufficiently prominent in subsequent writing of the authors is therefore embraced. Freedom as non-domination requires a transnational regulatory vision for strategies with transnational leverage that reduce domination globally, not just nationally. A paradox advanced is that the largest regulatory errors of recent history on the global stage are best corrected by micro relational strategies invented with a global imagination for crafting micro–macro linkages.

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1. Community and scholarship

Regulatory scholars are a community. My experience of that community has been of engaged, critical, and constructive conversation that has greatly clarified errors and expanded horizons. Even when I think, as I often do, that critiques of responsive regulation are actually relevant to any kind of regulation,¹ I still learn from the constructive ways critiques are advanced. Thanks to the authors who have made such thoughtful contributions to this special issue and to Christine Parker for her intellectual stimulus and generous service in bringing us together.

Books are sometimes singled out as important, though they are just moments in an ongoing conversation. Books can be reified as something more if they resonate with (almost plagiarize) ways some community of practice is thinking at a moment in history. At the end of the Reagan and Thatcher eras, there was some such resonance and plagiarism of practice with *Responsive Regulation*. We might view that moment as unimportant, and value more the quality of the conversation and the evidence collected that issues from it.

That said, it is a tribute to the thinking and writing of Ian Ayres that this particular moment of co-authorship was the time during a long pre-history of conversations on

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responsive regulation where people became most engaged with things I had been failing to communicate. I first presented the pyramid idea to a class of Brent Fisse's students in 1983. The subsequent decade saw some rejections of a paper that sought to encapsulate the pyramid idea and rejection of a grant application to research it in the domain of nursing home regulation. My enforced self-regulation article (Braithwaite 1982)² and mine safety book (Braithwaite 1985) laid foundations for responsive regulation that were little read in the decade after their publication. The "benign big gun" part of my rejected pyramid paper was applied descriptively to one cluster of Australian business regulatory agencies in an analysis of data Peter Grabosky and I collected (analyzed with John Walker) on the 103 most important Australian regulators (Grabosky & Braithwaite 1986). Perhaps because this book was seen as a treatise on Australian table manners, Oxford University Press ordered 66 copies from its Australian subsidiary for the entire British and European markets.

Rather than narrow the pyramid idea in the way journal editors wanted, Ian and I concluded in our conversations at the American Bar Foundation and the Australian National University from 1990, that it would be richer combined with other ideas on partial industry regulation, the politics of capture, tripartism, republicanism, enforced self-regulation, and more. I still like the unity we crafted under Ian's leadership from such a chaotic set of components. The strongest criticism in this rejoinder is of Ian for understatement of his contribution. He wrote much more than he claims. Ian was also the intellectual spark who wove my faded ideas with his bright new ones into a more lively fabric.

The collaboration was a catalytic moment because of the character of humility and support that Ian brought to our relationship. Ian was younger, cleverer, and it was a struggle to keep up with the quickness of his mind. That brilliance was mellowed with kindness and character, which inspired me during that period. Just as regulation is about relationships, so is regulatory scholarship. I have been lucky in the quality of my co-authors along the way, many of them my closest friends, one my life partner. Ian is one in a meaningful tapestry of relationships that carries this conversation forward. I have more to say in this rejoinder not, as Ian says, because my contribution was greater, but because I continue to trudge away empirically at testing and refining responsive regulatory ideas, while Ian moved onto more influential contributions that made him a stellar figure at the interface of behavioral economics and law.

2. Integrative restorative and responsive ideas

I hope for a future to the responsive conversation that pursues more holistic ways of integrating ideas. It is sometimes suggested in the literature that the game theoretic version of responsive regulation came first and the restorative or republican versions later. The idea of the pyramid as a policy dynamic came first – a presumption for starting at the base of the pyramid, for gradual and cautious escalation as regulation fails at lower levels, and for de-escalation when it succeeds. That is the policy idea to be tested. Tit-for-tat and restorative-republican accounts of both the pyramid and other responsive regulatory strategies came later and during the same period of striving for a more integrated account of how to do regulation with more effectiveness and justice, alongside a variety of other justifications for the policy idea, such as economizing on scarce enforcement resources.

Game theory and restorative justice provided explanatory and normative theories as to why the pyramid and other responsive strategies might be good policies. It could be that the posited theoretical dynamic of the pyramid is right while the theories of tit-for-tat and restorative justice are wrong as accounts of why it works. Or it could be that tit-for-tat and restorative justice provide good independent explanations of compliance, but the regulatory pyramid does not. There has been a great deal of implementation of responsive regulatory ideas around the globe (Wood *et al.* 2010) and a hundred empirical studies of elements of responsive regulation at the Australian National University alone (see almost a hundred evaluations of responsive regulation on the website of just one of the RegNet groups at ANU, the Centre for Tax System Integrity). One disappointment is that all of these have tested only selective elements of the responsive reform vision. We tried to persuade regulators to conduct a randomized controlled trial of a transformation to a holistic responsive policy from pre-existing policy frameworks. This is something our research community has managed to do more than a dozen times with different types of criminal justice agencies in randomizing to restorative justice (e.g. Sherman & Strang 2007). Business regulatory agencies proved unwilling to support a randomized controlled trial of an integrated responsive regulatory transformation. Hopefully others will succeed where I failed in this evaluation objective. In the meantime, the empirical and normative exploration of elements of responsiveness has enriched the debate, as the contributions in this special issue amply illustrate.

Another Ayres contribution was to suggest and develop the label “responsive regulation” as the integrative concept. I responded warmly to it, I suspect, because of its connection to North American influences I admired. The most important of these was Ralph Nader, who I first encountered as a student more than 40 years ago, and later more intensively when I was a leader of the Australian consumer movement. Nader had established the Centre for Responsive Law in 1968 and “responsive” was a word he used in conversations. In 1983, a US politician who led the internationalization of corporate crime enforcement, Senator Frank Church, founded the Centre for Responsive Politics. American law and society scholars we admired, particularly the Berkeley network, also referred in their writing to “responsive regulation” or “responsive law.”

One reason I was wary of Ian’s suggestion was that the most influential scholarly invocation of the concept was by Philippe Nonet and Philip Selznick (1978), in a way that saw responsiveness as an evolutionary stage in the development of law and society. This evolutionary baggage seemed utterly implausible. So I wrote to Selznick with a draft of what we were planning to say, embracing responsiveness, but rejecting responsive law as an evolutionary stage that follows repressive and autonomous law. Selznick’s response was slightly hostile and curt. In retrospect it is sad that engagement with him came to a jolt at that moment. At the same time we were finishing *Responsive Regulation*, Selznick (1992) was finishing *The Moral Commonwealth*. This was a book that greatly enriched our subsequent thinking on responsive regulation as a project influenced by what we hope are some of the best features of American philosophical pragmatism, for which Selznick was such a thoughtful voice.

Restorative justice was also a North American label. We in Australia and New Zealand applied the “restorative justice” concept to the ideas we were developing about conferencing in criminal process. These conferencing ideas were initially more grounded at

ANU in experience with “exit conferences” following regulatory inspections, and with emotionally intelligent regulation, than in diversion reforms with juvenile justice. We started to use the label “restorative justice” around 1992 so that our criminal law reform work would connect up with the North Atlantic social movement for restorative justice.

