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BROADENING THE APPLICATIONS OF RESPONSIVE REGULATION

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Introduction

This chapter considers over-regulation and under-regulation both as potential threats to freedom. It conceives political knee-jerks that see-saw between over- and under-regulation as posing particularly strong threats of domination. Responsive regulation was developed as an integrated and balanced approach to these threats to freedom. Its balance is particularly richly improved by integration with restorative justice. Responsive regulation is often thought of narrowly as an approach to business regulation. This chapter explains what responsive regulation means through discussing the way it was developed in the regulation of a particular human service, aged care.

Types of Regulation

In the human services, as with all domains where regulation is important, we can think of three kinds of responsive regulation. One is state regulation of the providers of a human service. Regardless of whether a service provider is a private firm or a government agency, there are other parts of government that have responsibilities to regulate them to ensure that they do not pay bribes, that the food they provide is not contaminated, the care they provide is not abusive, for example. A second kind of regulation by the state is of individual citizens. A child protection agency regulates mothers and fathers to ensure they do not neglect or abuse their children. A third kind is regulation of the state and of business by citizens, by civil society organizations. This third kind of regulation has a particularly strong role in responsive regulatory theory as a check and balance on the other two kinds of regulation.

We will illustrate these three kinds of regulation in aged care regulation, which was the most important substantive field in the development of harnessing of restorative to responsive regulation. In the process, we seek to begin to set up the argument of our concluding chapter that the human services suffer from a want of attention to questions of regulatory theory.

When John and Valerie Braithwaite, with many collaborators, started their comparative research on nursing home regulation in the late 1980s, well over 40 per cent of nursing home residents in the

United States were being physically restrained. Most commonly, they were confined to a chair with a lap restraint for just part of the day. We observed more devastating examples of restraint, however, where individuals were tied for long periods at the lap, with their wrists also to the arms of a chair, their ankles to its legs. Sometimes there was a punitive aspect to this abuse of the freedom of the elderly. Usually there was some principled rationale, such as that the resident had been pulling down the curtains when their hands were free, or that they were at risk of a fall. Good nurses and care workers know, however, that there are almost always better ways of solving these underlying problems by talking them through with the resident and their relatives.

So there began an 'Untie the Elderly Campaign' led by the National Citizens' Coalition for Nursing Home Reform (Braithwaite, Makkai, & Braithwaite, 2007). The campaign pointed out that the incidence of physical restraint in US nursing homes was probably more than eight times that in the UK. Campaigning called for and achieved legislative and regulatory changes that caused US aged care to become at least as good as British aged care in this regard. The Untie the Elderly Campaign also made heroes of restraint-free American homes. It put their Directors of Nursing and Administrators on the platform during their campaign meetings on Capitol Hill to explain how they achieved zero restraint. AMP (Awareness, Motivation and a Pathway) were all needed to untie the elderly (Honig et al., 2015). These American restraint-free homes showed simple Pathways to freedom, because the campaign leaders knew that Awareness of better outcomes in Britain and regulatory pressure from civil society to Motivate change were not enough.

So this was an example of civil society organizations regulating state regulators to change the state regulatory system, and also of civil society directly regulating private, state and charitable providers of aged care. It was a brilliant campaign that sequenced many regulatory strategies. One was to popularize its research results on the most common reasons administrators gave for physical restraint. This was to fend off litigation from the families of residents over falls. The research found that there was hardly any successful litigation for falls occurring as a result of failing to restrain a resident, but a considerable amount of successful litigation as a result of deaths caused by excessive restraint, as when a resident slid down in their chair and strangled on their lap restraint (Evans & Strumpf, 1989; Special Committee on Aging, United States Senate, 1990: 22–56).

Changes to nursing home inspection protocols and priorities occurred at the end of the 1980s as a result of the legislative victory of the Untie the Elderly Campaign. For most aged care facilities it was enough for the inspectors to arrive after the law changed and point out something administrators and staff already knew as a result of the campaign: that the expectation now was that facilities document continuous reduction in the use restraints if they were to stay out of trouble with inspectors. Most private, charitable and state providers of aged care achieved continuous improvement quickly. They had been persuaded by the campaign that it would make life better for them, as by reducing litigation costs, as well as better for their residents. Braithwaite et al.'s (2007) research showed there were hold-outs and hard-liners of ingrained disciplinary traditions. Increasing numbers of civil penalty orders were imposed on them after they ignored warnings. When the civil penalties also failed to change them, many were suspended from receiving new admissions funded by Medicare or Medicaid until they reduced their levels of restraint. This was a more severe penalty that would put the firm at risk of bankruptcy if it continued for too long. For a tiny number of facilities it was necessary to threaten proceedings to remove their licence if they did not change. In this chapter we will describe this kind of sequencing and escalation of regulatory responses as responsive regulation. In a short space of years all aged care providers did change, though some more transformatively than others.

The history of the United States can be read as a story of struggle for freedom. The period 1987–1992 when the elderly were freed from their chains was one of the most important and decisive moments in that history. National shame about such a recent past of keeping our grandparents in chains saw the nation in denial about this as another example of a past of other oppressed minorities in chains. During those few years, the incidence of physical restraint in US nursing homes fell from well over 40 per cent of all residents to well under 4 per cent. It fell a lot further still in the next two decades (Braithwaite et al., 2007). Cynics who believe that business always games new regulatory laws predicted that nursing homes would substitute by putting more of their troublesome charges under chemical restraint. The cynics were proved wrong. Chemical restraint was also caught up in the regulatory reform and also dramatically reduced (Castle & Mor, 1998; HCFA, 1998: vol. 1, viii). Game playing with the regulatory reform was averted because aged care providers were genuinely persuaded that the reform was in so many ways a good one. They saw what was needed to build a more decent society for our grandparents, and they took day-to-day professional pride in achieving restraint reduction at least until a new found of gaming the law took hold in the next century.

So, we can see each of the three kinds of responsive regulation that we described at the beginning of this chapter. We see responsive regulation of private, public and charitable providers of human services by state regulators. We see regulation of the state (first regulation of the Congress by civil society, then of the regulators by the Congress and civil society in combination). The National Citizens Coalition for Nursing Home Reform was regulation of the regulators by civil society. We see also a transformation of the way individual citizens were regulated by providers. Instead of tying up that elderly woman who was pulling at the curtains, a discussion was triggered about why she was so bored, so angry. From the perspective of this book, among the wonderful things about the way this was done moves to more restorative processes in aged care. Residents and Relatives Councils were newly empowered in conversations in a circle that included many in wheelchairs and sometimes residents wheeled in on their beds. These empowering conversations were often about what can be done to reduce the boredom and anger and improve the quality of care of residents. Representatives of these councils were also empowered to sit in the large circle of managers, staff representatives and inspectors in exit conferences at the end of nursing home inspections to decide on changes needed. Finally, care planning meetings in this era in the United States ceased being meetings only of care professionals to discuss revisions to a resident's care plan. Relatives were required to receive an invitation in advance so they could support and speak up for their relative. The regulatory reforms also required the resident to receive an invitation to the meeting.

While these authors started thinking about restorative and responsive regulation in the way business regulation was conducted in exit conferences after coal mine safety inspections (Braithwaite, 1985), the most important domain of R&D turned out to be a human service, aged care, where responsive practices of regulating business, regulating the state and regulating individuals were all critical to understanding how a freer society was created through the interaction between the regulatory state and regulatory society.

The Challenge of Understanding Responsive Regulation

Responsive regulation is about being responsive to those we are regulating; being responsive to the environment; responsive to democratic impulses—seeking to respond to the needs articulated by the regulated, and then, perhaps most importantly of all, being responsive to the history of encounters between the regulator and the actor on the other side of the fence. Restorative justice and responsive regulation are both relational forms of justice (see Llewellyn, Chapter 9 this volume) that can reduce domination.

Restorative and responsive justice both aim to privilege dialogue over punishment and aim progressively to solve problems by bringing more parties into the circle when circles fail. Responsive regulation is distinguished by its dynamic strategy—by signalling that a regulator will escalate responses if required. Regulators signal that they will not go away until all stakeholders are safe from the kind of domination of concern in the regulatory encounter. It involves human services providers consulting with stakeholders not only about what services are most valuable and that should therefore be provided, but also about the dynamic sequencing of strategies. This strategy is normally the strategy of first resort; that is normally the strategy of last resort; and these are the strategies we consider in between the first and last resorts.

Nursing home regulation illustrates the dilemma well. We have long periods of quiet when we hear nothing in the media about what is happening in the nursing home industry. Then one will burn down, or there are incidents of sexual assault in a nursing home, or reports are made to the police about a particular nursing home chain where more than a dozen people have died from causes seemingly related to neglect. A cycle of political scandal unfolds. Media exposure of the horror triggers public outcry that, in turn, puts pressure on the industry and on the government that is supposed to be regulating the industry. In the aftermath of the scandal comes recognition that change is needed. Governments come under pressure to do something tougher. Usually, this means tougher enforcement, for example sending someone to prison, imposing fines, shutting down a nursing home, removing a provider's licence or taking someone up to the top floor of corporate headquarters and off-loading them on the media scrum waiting below to write a story on their fall from grace.

What is also expected is law reform. However, what we often find unfortunately is that the reform that occurs is ritualistic. That is to say, it provides rituals of comfort to the community (Power, 1997). The reform that takes place gives the appearance that something is being done, so that political leaders can stand up and say, "Well we have now implemented these new procedures and all our staff will be trained in these steps". But rarely will this process prevent a relapse. Sure enough, no relapse occurs again for a while, because there is a media attention cycle with scandal and reform. The media have a wave of interest in a particular topic, then lose it, because they want to entertain their readers with something scandalous in a new arena. The media rarely continue to focus on the same regulatory agency—unless it is hit by another scandal immediately after the first. Attention will not stay on the same responsible politicians forever. They will soon be chasing after another politician, and that gives the agency a period of quiescence outside the limelight.

Often what we find in the many different business regulatory regimes we have studied is that these rituals of comfort, established in that climate of fending off the scandal, acquire a terrible life of their own. Levels of enforcement that may have been appropriate in the immediate aftermath of the scandal persist in a time when the business culture has changed, when perhaps the scandal's lessons have been learned and people are actually behaving in a more socially responsible fashion. There has been no reflection on or re-evaluation of the regulatory demands as the regulated environment changes. Most importantly, there is no cool head scrutinizing the regulatory demands that worked well, brought no change or were counterproductive. Regulators and regulated actors alike become slaves to the regulatory demands put in place in the aftermath of the scandal.

Then what can sometimes happen is that an industry or professional association will orchestrate a campaign with politicians in economic portfolios attacking bureaucrats for foisting ridiculous levels of red tape upon them. Consequently, there will be a call for deregulation. Those rituals of comfort may then be abolished and replaced with self-regulatory frameworks. Unfortunately, the baby may be

thrown out with the bath water. That is to say, no-one will have reflected on the positive elements of the rituals of comfort. And neither will they have reflected on how the rituals were becoming ritualistic; that is, why they were being followed for their own sake, as opposed to being used as tools to reflect, with discretion and wisdom, on what would be the most responsive way of dealing with a problem.