This was one respect in which I found myself at odds with northern thinkers, such as Steve Tombs and Ralph Nader, with whom I had much in common, but who had a more aggressive posture on imprisonment of corporate criminals. I agreed with the New Zealand Maori critique of western justice as barbaric because it stigmatized defendants by causing them to stand alone in the dock of western justice, hoping that they will experience guilt and pain from the experience. Such western legal barbarism is to be seen in corporate crime cases where individuals tend to be scapegoated for the greater culpability of bigger fish, for collective networks and structures of culpability. During 1979–80 fieldwork I discovered “vice-presidents responsible for going to jail” in the organizational lexicon of three US pharmaceutical corporations. Scapegoating then became a priority in the research led by Fisse with my collaboration. In the Maori conception, wrongdoers should be encouraged to feel a collective form of shame, the shame of letting down one’s extended family by having that family stand with the defendant throughout a justice process. This wisdom of Pacific sociologies of the emotions is that justice can provide productive paths to transcending shame in simple gestures of forgiveness by the family in response to efforts at repair, reform, and reparation by the perpetrator. This is different from western internalized guilt that eats away at a spirit that fights back resentfully.

Another influence is Australian Aboriginal and Melanesian thinking on the prison as a morally corrosive institution because it takes people away from their country, their land, when this is fundamental to human healing and transformation back to responsible citizenship. In a conversation with Chief Justice Yazzie of the Navaho nation I once admired the impact of indigenous spirituality in restorative circles. After confessing to an impoverished spiritual life, I asked if it were possible for a shallow westerner like me to learn from indigenous spirituality in order to be more effective in restorative conferences. He consoled that this was possible. His advice was to take your mind to that part of the natural environment with which you feel connection. It was simple advice, easy to follow, and helped me discover wider possibilities in webs of restorative dialogue. Then we discussed how difficult it is to sustain that spiritual nurture from nature in a prison cell; hence the high rates of indigenous (and non-indigenous) suicide in prison. I recall Nader’s alarm in the late 1980s when I supported Michael Milken’s community service proposal that in addition to a billion dollar fine he would work on solutions to the Third World debt crisis as an alternative to prison. Milken was the greatest genius of Wall Street of that era, the inventor of the junk bond. He was the basis for Michael Douglas’s Gordon Gekko character in *Wall Street*. Restorative shaming still seems a better path to try even when risk and repugnance are extreme. Perhaps the holism that binds the integration of restorative and responsive thought, in pursuit of a micro–macro synthesis from personal emotion to global institutional transformation, is more Southern, even if the restorative and responsive brands are Northern. New Zealand, possibly the most advanced jurisdiction in the world in implementation of both restorative justice and responsive regulation, integrates the concepts at a policy level in the “New Zealand Principles of Best Practice for Restorative Justice Processes in Criminal Cases”: “5 (New Zealand Ministry of Justice 2004). Flexibility and responsiveness are inherent characteristics of restorative justice.”

3. The normative narrowing of responsive regulation

Given some progress in moving from the pyramid to a more integrated responsiveness, a move Selznick was making in a very different way in *The Moral Commonwealth*, a criticism of Peter Mascini is important. This is that “in its dominant reception responsive regulation has been decoupled entirely from the civic republican ideal and pertains to just one of the four enforcement strategies that have been developed originally (the enforcement pyramid, tripartism, enforced self-regulation and partial industry regulation).” Scholarly analysis of multiparty regulation has developed greatly, as several contributors herein eloquently illustrate. It is just that this is normally discussed in New Governance or other terms, rarely picking up the tripartism work as another small voice in this evolution. As Peter Grabosky’s contribution explains, enforced self-regulation thinking developed, but under other (more sophisticated) banners, such as meta regulation. And as argued elsewhere (Braithwaite 2011), some of the responses to the Global Financial Crisis, such as President Obama’s effective nationalization and reform of General Motors, were in the partial industry regulation tradition of policy analysis, again without invoking responsive regulation. What matters is that these debates continued. The fact that they advanced as policy conversations that rarely considered responsive regulation does not matter at all.

It is, therefore, Mascini’s observation of decoupling from the republican ideal that troubles much more than the seeming narrowing of the responsive conversation to the pyramid. The essence of the republican ideal is that good policy is that which advances freedom as non-domination; deft checks and balances against arbitrary power are keys to republican freedom from domination (Pettit 1997). Though it has its limitations, most importantly failing to account for when and how domination of non-humans is wrong, I remain attracted to it. A dilemma was whether we should argue that people might use the ideas productively even if, like most people, they do not fully subscribe or subscribe much at all, to a civic republican political philosophy. I erred over the years in failing to assert more persistently the imperative of linking strategies of responsiveness to the normativity of a politics of non-domination. All regulatory ideas are dangerous if they are not embedded in a moral philosophy explicitly designed to restrain their excess. The republican dispensation is helpful in this regard. It says do not escalate your response up a pyramid, do not nationalize General Motors, do not name and shame, if doing so reduces freedom as non-domination. Equally importantly, it says to President Obama in 2008, do not fail to be so bold as to nationalize General Motors (temporarily), indeed to nationalize Lehmann Brothers as well, if that is what is required to advance freedom as non-domination for your citizens.

Pauline Westerman’s essay is a good reminder of why it is so important to have a principled moral philosophy. She raises hard questions about how ethical it is for the law to be responsive, rather than consistent. From a republican ethical standpoint, the principle of non-discrimination has to be important. Why? Because a law that can discriminate against people because they are black, lesbian, or an immigrant, leaves folk feeling vulnerable to arbitrary power. This is an evil from a republican perspective, because vulnerability to arbitrary power is, by definition, domination. Black people cannot experience freedom as non-domination if they live under the arbitrary power of the laws of apartheid. But does it breach the principle of non-discrimination for the President to nationalize General Motors, to demand the resignation of its CEO, to insist upon renewal

and relevance in the production of greener cars, while not forcing these things upon Ford? More to the point, does it breach the principle of non-discrimination interpreted in a republican way? Westerman is right, we think, that it does not. The law for the state to bail out and take over General Motors would apply to Ford if its demise threatened a more monopolistic automotive industry, if its lagging environmental performance were a threat, and if its benighted management sat with its hand out as it allowed plant closures that would cause mass poverty in the state of Michigan. The law did not discriminate against them because of any characteristic of them as categories of human beings.

At one level, like cases are not being treated alike here, and this is so even in the way the strategy is named, partial industry regulation. Yet a principle of generality underlies the partiality of partial industry regulation. If Ford were posing the same threat to freedom as non-domination, then Ford on our republican view should have suffered the same temporary socialism. Westerman has made a fine contribution in showing why common critiques that responsive regulation flouts principles of equal treatment and non-discrimination are philosophically empty. I would go further by saying that a narrowly conceived legal formalism of treating like cases alike under narrowly conceived rules is a threat to freedom as non-domination. The way corporate advantage and the advantage of wealthy taxpayers over poor ones works in tax law is a good example. Powerful actors across the decades challenge tax rules on the basis of their lack of specificity and the “inequitable” way they have been applied to their case. Over time, this creates a complex body of tax rules that those with great wealth can game to pay little or no tax. Poor and middle class people cannot afford to game tax law to eliminate their obligations, and cannot comprehend the law. I have argued for a more responsive tax law that advances the overarching principle of freedom as non-domination by giving an important place to both rules and principles in tax law, with principles trumping rules, rather than the reverse (Braithwaite 2005). This includes the kind of general anti-avoidance principle that many nations have added to their tax codes in recent decades. Under this dispensation, it is the principles that are more general, are more richly infused with reasons, and are designed to last, while rules are endlessly adjusting to histories of corporate gaming of those rules.

Unequal treatment, conceived through the prism of a narrow conception of rules, is therefore a threat to the law’s purposes. A responsive regulatory pyramid, it must be conceded, can also be a threat to the law’s purposes, unless the pyramid is regulated by a set of principles that protect people from arbitrary power. This takes us back to why it matters to take up Mascini’s challenge of reconnecting the pyramid more consistently to republican principles. When we do that, we begin to comprehend that formal rules are not the only way or even the most important way, of protecting people from arbitrary power. The responsive regulator sometimes says you have clearly breached this rule: I am going to give you a second chance, but if I return in a month and this problem has not been fixed I will call in our prosecution team; is that fair?³ If the citizen agrees that this is fair and is prosecuted when she has failed to fix it after the inspector returns months later, she is unlikely to feel that she is a victim of arbitrary power, even though the firm down the street is let off with a warning for the same offense on the same day. The non-arbitrariness was constituted only partly by the rule; it was more fundamentally constituted by the responsive regulatory dialogue. For that noble result, responsive regulation has to be firmly ethically grounded, and freedom as non-domination remains a credible candidate for that grounding.

All this goes to why it is important to be responsive to Westerman's five functions of rules (or principles) as sources of reasons: reasons must give justification, open space for criticism, limit discretionary powers, enable the coordination of actions, and be reasons that supply a *modus vivendi* that can be explained to generate acceptance from those involved. While we think republican rules deliver well on those functions of rules, and that they can do so persistently across time, the more important point is that Westerman's contribution opens up a good way of assessing whether there are better principles for the ethical regulation of responsive regulation than republican ones.

My only quibble with the Westerman paper is the suggestion that responsive regulation involves inequality of arms in the sense that the state has access to a regulatory pyramid, but the firm does not. While it is true that no strategy of regulation, including responsive regulation, can avoid inequality of arms, it is contingent whether states or firms have the more potent weapons with which to regulate the other. A developing country that is utterly dependent on the IMF, the World Bank, and US aid, is no match for an American mining giant backed by the power of its state. Even within the most powerful state on earth, Wall Street recurrently proves to be armed to outflank Washington. In our responsive regulation training of Australian regulators in areas like corporate tax compliance, we find it best to do it with big business in the room. When we ask the regulators to design a pyramid to respond to a particular challenge, like refusal to hand over records, we also ask the big business representatives to design their pyramid of escalations to what they see as unreasonable impositions by the tax administration. Their corporate pyramids include layers, such as complaints to the political masters of the tax office, encouraging criticism of regulators by the financial press, legal challenges, and Freedom of Information requests that harass officials by tying them up over a photocopying machine for months copying old records. They usually do not mention campaign contributions combined with an expectation that a regulator will be reassigned! Then we broker a conversation between them about the advantages of exploring paths that allow both to play the regulatory game at the base of their pyramids.

One referee wondered whether "in reality it is rarely possible to have this kind of discussion." Beyond tax, I have organized it in aged care regulation, casino gambling, animal welfare, occupational health and safety, and regulation of universities. A lesson I have learned for making this possible is to refuse to do consultancies that help a regulatory agency to prepare a responsive regulatory policy. In response to a request for that help, I say that I don't do consultancies, but would be happy, without charge, to have a cup of tea to toss around ideas and to give a talk to their people on condition that appropriate representatives of the regulated industry and relevant NGOs are also invited. This has proven a good path to an event where outside-in collaborative design of pyramids is possible.

4. Being responsive transnationally

Abbott and Snidal are correct to identify the national focus of our 1992 book as a significant limitation on its relevance to a world of global transactions and global and regional institutions. In such a world, they draw our attention to the increased importance of regulatory collaboration in the enforcement toolkit. The Abbott and Snidal paper is a useful antidote to the common view that it is difficult to make regulation bite when corporations can respond by shifting their activities to another jurisdiction that is

less demanding. While these challenges can be profound, it is also true that on some problems it is easier to make progress transnationally than through national regulation. A more plausible path to opening up more equal employment opportunities to women in a state like Saudi Arabia has been pressure on international companies not to ignore their equal employment opportunity commitments when operating there. Pressure on the government of Saudi Arabia to enact laws for equal rights for women and enforce them has been notably less successful.

When regulators in one country with a cosmopolitan enforcement consciousness discover a serious breach by a multinational corporation, one of the things they can demand is an enforceable undertaking. An enforceable undertaking can settle the offense near the bottom of the pyramid with a wide-ranging, independent enquiry and repair of like problems across its worldwide operations. I have argued how Australian regulators might have deployed this against Arthur Andersen to prevent its collapse, and the collapse of firms it audited, such as Enron in 2001, and how Australian regulators with a cosmopolitan enforcement ethos might have responded to the defective Halliburton concrete offshore oil rig casing in their 2009 Timor Sea disaster in a way that might have prevented the 2010 Deepwater Horizon tragedy in the Gulf of Mexico (Braithwaite 2012). Abbott and Snidal are also right that responsive regulation can be applied to the regulation of states, and not just in matters of commerce.

An international relations of warfare is the unfamiliar transnational frame through which I ponder the paper by Tombs and Whyte. Ian and I are no experts on 21st century British occupational health and safety and have no reason to question their conclusions about the decline of British OHS enforcement so far this century. Instead, I argue that in a transnational normative frame, the situation is much worse than Tombs and Whyte document. The most terrible OHS problem in the history of British capitalism was probably its coal mines. As with Chinese capitalism this century, in the late 19th and early 20th century coal mine accident fatalities were taking more than a thousand lives each year, 60,000 throughout the 20th century (Braithwaite 1985). It was a great civilizing accomplishment of British capitalism, and of OHS enforcement, from the mid-20th century, that even when coal production remained at higher levels than at the beginning of the century, the numbers of mining deaths dropped to much lower than 100 per annum. By mid-century, British coal mines were better regulated and much safer than those of the world's biggest coal producer, the US, which sacrificed 100,000 coal miners in the 20th century; and the biggest coal exporter, Australia.

After the 1984 miners strike, Margaret Thatcher closed almost all British coal mines permanently. One benefit of this, though hardly the main one from her Hayekian perspective, was that it was no longer necessary for her to fund an expensive coal mine safety inspection program. Mines were not the only mainstays of industrial capitalism that almost disappeared during the era from Thatcher to the millennium. Factory production also mostly disappeared, compensated by the rise of the finance sector, tourism, export of education services, other services, and high technology jobs in pharmaceuticals, biotechnology, and information technology. I do not mention this to argue that, therefore, Britain probably does need less OHS inspection; as always, it probably does not have enough.⁴ My point, rather, is that the British people were consuming more from the mines and factories of industrial capitalism than ever before. It is just that most of the mines were in Africa and the factories in Asia (a theme in Grabosky's paper as well). In the process, the great civilizational strides of British OHS from the mid-19th century to the 1970s were lost.

Today Britons consume minerals mined in much more murderous conditions than was ever the case domestically. Industrial capitalism has not gone away; it is nastier than it was in the heyday of western industrialization, because of the way capitalism works when unconstrained by domestic politics. An example is coltan, the source of the tantalum used in the manufacture of all mobile phones, tablets, and laptops. Much of it comes from mines controlled by armed groups in the Democratic Republic of Congo (DRC). Three hundred international mining and oil companies are in the Congo, all the big ones, including the British–Australian giants of the industry, BHP–Billiton and RioTinto.