This cycle of high regulatory control by the state followed by self-regulation continues, regardless of the regulatory domain. What we find is a see-sawing between the highly punitive regulation of a problem, and trust in self-regulation and corporate social responsibility. Consequently, the regime designed to serve a particular public interest fails to evolve. There is no cumulative learning and continuous improvement in the design of the regime. Rather there is this cycle of moving back and forth between the ritualism of 'getting tough' at one extreme, and that of 'removing all red tape to make it easier for people to do their job' at the other. The capacity of the regulatory system to solve growing problems then fails to grow.

Transcending the See-saw: Thinking About Regulatory Pyramids

Responsive Regulation, by Ayres and Braithwaite (1992), helped to think of regulation very broadly as 'steering the flow of events' (Parker & Braithwaite, 2003), where the idea of responsive regulation is to be creative in the steering tools selected.

A key idea in all of this is a regulatory pyramid. Above is a very straightforward example of such a pyramid that might apply to the regulation of something like a nursing home (Figure 2.1). There is no such thing as a standard pyramid or a pyramid that is the right way of being responsive; the right
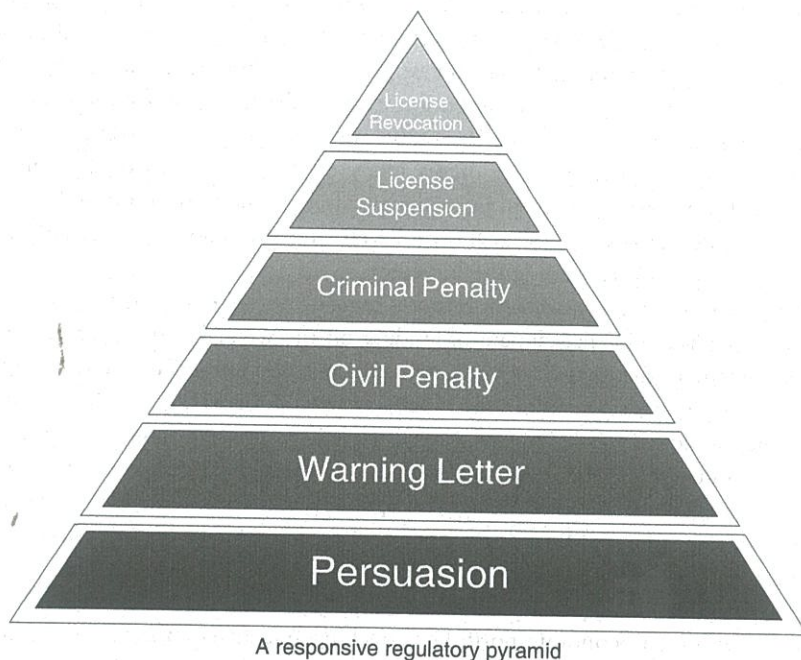

A responsive regulatory pyramid

FIGURE 2.1 The Regulatory Pyramid

thing is to be responsive in different ways depending on different situations. The idea of this particular example of a pyramid is to start at the bottom of the pyramid and regulate through persuasion in the first instance. This means we talk to people and say, "It's awful that people are lying every day in urine-soaked sheets. What can you come up with to change that?" Sometimes just asking such a question stimulates real change. That is a 'persuasion' example. What then if inspectors return to find there is still a problem with urine-soaked sheets? Perhaps the appropriate response then is to issue a warning letter—a formal shot across the bow.

Warning letters work variably; they have differential effectiveness in different areas. In Japan, for example, letters can be very effective, because Japanese businesses take seriously a letter from the State, whereas Australian businesses tend not to take them so seriously. In the tax arena, letters can be surprisingly effective. For example, when a tax agency has a large number of small and medium-sized businesses which have paid no tax for the past three years (and that is all the tax office knows about them), the agency can send a computer-generated, though cleverly crafted letter to these businesses, as the Australian taxation office has done, to the effect of "We have noticed that you have not paid any tax for three years". A considerable proportion of the businesses then pay tax in the next year. This is a cheap intervention that generates a large amount of revenue (Braithwaite, 2005).

If the warning letter fails, one of the standard regulatory responses is to impose civil penalties. This does not mean a criminal process but an 'on the spot' fine. In nursing home regulation, we have seen that it usually escalates to the more effective form of a ban on the admission of new residents, until such time as the facility complies. This can be a highly effective kind of civil penalty because it means that the business can return to normal with the admission of new residents as soon as the problem is resolved, and until then it can concentrate on improving quality of care for a smaller group of residents. The cost to the organization is significant while it is in force—the business loses money every day that they are unable to admit new residents to their facility. But as soon as the problem is fixed, that civil penalty will be removed. Should the short, sharp measure of civil penalties fail, the regulator might proceed to the next step on the pyramid, a more punitive approach such as laying criminal charges in the courts.

People find it strange sometimes that licence suspension and revocation would be at the peak of the pyramid above a criminal penalty. For human services providers, however, removing their licence to provide those services is really like capital punishment. Closing a business is corporate capital punishment. So is closing a government subunit that provides some human service. The worst outcome for owners, shareholders, workers and users of the service is to have the provider sink into bankruptcy because it is no longer an approved provider. People lose their livelihoods because there is little likelihood of the organization trading its way out of trouble if it no longer can provide services. The same is true of 'regulation inside government', when one part of the state regulates another (Hood et al., 1999). If a state anti-corruption commission or a government audit office closes another government operating unit in the human services and a new state provider is built from scratch, this can have more dramatic consequences for everyone involved than targeting a responsible individual to go to prison.