5. Responsive regulation of Congo mines

Now consider a micro-application of responsive regulation to these challenges: first, the challenges of responding to sources of domination that are transnational; second, the challenges to responsive regulation of situations of exceptional risk. I returned from eastern Congo in May 2012. Luvungi in Walikale, North Kivu, is a village controlled by a businessman named Checka and his armed group Mai Mai Checka. His business has involved seizing/controlling mines, including extracting benefits from child slavery in mines. In 2010, Checka's men allegedly perpetrated mass rape against at least 387 people in a string of 13 villages around Luvungi with some FDLR (Democratic Forces for the Liberation of Rwanda) and other elements. Most victims were women and children, including a one-month old baby, though there were 23 confirmed male rape victims. Beyond the 387 victims confirmed by the UN police, there is an unknown and probably large number of even more terrified victims still hiding in the jungle, others who are dead or fearing the consequences of providing testimony. Almost all known victims were gang raped by two to six men or boys, on multiple occasions, over the course of four days.

The order to attack was issued by Checka as part of a campaign to consolidate his control. Checka was one of many leaders of armed groups who had been offered (at the base of the pyramid) a deal of amnesty and integration into the Congolese armed forces in the late 2000s, and earlier, in return for ceasing to add to the interminable wars that extinguished millions of Congolese lives since 1997. Terms were never reached in these peace deals. It is easy to critique these peace proposals at the base of the pyramid as unconscionable impunity. Yet the reality is that the military capacity is not available to capture all of Congo's Checkas. After the 2010 mass rapes, however, with international assistance from western rape investigators, warrants were issued for the arrest of Checka and seven others for the Luvungi rapes. Attack helicopters from MONUSCO, the UN peacekeeping mission, were utilized to back up Checka's arrest. He had fled, perhaps tipped off, from where intelligence indicated he could be captured. After the first court hearing for the only defendant who was arrested, Checka's men advised victims that unless they recanted their testimony there would be another mass rape against their village. This led many women to conclude that recanting was the right thing to do to protect their children. One hundred and sixteen people, including a number of children, were also captured into slavery as a result of the 2010 Luvungi attack.

Here is a case where arrest and criminal prosecution may not be sufficient for the peak of the pyramid. Indeed, the want of a capability to escalate beyond attempted arrest is making things much worse for the terrified people of Luvungi as I write – they are at risk of another long period as refugees living hungry in the jungle. As I revise final edits for

publication, it seems possible they have already suffered that fate. It is hard to know amidst all the current fighting. The need at the time I wrote the first draft of this reply in June 2012, was to escalate to deployment of credible military strike capability in Luvungi and to advise Checka that unless he surrendered to face trial he would be attacked. This is unlikely to happen. The Congolese government had and has neither the political will nor a reliable military capability to do this. The two senior local Congolese commanders, colonels, were assassinated with 18 other soldiers in Checka's area of control in April 2012, quite probably by Checka, though we cannot be sure that some other armed group was not responsible. Nor do we know whether it had anything to do with military attempts to arrest him or to clear his control of mines. We now know that during the month of June when I was writing the above about the need to prevent further rapes, there were 42 "protection incidents" recorded by the UN in Walikale, which were "acts of sexual violence."

We probably can conclude that if western special forces had been deployed to the area and negotiated a deal somewhere along their enforcement pyramid, Checka could have been brought to surrender. We conclude this because it has been done before in eastern Congo. Checka probably had only around 150 fighters, some of them children. So he could not survive credible force indefinitely. He might be able to hide from western special forces for a time. Meanwhile, it would not have been a difficult military objective to clear him permanently from control of local mines, cutting off the financial lifeblood that makes insurgency an attractive business, and protecting victims of his crimes from further intimidation. At the time of the last big crisis in this province of eastern Congo in 2009, the UN Secretary-General called for western troops to come in to help control the situation. He did this because in the crisis before that, when European Union troops were deployed in one part of the east for a few months, the killing was quickly and sharply reduced, though not eliminated. No western state heeded the Secretary-General's 2009 call. All of the senior western diplomats interviewed in DRC gave the same reason why western boots on the ground to take the fight to armed groups (if surrender could not be negotiated) was not going to happen. Iraq and Afghanistan were enough; their electors were fed up with deployments to difficult, protracted conflicts. I argued back that clearing weak armed groups from mines was such an easy objective, compared with defeating the Taliban. This did not budge the diplomats from the political impossibility of satisfactorily protecting the people of Luvungi. These people might be at such great risk because of our consumption of the minerals they dig; they might be at risk because of attempts at criminal enforcement that had been launched at the behest of the west, but the west is then capable of washing its hands of further responsibility.

For a responsive regulatory theorist, this is a parable with layers of meaning. One meaning is that it can be reckless with peoples' lives to escalate a long way up the regulatory pyramid required, unless one is willing to escalate all the way. In the face of how politically hard this can be, we cannot responsibly be dismissive of reconciliation with the most terrible of criminals at the base of pyramids. More escalation is so often worse than less if there is not that political commitment to escalate however far is needed to secure safety with justice. Finally, this returns us to two important issues in the Tombs and Whyte paper.

The first is that responsive regulation does not work effectively if the level of escalation is read off from an assessment of the level of risk. The base of the pyramid is

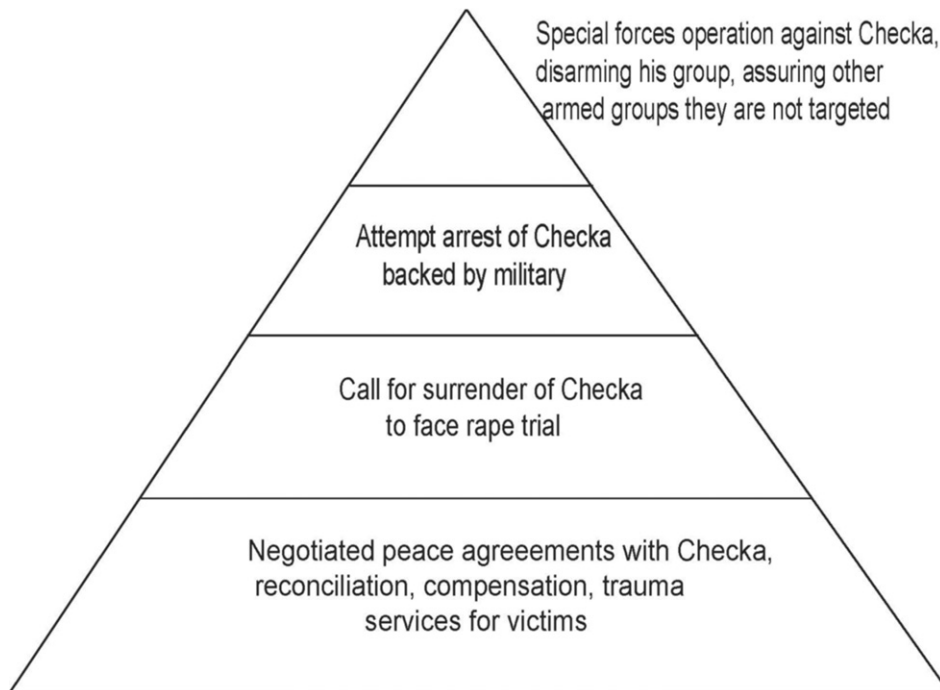


Figure 1 Proposed June 2012 enforcement pyramid against the Mai Mai Checka commanders in eastern Congo.

sometimes the place to be when risk is extremely high. Nuclear safety regulation has supplied us with examples of collaborative regulation to manage exceptionally high risk (Rees 1994). While the worst place to be in a tough case is stuck in the middle of the pyramid without a credible capability to escalate to force the safest possible resolution, Luvungi is also a case where negotiated settlement is second best to deployment of military power. One reason is that it is possible that asserting territorial domination and punishing villagers for past cooperation with the government are not the only reasons for Checka's terror campaign. Another reason might be to spread terror as a bargaining chip to end the terror in return for a deal where he gets impunity, corrupt control of certain mines, and effective control of the state apparatus in this patch of the country after integration of his forces into the Congolese army. Indeed, the foregoing sentence that I wrote in June 2012 has proved predictive of the conduct of a number of warlords in the region who escalated attacks on civilians in eastern Congo in July and August, creating half a million new refugees. The kind of pyramid I had in mind in June 2012 is represented in Figure 1. Whether this would be appropriately responsive to conditions on the ground since June 2012, I cannot say.

The second issue that returns us to Tombs and Whyte is that this is a case that shows how, in a world of transnational supply chains, domestic progress in reducing production deaths is not progress in reducing domination if it is associated with a shift of consumption to products sourced from sites with exceptionally unsafe conditions of production. This is a crucial point from the republican normative frame of acting to minimize domination in the world. When this is the pattern, there is culpability in the west for the killing caused to deliver our consumption. And we have special culpability if we

(successfully in Luvungi) call for escalation only part way up an enforcement pyramid, then walk away politically if our state is asked to back up those arrests with the force required to effect them. Without a global ethic and a networked responsiveness that aims at global protection, our occupational health and safety footprint will press ever deeper into the foreheads of people like the 1.5 million mine workers and slaves in the DRC.

In its 1992 formulation, responsive regulation was culpable of an inward-looking western national vision of how to make regulation more decent. Freedom as non-domination demands a transnational regulatory vision for strategies with transnational leverage that reduce domination globally, not just nationally.

6. Conditions for responsive regulation

Across these essays, much is said about the conditions that make it difficult for responsive regulation to work. There is validity to these observations. We can only agree that “responsive regulation is vulnerable to effective deregulation” (Tombs and Whyte). This is especially true when add-ons like layering the pyramid according to levels of risk are put into the model. Any approach is vulnerable to that political fate. One generic plea we should make on conditions of success is that sometimes the conditions for responsive regulation to work would be even more demanding for competing regulatory strategies. The comparative question between theories is what counts if what one cares about is reducing domination in the world. One example of such a comparative question is how hard is it for consistent punitive enforcement to meet the conditions for its success, compared to the difficulties for responsive regulation in meeting the conditions for its success? For instance, as hard as it is to make responsive regulation of mine safety work in the Congo, how much more politically difficult would it be to make consistent criminal enforcement work there? Or consistent education and persuasion! In all of this, the strength of responsive regulation is that it assumes the strategies advanced in its name will fail very often. It is designed to learn from those failures by repairing pyramids through adding layers that cover the weaknesses of failed strategies with varieties of new or reformed strategies, one of which might work. That virtue is lacking in the theories of those who think “putting a price on carbon works,” “prosecution works,” “zero tolerance works,” “education works,” “politicizing regulation works,” or “risk assessment works,” without hedging such acts of faith and, often, without feeling any obligation to promote a program of empirical research that renders them refutable.

Tombs and Whyte argue that we show too much faith in non-state regulation and have, therefore, contributed to state regulation being decentered in Britain. Grabosky argues that we did not pay enough attention to non-state regulation, and, in particular, to the way digital technology has enhanced and democratized its potential. Grabosky is certainly right that there is more of it now in more variegated form than there was in 1992. More importantly, we think Grabosky and Tombs and Whyte are correct that non-state regulatory failure now deserves as much attention as state failure. Redundancy of regulatory design is needed that is as resilient to non-state as to state failure. Designs are needed that give regulators options to keep plugging away at a serious problem with renewed seriousness when the strategies they have attempted in the past fail for reasons they do not understand. I do not think Julien Etienne is right that “Responsive Regulation implies and assumes that regulators could be able to identify which enforcement response

would unambiguously fit the unambiguous behavior of the regulatee.” Rather, we see responsive regulation as assuming that some things are knowable and known (where “sense-categorize-respond” is appropriate), others are knowable and unknown (where research is needed), others are complex (where a “probe-sense-respond” approach is apt) or chaotic (where “act-sense-respond” may be the best we can do, yet may be better than unresponsive paralysis) (Braithwaite *et al.* 2007, p. 310, discussing Cynfin frameworks informed by complexity science). Expressed in such theoretical language, this sounds hard to do. But as argued in that publication, one can agree with the Australian military that “strategic corporals” without tertiary education can and must learn how to be as responsive as possible to complex situations through concrete scenario training.

Wisdom in clarifying response options for complex domains, and, indeed, in clarifying the nature of the “relational signals” in play, can come from reading good ethnographic studies of regulation conducted in diverse contexts. Understanding the behavior and motivation of actors probably helps, but the bigger message of responsive regulation is about planning for the likelihood that there will be large failures of understanding. In the face of this, we must persist with iterating between different ways to solve an important problem. I have learnt in the last seven years, from coding 17 armed conflicts around the world, that peace agreements that hold for a period of history are usually preceded by a great many that do not. Defective or misunderstood signals between the parties are certainly one common target, as Etienne would predict. Part of our development of the theory of responsive regulation in our 2007 book was to contend that just as military strategists can learn to regulate partly chaotic and complex environments that are partly designed for unknowability to the enemy, so can business regulators learn to regulate in conditions of highly partial knowability.

Cristie Ford has a similar concern to Etienne, when she says: “At least in prudential regulation of global financial institutions, in the wake of the recent financial crisis, neither the ongoing face-to-face relationship nor the boundedness or knowability of the regulatory terrain can be taken for granted.” With derivatives, knowability cannot be taken for granted on the part of regulators; it cannot even within the firms that engineer derivatives. Those knowability limits were responsible for the insolvency of so many banks that were experienced in derivatives and had profound interests in avoiding insolvency. As to the other part of the limits of responsive regulation Ford nominates in this quote, perhaps one of the things we should learn from the recent crisis is that “in the prudential regulation of global financial institutions,” the “ongoing face-to-face relationship(s)” that were missing are imperative.

All global financial institutions should have a prudential regulator meeting face-to-face with key players in their risk management and audit functions every day. That is, the regulator needs at least one specialist in the regulatory affairs of that global firm with a full-time desk inside their corporate headquarters. Middling economies like Australia can manage to do this with quite a large number of its biggest firms, not only for financial regulation, but also by the national tax administration for more than the largest 100 firms. These are good regulatory investments for a nation. Poorer nations than Australia that cannot afford permanent regulatory desks in the national headquarters of their global financial institutions might consider collaboration with regional partners to share that burden. This might mean one state regulator monitors one bank’s regional and global trading and shares the findings, and a second state’s regulator monitors another

bank face-to-face. It might mean seeking donor funding to ease the burden of face-to-face monitoring. This could be a good long-run poverty-prevention investment by development banks.