Redundancy as a Principle of Pyramid Design

One of the reasons for having layers in the enforcement pyramid is that most of the tools that we use to solve problems, whatever the problem, will not work most of the time. This is as true of relational approaches as of any other. Relational approaches to restorative and responsive regulation often fail. We may focus attention on controlling a particular problem, but its complexity will often mean that

the intervention will not hit the mark—in some circumstances even being counterproductive. So what we do is to have some redundancy in our controls through using a mix of strategies (Gunningham, Grabosky, & Sinclair, 1998). The nature of the mix is important however. Obviously, we must prudently assure that strategies are not contradictory. One part of the strategy can be effective while it undermines some other aspect of the strategy. Equally importantly, we do not want strategies to be too similar. When we look at mixes of strategies empirically, we find that people are not very creative about developing layered strategies for risk prevention. That is to say, they think of many techniques, but most are too alike. This is illustrated by James Reason's (1990) "Swiss Cheese" model of risk prevention (Figure 2.2).

Reason's work focused on aircraft safety. How do we resolve a situation in which a pilot who has been drinking alcohol crashes the plane into the mountain? We have a co-pilot present, but the co-pilot may have been the pilot's drinking buddy. Or, how do we resolve a situation in which a pilot is disoriented by a white-out in a snow storm? If we rely on a co-pilot, both pilots are likely to be simultaneously affected by the optical illusion. This is the idea of the holes in Figure 2.2 being in alignment—we don't have sufficiently diverse strategies to act as checks and balances against one another. It would be better to have the plane flown by a pilot and a computer than to have it flown by two pilots or two computers. Be it a computer virus, be it drunkenness or white-out, we require different checks and balances to successfully manage risk. Covering the weaknesses of one strategy with the strengths of another is an underlying principle in designing regulatory pyramids. To have a pyramid that relies only on economic sanctions of different levels of intensity is to ignore the insights provided by Reason. If money is no object to the regulated actor posing a risk to the community, that regulated actor will continue to buy his or her way out of trouble with the regulator. The regulatory system needs to be designed in such a way that if strategy A fails to contain the risk, strategy B will still have a fair chance of being successful, because it seeks to contain risk in an entirely different way. Persuasion, education, social sanctions, psychological sanctions and economic sanctions provide a diverse array of strategies for consideration in designing pyramids. Later we will introduce the idea of praise and reward to further diversify the strategies available for more effectively addressing risk. In nursing home regulation,
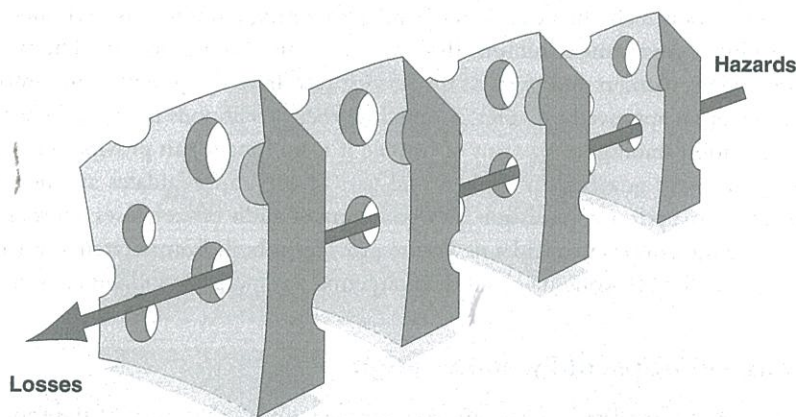

FIGURE 2.2 Swiss Cheese Model of Risk Prevention

Source: James Reason (1990).

when Australian inspectors routinely offered praise when compliance was achieved, this was one of the strongest predictors of improved quality of care (Makkai & Braithwaite, 1993). The child development literature likewise shows the importance of building intrinsic motivation for ethical conduct by praise for being a good little boy or girl (Altschul, Lee, & Gershoff, 2016; Gunderson et al., 2018).

A Second Principle of Pyramid Design: Optimum Harm Minimization

Another general principle in the design of a pyramid is that there is a regulatory optimum to be sought which is unique to the particular time and context in which the problem is situated. For effective resolution, the same problem does not necessarily demand the same solution each time it occurs. Responsiveness to the problem means taking into account the context because it is always changing and histories differ. Consider the earlier example where scandal has embroiled a regulatory agency. Where the optimum lies following the huge public scandal that has the agency in a corner is far removed from where it lies during a period of regulatory quiescence. Tough measures sometimes must come into play after regulatory failures, soft measures when regulated actors are cooperatively engaged in compliance. And this is not only for political reasons. When controls are not successfully operating and the media exposes regulatory failure, there is a decline of confidence in the law and its enforcement because nothing is seen to be done. Honest regulated actors who are playing by the rules will begin to think, "Well I must be the only mug around here who is spending my budget to maintain compliance with these environmental rules", if it is environmental regulation of a government agency or a business. Consequently, their commitment to voluntary compliance will erode if, in the context of that public scandal, there is an absence of firm action against non-compliers. In more normal conditions, however, we may not need such a heavy-handed enforcement approach, in which case this balance will be different.

Most social problems are either under-regulated or over-regulated. Finding the mix of strategies that optimize harm minimization is no easy challenge. Figure 2.3 represents how Stephen Mugford (1991) developed the idea of harm minimization in relation to the regulation of harmful drugs, from legal ones like tobacco to illicit drugs like heroin.