In addition to full-time regulatory desks in financial firms that are globally significant risks, desks may be needed inside any bank branch that is clocking up loan defaults with a frequency that radically exceeds industry norms. That daily face-to-face presence is only needed for as long as the branch remains an extreme outlier in defaults, and perhaps only within major economies capable of developing a tsunami of defaults large enough to wash across continents. The lesson is not to despair that the daily face-to-face communication needed to allow responsive regulation to work in preventing transnational crises was missing and will inevitably be missing when it counts. It is to reform the targeting of face-to-face regulation in the way that responsive Australian tax regulation has been learning to do. It has done this within the context of a form of regulation where the normal dispensation is of zero face-to-face communication with most taxpayers across their lifetimes. After dozens of empirical research projects evaluating the attempts of the Australian Taxation Office across a decade to scale up responsive regulation to more complex contexts, Valerie Braithwaite and the Centre for Tax System Integrity team are not inclined to see this endeavor as tilting at windmills. Rather, they see it as flawed in a great variety of specific and remediable ways. Likewise, with our experiments when I was a part-time Commissioner in the (Australian) Trade Practices Commission in the 1980s and 90s. These attempted to scale up restorative conferences at the base of a pyramid to offenses with as many as 300,000 victims at the hands of the most powerful corporation in Australia at that time. There were certainly difficulties that did not arise with restorative justice on a smaller scale. The lesson from the experimentation was not, however, that restorative justice was necessarily less effective than deterrence-oriented litigation or other alternatives at this level of scale (Parker 2004).

None of this is to contest Ford's fundamental point that responsive regulation must be buttressed by other regulatory technologies, nor to contest the need for responsive regulation to embrace new layers of alternative regulatory technologies so it can better cover the weaknesses of the regulatory techniques it has deployed in the past. Better use of intelligence clearing houses is a good example. Ford rightly points out (citing Diane Vaughan) that poor information and poor communication of it can be a larger problem than poor relationships. In the study of 39 coal mine disasters that gave rise to the regulatory pyramid and to the consideration of coal mine inspection exit conferences that prefigured restorative conferencing (Braithwaite 1985, pp. 27–31), a fundamental cause of 17 of the disasters was inadequate communication of hazards or weak reporting systems, a higher number still if an absence of a plan to close the loop on communicated hazards was added. In a sense, *To Punish or Persuade* argued that improved relationships are the key to the improved communications that bring attention to the right news about safety problems delivered (relationally) to the right desks. That study also showed the value of selective use of default rules in response to the variability and complexity of the geology of mines. This is enabled by the option of default roof support rules widely used by firms that struggle with that complexity or privately written and publicly ratified roof support rules.

While the hardbitten responsive regulatory theorist can agree with all of those aspects of the Ford critique of the limits of relational responsiveness, I remain reluctant for responsive regulation to embrace technological substitutes that drive out the relational elements with strategically important targets of regulation. The worst cases of

regulatory failure seem to happen when technological fixes are seen as totalizing solutions that make relational regulation redundant. The role of the trust placed in quantitative risk modeling in the onset of the recent financial crisis is just one example. The best research continues to find that relationships of trust hold the key (e.g. Gunningham & Sinclair 2012). This is not to say that responsive regulation is only about being relationally responsive; by definition, it is about being responsive to geologies, environments, histories, and contexts of disparate kinds. Relational responsiveness is, nevertheless, a heart-land issue for the theory; if it falls, the theory falls.

7. Scalability and relationships at hot spots

Ford is right that there has been insufficient attention to the scalability challenges of assessing how regulatory strategies cope at the greatest levels of complexity, workload, and scope. In this section, I argue that risk assessment is vital for a geography of policing deployment that responds to the scalability challenge. Transforming the responsive regulatory pyramid into a pyramid layered by risk is not. Clever networking of private and public regulatory actors is advanced as vital. Most of all, this section argues that the scalability challenges require what Kleiman (2009) calls dynamic concentration of deterrence. A tough, dependable peak to the pyramid is seen as an exemplar of dynamic concentration.

I have argued that scale makes it intractable for the Congolese state or any state to solve problems such as our dependency on slave and child labor for coltan. That challenge requires a globally networked vision of responsibility to act on missing elements from the regulatory equation. This does not mean I agree with Carol Heimer's (2011, pp. 670–671) point, cited by Ford, that "regulation [necessarily] depends for its effectiveness on support from higher scales." Whatever form regulation takes, responsive or otherwise, there are, of course, better prospects of efficacy if street-level bureaucrats are backed, rather than thwarted by a functioning law and higher layers of state bureaucracy above them. But there is no inevitability about this.

One of the points of our comparative study of nursing home regulation across three countries and three decades (Braithwaite *et al.* 2007) was to show that British street-level inspectors of the 1980s and 90s were in many ways more effective than American inspectors of all eras, even though the British had much less support from layers of bureaucracy above them and labored under a law that was utterly unworkable for making enforcement work. British street-level bureaucrats enjoyed the freedom to be creative advocates for the elderly and used that creativity to mobilize banks, for example, to read their reports and question loan applications from nursing homes with miserable quality of care, even to confront the owners of "death houses" at their church. In contrast, some of the US state inspectorates with strongly layered bureaucracies and enforcement tools supporting them were inhabited by enforcement automatons who lacked any sense of creativity in their advocacy and problem solving. There was no "support from higher scales" that allowed the British responsiveness of the 1980s and 90s to happen. Bureaucratic superiors had little knowledge that this was how the street-level bureaucrats were getting the job done. There was certainly no support from a legal framework they had put in place to enable it. Another study of securing results by creative and purposive enforcement by street-level bureaucrats who were not tightly integrated into a regulatory hierarchy, indeed, who resist hierarchy, is Coslovsky's (2011) research in Brazil.

In seeing networked governance from street-level nodes as equally important to integrated coherence of state bureaucracies, there is a lot to learn from the history of police effectiveness as regulators of crime. Not only is the Ford scalability critique relevant here, so is Julia Black and Rob Baldwin's (2010) critique of the neglect by responsive regulation of deployment of monitoring that is informed by risk assessment. I agree with Tombs and Whyte that it is bad policy to use risk analysis in the contemporary British way they describe or by pursuing correspondence between levels of risk and levels of an enforcement pyramid. But it would be folly to neglect levels of risk in deciding where to deploy street-level bureaucrats. Again, this was a topic neglected in the 1992 book, though it was diagnosed in its considerable complexity in the empirical research that led to our 2007 book on nursing home regulation (Braithwaite *et al.* 2007).

Until the past decade or two, most criminologists, including me, tended to believe that "putting more police on the beat" made no difference to the crime rate. It was the scale of the problem that seemed to make this obvious to us: the odds of any crime leading to arrest by a police officer who happened to be in the right place at the time a crime was committed, were minuscule. When we erroneously taught our students this, we would cite studies like the Kansas City Preventive Patrol Experiment (Kelling *et al.* 1974) that showed crime rates did not change in areas of Kansas City randomized to higher and lower levels of police car patrolling. Our error was at two main levels. First, patrol car policing with mobile communications and computing on board was one of those cases of a technological fix to a scalability problem that failed, because it drove out relational benefits of old-fashioned policing walking the beat. The error is at its worst when the problem is greatest. Part of the failure of the UN peacekeeping response to mass rape at Luvungi was that peacekeepers were patrolling along the main street of the 13 villages during days when the victims were being raped repeatedly. This also happened elsewhere with mass rape in the Congo. Windows up, air-conditioning on, they did not hear the screams. Without stepping down from their cars to chat with citizens, no one could direct them to the homes of victims. They did not pause to notice the terror on peoples' faces as they sped by.