Mugford pointed out that we can have over-regulation of illicit drugs, meaning that the industry goes underground. As a result, there are more impurities in drugs, and people die from this. Alternatively, we can have under-regulation, as has traditionally been the case with tobacco. For much of its history, tobacco could be readily purchased at relatively low prices by anyone, including adolescents, with
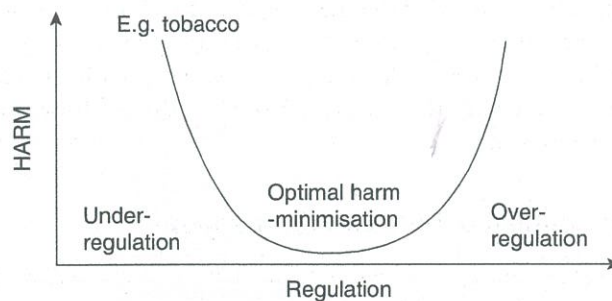

FIGURE 2.3   Regulation for Harm Minimization

alarming health consequences, including lung and throat cancer and cardio-vascular disease. Finally, we can have an optimum level of regulation, where we bring the issue into the open and arrive at an approach which avoids the excesses of harm from these various pathologies of under-regulation, whilst not accelerating harm by criminalization.

In the regulation of pharmaceuticals, most societies strike a more interesting kind of balance than they do with either tobacco or heroin. That is, there is a prescription regime that has built within it various checks and balances. To sell pharmaceuticals, like cigarettes, through the supermarket might be dangerous under-regulation. We see regulation escalating upwards to a degree with drugs that can be bought over the counter, but only from a pharmacist who provides warnings for use; and then escalating further when a doctor's prescription is required for their use. We can also see the problems that arise if access to therapeutic drugs goes too far. At this other end of the spectrum, we could suffer terrible therapeutic losses by criminalizing the use of many pharmaceuticals that we rely on to cure disease and restore health.

Optimum harm minimization can be challenging. Child protection is an excellent example. Public outrage over the death of a child from a family known to child protection authorities can lead to closer monitoring and assessing of families, perhaps even removing children and placing them in foster care more quickly than usual as a precautionary measure. Such a package of intervention strategies may not only amount to over-regulation, but also may perpetuate the same risk, increasing stress on families and carers, stress that jeopardizes the quality of care provided for children. If stress is a risk factor, adopting corrective measures that increase stress will allow the problem to mushroom rather than be contained. The prospect of over-regulation creates another set of problems. Instead of lifting standards of care across the community, over-regulation that continues beyond the crisis may result in resource-poor families keeping children out of school and away from health services for fear of harsh intervention from child protection authorities. Over-regulation may also reduce the number of foster carers who are willing to engage with the child protection system: They may be willing to care for children, but not willing to deal with a complex set of rules that the authorities impose upon them.

Principles of optimum harm minimization and risk prevention affect the suite of strategies that are assembled for a regulatory intervention. In thinking through the child protection situation, it becomes clear that good regulatory design depends on having a deep understanding of how children are cared for in families and how families manage their life situation. Such understanding becomes even more important when the strategies are arranged within a regulatory pyramid. The regulatory pyramid makes assumptions about how various strategies will be interpreted by regulated actors. Before a pyramid is implemented, regulators must be sure that the meaning they attach to the steps of the pyramid corresponds to the meaning attached by regulated actors. Each step up the regulatory pyramid is intended to be more intrusive by the regulator as we discussed earlier with the nursing home regulation example. Checks need to be made to ensure that those being regulated see the regulatory pyramid as incremental in the same way as the regulators do.

Assumptions About Regulated Actors and Strategies

To understand the different meanings attached to different steps in a regulatory pyramid, we need to return to our basic structure (see Figure 2.4) and think about it in a more abstract way. At the base, we try to solve the problem by capacity development. In so doing, we form a certain kind of assumption

about the regulated actor. At the base of this particular pyramid we assume that the regulated actor is a learning and rational citizen. If mistakes are made, they might not be repeated.

The next level up the pyramid is restorative justice as a regulatory strategy, where we assume the regulatory actor is virtuous and will respond to the restorative justice dialogue.

Then, failing that, we escalate to a deterrence-based strategy that could be something like those fines that we have in the more detailed pyramid in Figure 2.1. At this level we assume that individuals are swayed by the costs of persisting with their behaviour. They will pause to re-think their situation because the costs are mounting and the regulator is not going away or moving on to someone else. With the increased pressure from the regulator, they come to the decision that they may be better off if they adapt and change their behaviour to meet the expectations of the regulator.

In summary, constructing a regulatory pyramid means assembling multiple strategies that are sorted and assessed with three principles in mind: (a) Is the strategy adding value by delivering a redundancy that can prevent risk? (b) Is the strategy optimal for harm minimization? and (c) Does the strategy speak to the self that we want to influence (that is, the learning self, the virtuous self, the rational self and the incompetent and irrational self)?

At this point, a further refinement needs to be reflected upon. At each of these levels of the pyramids in Figures 2.1 and 2.4 we can have multiple stages. Responsive regulation is nimble and flexible. At different stages up the regulatory pyramid, a particular strategy may be tried and re-tried, providing there is some rationale for thinking that because the context has changed, a new attempt might be productive. For nursing homes in Figure 2.1, for example, a restorative justice circle could be held between civil penalty and criminal penalty. The idea would be to talk through the problem, with a backdrop of deterrent measures. Let us assume that this strategy fails. The problem re-occurs, and another restorative justice circle is convened. It fails and we convene another one in a rather different way with different and more people in the circle and see if it succeeds. And maybe if they all fail, we can try different layers of deterrence. We could try withdrawing funding on new admissions to the facility until it is fixed. If that fails then we could escalate up to something tougher, like criminal penalties, and incapacitation, such as licence suspension or revocation. Or, if we switch our thinking to illicit drug control, we may
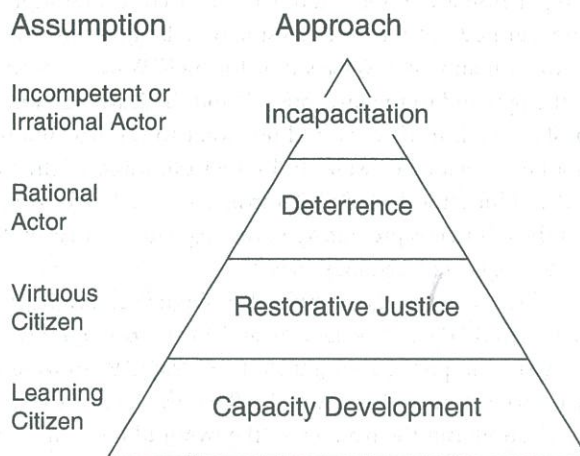

FIGURE 2.4 Regulatory Assumptions and Approaches

try restorative justice and court-imposed fines, but we may also come to the view that the drug dealer should be immediately put in prison, so that it is harder for them to endanger the community. Regulatory pyramids can never be used as templates. They need to be used responsively in relation to context, persons and threat to community, not only now but also into the future.

Possibly the most important idea, and the hardest for policy makers to get their heads around with regulatory pyramids, is that we have to think in a very particularistic way to construct them. This introduction to responsive regulation has provided an abstract way of talking about responsive regulation. We often miss the point that we design pyramids to achieve a practical task and to provide practical entries to different layers of the pyramid. To push our thinking a little more in this direction, the chapter moves on a little later to talk about the complementary idea of strengths-building pyramids.

Before doing that, however, consider an issue that causes consternation among some, and wild goose chases for others. The above discussion may leave the impression that responsive regulation is all about categorizing people. That is not as much the case as accepting that we are all very complex characters and have a range of selves we put forward when we are engaged with regulation. We all have some moments when we are capable of learning or thinking differently about a problem. We also have times when we just don't get it, when there are blocks to our accepting what is being asked of us. We all have moments when we are virtuous, and moments when we are not. We have some moments when we are rational actors and probably more when we are not. As regulators it is important to understand that regulators and regulated actors have one important thing in common. We share a very large number of moments when we do not act in a particularly competent or rational way. That is not to say we cannot or will not change if nudged in the right direction and given an opportunity (Thaler & Sunstein, 2008). Responsive regulation prefers to gently coax and caress change, but if necessary it pushes change coercively, after proffering opportunities to meet regulatory expectations. What this means is that all of us have multiple selves according to the particular context in which we are acting, and any of those selves can come to the fore depending on how we define the context we find ourselves in.

Understanding Multiple Selves

To understand responsive regulation is to understand that we have these multiple selves. Regulation can be designed to get us to put our best self forward in a situation. Imagine we are projecting the 'rational actor self' in a particular situation and ask, "What's in it for me?" What responsive regulation is trying to do is to move us down the pyramid to the virtuous self and the learning citizen role (see Figure 2.4) where the regulator's appeal is to ask us if we would not want to do that simply because it is the *right* thing to do and can we not be persuaded to want to do the right thing all the time? We have seen that this was very much how the "Untie the Elderly" Campaign succeeded. In other words, the regulator seeks to drive the nature of the self that is presenting in the regulatory situation further down the pyramid toward more virtuous selves, more learning selves.

The idea of the pyramid then, if we can go right back to Figure 2.1, is that we want most action to be down at the base of the pyramid. We start at the base and work up. Then if we get up to higher levels of the pyramid and things start to improve, we want to de-escalate. We move back down the pyramid. That there is the least space at the peak of the pyramid reflects the fact that it should be extremely rare that we resort to licence revocation. But the paradox of the pyramid is that if we lop the top off, we can only escalate up to something like civil penalties. The design of the pyramid is to keep driving us down to the base: The peak of the pyramid exists to both give the regulator the capability to escalate up the

pyramid, and the regulated actor the incentive to keep things down at the base. If we lop the top off and have a pyramid that only goes halfway up to civil penalties for instance, the logic is reversed. The pressure will be to escalate from the warning letter to civil penalties. Why will the pressure be to escalate up to civil penalties? Precisely because the regulated actors know that is as far as things can go. They have greater incentive to be game-playing rational actors, because the worst thing that could happen to them is visible and they are prepared for managing their worst-case scenario. In areas like occupational health and safety regulation in the United States, we have seen a standard civil penalty regime operating. Regulated actors break the rules in relation to their workplace, get a slap on the wrist and a fine. Paying the fine just becomes a cost of them doing business. In such regulatory contexts voluntary compliance tends to fail; normative commitment to doing the right thing corrodes. Instead, the truncated nature of the regulatory options produces a calculative optimizing attitude to occupational health and safety obligations.

Supports and Sanctions: A Regulatory Pyramid and Strengths-based Pyramid

The idea of the regulatory pyramid is that non-compliance is posing some sort of risk and therefore requires some form of risk containment. The regulatory pyramid is about the idea of prompt responses before the problem escalates. Conversely, the emphasis in the strengths-based pyramid is more on opportunities assessment and opportunities enhancement. The strengths-based pyramid is about waiting to support strengths that bubble up from below. Adding strengths-based pyramids to regulatory pyramids seeks to emphasize that we are too often obsessed with risks and not enough with opportunities.