The second error in our reading of the Kansas City experiment was in interpreting the response to the scalability challenge as one of increasing resources and intensity of policing in proportion to the scale of the crime problem. What we know now is that urban crime is amazingly concentrated in hot spots. Patrolling in the 98 per cent of urban space that is not a hot spot is close to useless. Police walking the beat at hot spots is effective even if it is just a passive presence. In addition, randomized controlled trials suggest that problem-oriented policing where police "pick important problems and fix them" is even more effective than passive, reactive policing (Braga 2002; Weisburd *et al.* 2010). Problem-oriented fixing of community problems and relational policing are hard to do without climbing out of patrol cars. So are "institutionalized learning loops" (Ford citing Parker 2002).

Policing also has its analogue to the "behavioral cascades toward excessive risk taking" that Ford rightly sees as part of the causation of financial crises. Australian visitors to cities like New York used to wonder what was wrong with American police that they would patrol open-air drug markets without arresting sellers. Worldly-wise criminologists like me would explain to them that American cities are not Australia, and that their police confront an enforcement swamping problem that Australian police do not have to manage. If that police officer arrested just one seller at the open-air drug market, she will

spend the rest of her shift at the station processing that arrest while other sellers keep the market going without the benefit of her monitoring. If she hangs around without making arrests, she might at least intervene to prevent selling to children, might defuse some violence. We know now that even in the face of a scale of problem that makes arrest of all sellers impossible, police can clear open-air drug markets by follow-up from an announcement that publicizes that the market will be closed from 9 a.m. on a certain date; the first person selling drugs in that place after that time is guaranteed arrest. Zimring (2011) credits the clearing of public drug markets with a major contribution to the steep decline in New York homicide and other crime rates since 1990.

Tax authorities have also learnt how to respond to the scale of the enforcement swamping they face from cascades of risk taking into tax shelters. This is to announce that while they do not have the enforcement resources to litigate the shelters of all who have stampeded into shelters, they do have the resources to prosecute the first risk taker to jump into a shelter after the date of their announcement of intent to attack particular shelters in the courts. This can also be extremely effective in ending cascades of risky cheating (Braithwaite 2005). Ayres had the same one-by-one insight about the power of partial regulatory rewards to break big challenges, such as the OPEC oil cartel. The partial regulatory idea was basically to pick off an individual state with policy bribes for it to break ranks with the discipline of the oil price cartel.

As usual, though, practitioners had been ahead of regulatory theorists. Tax officials were ahead of us, as were generals in the Congo, right back to the legend of the Texas Ranger. The Ranger faces a lynch mob with one bullet in his gun. He turns away the mob with the promise, “the first person to step forward dies.” Kleiman (2009, pp. 49–67) elegantly theorizes why the “dynamic concentration” of deterrence by the Texas Ranger works, and why escalated sanctions for drug probationers in the evaluations of operation H.O.P.E. in Hawaii work (see also Kennedy 2009). A meta analysis of 10 quasi-experimental and one randomized controlled trial of dynamic concentration found rather consistent effectiveness across studies and a medium-sized statistically significant crime reduction effect overall (Braga & Weisburd 2012). Dynamic concentration at the peak of a pyramid is just one way of focusing limited enforcement resources that can increase the deterrence of everyone.

Kleiman’s dynamic concentration theory shows why abandoning random targeting in favor of a strategic method of concentrated targeting can work as long as monitoring works. In the simple case of scarce resources enabling targeting of only one of two regulated actors, the intuition that “concentrating on Al would allow Bob to run wild” is wrong. If Al is promised certain punishment, Al will comply, so long as compliance costs are less than penalties. “Then Bob, seeing that Al has complied, will himself comply; otherwise Bob knows that he would certainly be punished. So giving priority to Al actually increases pressure on Bob” (Kleiman 2009, p. 54). Kleiman shows that this initial insight holds for a variety of conditions, such as promising certain punishment of the second mover, rather than the first mover, larger numbers of players, players moving simultaneously, rather than sequentially. Dynamic concentration can help a little punishment go a long way.

Thinly resourced policing and regulatory inspection can be extremely effective at addressing risks of great scale and complexity. President Bush was reluctant to learn this about the effectiveness of weapons inspectors in monitoring the dismantling of Saddam Hussein’s weapons of mass destruction program. I was slow to learn this lesson about risk

in areas I work. As recently as three years ago, I commiserated with a European general who had served in the Congo about how impossible his job must have been with so few enforcement resources and with the mass murder and mass rape of millions occurring around him. Not at all, he replied, all that was required, and what he was doing in his area of eastern Congo in the mid-2000s, was to call all the warlords of his patch in after an incident of mass rape and explain that while he did not have the resources to pursue all of them militarily, he did have the troops to pursue the next one of them who perpetrated any atrocity of that kind. When I interviewed another general in the Congo in 2012, he said something rather similar. He opined that if he were allowed to hunt down these small armed groups one by one in the way he would if the problem of mass rape arose in his home country, it would take four to six months to clean out the warlords from the mines and to end the mass rapes. The problem was, both generals said, that their home governments and the UN did not want to risk losing any peacekeepers to the cause of making the DRC safe. And such a campaign possibly could not be conducted without taking a few losses.

With rape in war, with covert weapons of mass destruction programs, as with the most destructive of financial crimes, regulated self-regulation remains a more hopeful path than new regulatory technologies or direct state deterrence achieved by linear scaling up of state enforcement in response to the scale of the risk. That is, the solution is likely to arise in regulatory conversations with warlords who are persuaded to go back to their fighters to demand and monitor that rape stops at the base of the pyramid in Figure 1. Relational regulation of warlords and Saddam Husseins by street-level bureaucrats remains more effective than drones and high tech threats that seek to regulate at a distance. If the US ambassador to Iraq had got her relational regulation of President Hussein right in 1990, in particular, had she not failed to signal clearly that the US would not allow an invasion of Kuwait to stand, that invasion probably would have been headed off and Iraq might have remained a US ally against Iran.⁵

8. The grand scale of relational and republican regulation

My conclusion is that the regulatory errors on the largest scale in recent history, such as both wars in Iraq and the Afghanistan war, the millions of lives lost in the Congo, Rwanda, and across the Great Lakes region of Africa, the collapse of Arthur Andersen and Enron, the management of the 2008 and earlier financial crashes, could have been prevented or ameliorated by attending to the relational regulatory failures at issue. The second general conclusion is about the republican ideal of minimizing domination. That ideal might have instructed every western state and every western public who thought the invasion of Afghanistan was justified in 2001, that this was morally wrong. At least it was wrong before less dominating responses were exhausted, such as entering into the offered negotiations with the Taliban for the surrender of the Al Qaeda leadership to the courts of a third state or undertaking the kind of special forces operation to arrest Osama bin Laden that was launched in 2011 (at a time when his whereabouts were better known). It might persuade those same western publics, who in recent years have supported immediate withdrawal from Afghanistan, that once the ethical error of excessive escalation has occurred, the ethical obligation is not to cut and run, allowing Afghan feminists and others to be slaughtered, but to manage de-escalation and a ceasefire that protects victims.

It means western publics and governments taking responsibility for their exploitative consumption of conflict minerals in places like the Congo. And that means not pushing for prosecutions of warlords in ways that result in preventable re-victimization of those who testify, unless there is a willingness to follow all the way up an enforcement pyramid until victims are secure. By acquiring a vision of how really big problems can be confronted relationally, maximizing freedom as non-domination, we can enhance our regulatory imaginations on how better to do that on smaller scales. I have sought to illustrate with my own biography as a nihilistic young criminologist, that when there is a history of regulatory nihilism and impossibilism paralyzing a practical politics of confronting domination, ducking responsibility for evidence-based reconstruction will not do. Deconstruction in response to failure will not do. It allows the rape to continue.

As an experienced criminologist, in helping write *Responsive Regulation* I showed a clear failure to apply lessons to business regulation that were sitting under my nose in the superior evidence base of criminological research on topics like policing. Likewise, for a long time there was a failure to take responsive regulatory insights in the reverse direction to inform crime control, as in Ian Ayres and Steven Levitt's (1998) clever research on LoJack. Now as a student of international affairs, I begin to see ways responsive business regulation can learn from the regulation of warfare, and vice versa. The power of dynamic concentration to manage enforcement swamping and scalability challenges was brought to me by that European general from his Congo experience. It had always been part of my practical understanding of enforcement from the story of the Texas Ranger. Regulatory theory fails when it neglects scanning widely for the experience of how practitioners solve the theoretically unsolvable.

Notes

- 1 A common critique, advanced again in this special issue, is that responsive regulation depends on regulators and regulatees understanding one another's languages. As regulation becomes more transnational, this is an increasing problem for any form of regulation enforced in a law written and interpreted by adjudication in one language or depending on education and persuasion. A "compared to what?" analysis might encourage us to engage with how to strengthen the advantages of an approach like responsive regulation that gives priority to face-to-face communication. Australian nursing home inspectors, for example, use non-verbal communication: physically show people how to complete forms, physically show how to remove an unsafe element from an environment by adjusting a machine or drawing a space redesign, enroll third parties at the work site who have more plural language skills, learn how to call in telephonic interpreter services, and how to recruit an inspection workforce that covers a diversity of languages. Communication challenges are more profound with residents who speak no clear words in any language. It is inspiring to watch how skillful inspectors make non-verbal communication work with them to uncover abuse and neglect.
- 2 The concept still does not get a warm response: "‘ENFORCED self-regulation’ is an oxymoron, and a singularly inelegant one. That Ray Finkelstein, QC, chair of the Independent Inquiry into the Media and Media Regulation, had to resort to such a clunker in the report he submitted last week to Communications Minister Stephen Conroy is indicative of the pitfalls facing those who declare their adherence to the ideals of free speech and media freedom while also advocating tougher regulation" (*Sydney Morning Herald*, 6 March 2012).
- 3 The dynamic concentration of deterrence theorists (or "focused deterrence" theorists) in criminology now refers to this as banking deterrence.

- 4 In the only research I have undertaken observing British regulatory inspection, with health and safety in nursing homes, the difference in resourcing from other regimes was extreme, with English nursing home inspections averaging four inspector hours in a period when US inspection averaged more than 10 inspector days. This was before the Blair–Brown inspection cuts of the mid-2000s (Braithwaite *et al.* 2007, p. 155).
- 5 For a transcript and commentary on the feeble signaling in her 25 July 1990 meeting with President Hussein, see Salinger and Laurent (1991, pp. 47–62).

References

- Ayres I, Levitt SD (1998) Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack. *Quarterly Journal of Economics* 113, 43–77.
- Black J, Baldwin R (2010) Really Responsive Risk-Based Regulation. *Law & Policy* 32, 181–213.
- Braga AA (2002) *Problem-oriented Policing and Crime Prevention*. Criminal Justice Press, Monsey, NY.
- Braga AA, Weisburd DL (2012) The Effects of Focused Deterrence Strategies on Crime: A Systematic Review and Meta-analysis of the Empirical Evidence. *Journal of Research in Crime and Delinquency* 49, 323–358.
- Braithwaite J (1982) Enforced Self-regulation: A New Strategy for Corporate Crime Control. *Michigan Law Review* 80, 1466–1507.
- Braithwaite J (1985) *To Punish or Persuade: Enforcement of Coal Mine Safety*. SUNY Press, Albany, NY.
- Braithwaite J (2005) *Markets in Vice, Markets in Virtue*. Federation Press, Sydney.
- Braithwaite J (2011) The Essence of Responsive Regulation. *UBC Law Review* 44, 475–520.
- Braithwaite J (2012) Flipping Markets to Virtue with Qui Tam and Restorative Justice. *Accounting, Organizations and Society* (in press).
- Braithwaite J, Makkai T, Braithwaite V (2007) *Regulating Aged Care: Ritualism and the New Pyramid*. Edward Elgar, Cheltenham.
- Coslovsky SV (2011) Relational Regulation in the Brazilian Ministério Público: The Organizational Basis of Regulatory Responsiveness. *Regulation & Governance* 5, 70–89.
- Grabosky P, Braithwaite J (1986) *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*. Oxford University Press, Melbourne.
- Gunningham N, Sinclair D (2012) *Managing Mining Hazards: Regulation, Safety and Trust*. Federation Press, Sydney.
- Heimer C (2011) Disarticulated Responsiveness: The Theory and Practice of Responsive Regulation in Multi-layered Systems. *UBC Law Review* 44, 663–694.
- Kelling GL, Pate T, Dieckman D, Brown CE (1974) *The Kansas City Preventive Patrol Experiment: A Summary Report*. The Police Foundation, Washington, DC.
- Kennedy DM (2009) *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction*. Routledge, New York.
- Kleiman MAR (2009) *When Brute Force Fails: How to Have Less Crime and Less Punishment*. Princeton University Press, Princeton, NJ.
- New Zealand Ministry of Justice (2004) Principles of Best Practice for Restorative Justice Processes in Criminal Cases. In: *Restorative Justice in New Zealand: Best Practice*. Ministry of Justice, Wellington, New Zealand.
- Nonet P, Selznick P (1978) *Law and Society in Transition: Toward Responsive Law*. Octagon Books, New York.
- Parker C (2002) *The Open Corporation: Effective Self-regulation and Democracy*. Cambridge University Press, Cambridge, UK.
- Parker C (2004) Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings. *Modern Law Review* 67, 209–246.

- Pettit P (1997) *Republicanism: A Theory of Freedom and Government*. Oxford University Press, Oxford.
- Rees JV (1994) *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island*. University of Chicago Press, Chicago, IL.
- Salinger P, Laurent E (1991) *Secret Dossier: The Hidden Agenda Behind the Gulf War*. Penguin, London.
- Selznick P (1992) *The Moral Commonwealth: Social Theory and the Promise of Community*. University of California Press, Berkeley.
- Sherman L, Strang H (2007) *Restorative Justice: The Evidence*. The Smith Institute, London.
- Weisburd D, Telep CW, Hinkle JC, Eck JE (2010) Is Problem-oriented Policing Effective in Reducing Crime and Disorder? Findings from a Campbell Systematic Review. *Criminology & Public Policy* 9, 139–172.
- Wood C, Ivec M, Job J, Braithwaite V (2010) Applications of Responsive Regulatory Theory in Australia and Overseas. Occasional Paper 15. Regulatory Institutions Network ANU, Canberra, Australia.
- Zimring FE (2011) *The City That Became Safe: New York's Lessons for Urban Crime and Its Control*. Oxford University Press, New York.