The strengths-based pyramid is about hope for seizing opportunities; regulatory enforcement pyramids are ultimately about fear of sanctions. Strengths-based pyramids are about establishing institutions focused on building community hope, empowering communities to solve their own problems. Good leaders of institutions like universities sit back, see where excellence is bubbling up from below within the institution and say, "That is terrific. Let's get behind it". This is a strategy that builds and regulates through a strengths-based approach, in contrast to top-down restructuring that might crush the innovation this is bubbling up (Gunningham & Sinclair, 2002).

We see then that regulatory pyramids of sanctions and strengths-based pyramids of supports do different things. A regulatory pyramid pushes standards above a floor. A strengths-based pyramid is about pulling standards up through a ceiling. If the purpose is to dramatically lift standards, regulators handicap their effectiveness by focusing only on the poor performers, that is, on minimal standards and on the enforcement pyramid. In addition they need a strengths-based pyramid to help them focus on excellence, recognizing the accomplishment of the high flyers and using them as a benchmark for pulling everyone's standards up. This can happen in cultures of industry compliance (Gunningham & Sinclair, 2002), but it can also happen among adolescent peer groups. The young person who finds a new way of being, that takes his or her life into a new trajectory, can help to raise up everyone in his or her peer group, just as firms that are leaders can raise the standards of everyone across their industry in work safety for instance. The key idea is that one going up through the ceiling can help pull others up through the floor. And that is part of the philosophy of a strengths-based approach.

So how can we use regulatory and strengths-based pyramids? They can, and most effectively are, used in combination. Regulators generally have the dual role of pushing standards above the floor and pulling standards up through ceilings. If we have a set of problems or a set of risks, one way we can set

out to solve them is to focus and target the risk. Restorative justice helps with that because it puts the problem, rather than a stigmatized person, in the centre of the circle. In doing so, we consider ways of containing risk. One approach is to prevent people from engaging in a certain behaviour—the traditional regulatory pyramid approach. However, if we were to apply the strengths–based philosophy, we would focus on individual, family and collective strengths and try to expand out from their strengths until they absorb the weaknesses. Both can be effective ways of steering the flow of events. The argument is not that one should be used and the other not. The strengths-based critique is that too much public policy is about risk-management and not enough is about strength-building.

If there is an under-performing person within a human services organization that is letting the team down, creating disasters week in and week out, one way to solve that problem is by targeting the risk that person poses to the organization. We can re-train, discipline and regulate them in some way, so that the risk is no longer a problem. Another way to think about such problems, however, is to see how the strengths of other people might compensate for that person's weaknesses. A human resource manager using a strengths-based approach might say to an under-performer and the work team: "Wouldn't it be better for you to move into this area of responsibility, where you have real strengths, and where the person in the job at the moment is not as good at that as you are. You will absorb their weaknesses with your strengths, and this other person over here absorbs your area of responsibility, where they have strengths that are greater than your weaknesses". In this way, problems are dealt with by using the strengths of people who are already there, and growing those strengths through nurturing them, rather than trying to discipline the weak link. We do that in managing problems in organizations all the time, but we perhaps do not think about it in regulatory terms as a strategy of using strengths-based rather than risk-based intervention.

Below in Figure 2.5 is just one example of complementing a regulatory (or what we shall now call enforcement) pyramid with a strengths-based pyramid, which is from the nursing home regulatory research (Braithwaite et al., 2007).

The two pyramids in Figure 2.5 are also often called a pyramid of sanctions and a pyramid of supports. At the base of the two pyramids we have an education and persuasion approach. In the regulatory pyramid it is focused on the problem, informing the regulated actor about what they should do to avoid
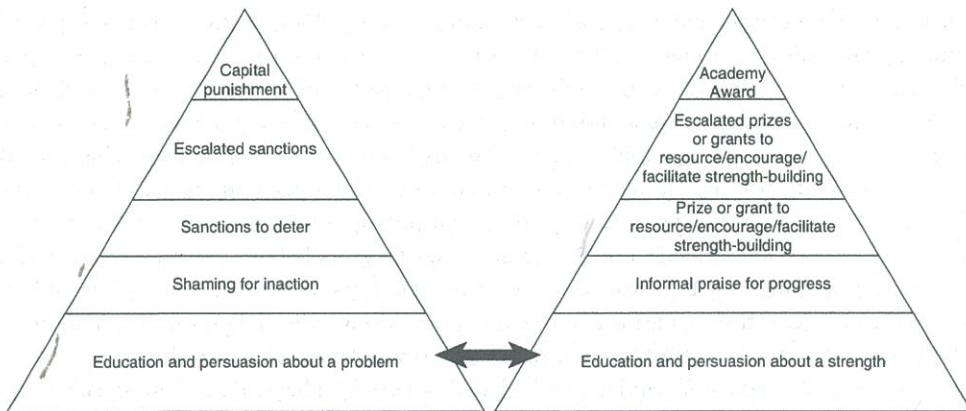

FIGURE 2.5 Enforcement Pyramid and Strengths-based Pyramid

risks, perhaps risk of injury in the workplace. In contrast, an education and persuasion approach on the strengths-based pyramid would focus on the opportunity regulated actors have to improve their well-being based on a strength that they have, perhaps a good way of lifting a patient. From this strength, other improvements will be sought and other strengths introduced to safeguard against risk. Let us consider the case of nursing home regulation in relation to these two types of pyramids. Inspectors may give informal praise when they inspect the nursing home, for example: "That is terrific what you have done there". We have seen that praise in our empirical research was found to be a powerful predictor of improved compliance of the nursing home, that is, improved quality of care two years on (Makkai & Braithwaite, 1993). Praise for improvement is a simple thing that inspectors do that does not increase the cost of regulation.

A strengths-based approach can also be used to target particular facilities that are known to have potential while also facing problems. By opening doors for them to learn more, regulated actors can see what the gold standard is, can be encouraged to reach that standard, and in the process, manage their risks. At the level of say an individual child or a family that has a child protection problem, the strengths-based philosophy would give rise to questions like, "What are the strengths of this individual child? What are the strengths of this family or the school that the child goes to?" And, "Which of all of those strengths, if we concentrated on just one, would be the most strategic in absorbing the risks that exist around the life of that child?" There might be another strength on our list of strengths, which is a really impressive strength, and from which we could grow many more strengths, but it might not be a very strategic one to target in terms of absorbing the particular risks that are putting that child at risk, or that family at risk.

It is the same when we award a prize. These are not prizes in the imperialist tradition of knighthoods in the British Empire for a life of serving the disciplinary objectives of the empire. Nor are they like rankist prizes[1] of academic imperialism for a life lived in a discipline that is superior to the lives of others in disciplining of young minds into the regulated paths of that discipline. We give out these prizes for specific continuous improvements in the quality of care given in nursing homes. The nursing home has done something really innovative that we want the whole industry to take notice of, because if they all take notice of it, it will help them all pull themselves up through ceilings and above the floors the standards set. With escalated prizes and academy awards, we can escalate up to these more exceptional rewards. Similarly, we can have an escalated set of regulatory sanctions. Indeed, the idea is that the pyramids are complementary. You would more than likely be doing both—ideally, you would start at the base of the strengths-based pyramid, and see how far it could take you. For regulators, it is much more satisfying to start by escalating up this strengths-based pyramid. An inspector goes into the nursing home, sees some things are improving and targets those things because that is an inspiring new development: and if they get this improved management system really working then they are going to solve a lot of the risks that might otherwise have led the inspector to escalate up with sanctions. So, the inspector concentrates on moving up the strengths-based pyramid, and encourages the regulated actor to have staff awards for some action that is critically important, or a scheme where residents are able to fill out a piece of paper to thank a staff member for something particularly kind. Inspectors need to encourage all of these sorts of positive things. And if they are producing greater improvements through the pyramid of supports and absorbing the risks that are causing most concern, then we have the desired outcome without damaging social relationships or imposing costs. If on the other hand, there still are major risks that are not being absorbed, then the inspector would move across to the enforcement pyramid, and would signal preparedness to escalate up this pyramid with these more costly regulatory interventions. So, inspectors can, and usually will be escalating up both regulatory pyramids simultaneously.

We have only started working with enforcement and strengths-based pyramids together. How that should be done is far from resolved. To privilege strengths-based pyramids is an empowering philosophy. It allows regulated actors to become the more dominant shapers of the pace. But many regulators have protective obligations under the law, and there is a threshold where a regulator just cannot sit on their hands and allow regulated actors to go at their own pace when some terrible risk is not being managed. Knowing when to move to enforcement from strengths-based pyramids is a hard question, relying very much on the knowledge and wisdom of experienced regulators who have a deep understanding of regulated actors and the contexts in which they work. What we do know, however, is that regulation currently errs on the side of enforcement because of the mistaken belief that this provides the best protection and too often in doing so relational and cultural safety is undermined.

Be Wary of the Nuclear Option

Thinking about strengths-based interventions in a regulatory area where, for example, children's lives are at risk may seem to some managers to be part of the problem. Child protection has been heavily dominated by social work philosophy and practice, and empowerment is one of the central tenets of social work. For those managers with doubts about the usefulness of strengths-based approaches in high-risk areas like child protection, consider a radically different kind of regulatory challenge that has been well researched—nuclear safety regulation. In this area the reaction of regulators has been that "there is no riskier activity than a nuclear power plant; we must have a tough regulatory strategy with formal guarantees of enforcement because we just cannot afford to have a nuclear melt-down".

After the investigation into the Three-Mile Island disaster in the United States, where America almost faced its first nuclear plant meltdown, regulators and the commission of enquiry (Kemeny, 1979) reached a surprising conclusion (Rees, 2009). They found that due to the emphasis on detailed regulatory control and tough oversight enforcement, checking against risks in a highly 'rulish' regulatory regime, people operating the nuclear power plant became rule-following automatons. They became ritualists—following rituals of comfort so that people out there might think they would be safe from a nuclear meltdown (Braithwaite, 2008: Chapter 6). When something went wrong, they frenetically searched for "Which rules haven't we followed", instead of thinking systemically about the safety management system. Indeed, they could not think in a problem-solving way because the enforcement system had prevented them from developing systemic wisdom.

The learnings from Three-Mile Island led to a radical shift in the enterprise of regulating for nuclear safety. The regulatory regime moved to one that was less prescriptive, less obsessed with enforcement and more self-regulatory and relational (or communitarian as Joseph Rees (2009) put it in his classic work). The emphasis was more on thinking and learning than it had been before. This was a more strengths-based, wisdom-building regulatory regime. The effect of that change has been impressive. Regulators have quite a good way of measuring nuclear safety risk which is to measure how many SCRAMS there are—automated shutdowns of a nuclear power plant as a result of systems passing safety thresholds. In the ten years after Three-Mile Island across the United States and then globally, the risk of SCRAMS reduced from 7 to 1 per facility per year, and the following decade up to 1990 it reduced from 1 to 0.1—another ten-fold reduction. The regulatory technology in relation to nuclear plants has improved through being more strengths-based rather than doing what seems to come naturally with a very extreme risk—that is to keep focused on those risks and to prescriptively regulate them under formal enforcement controls.

Conclusion

The process of building responsive regulatory pyramids takes place with a number of relationship-building principles that sit alongside a regulatory agency's formal mission. We can think of these as the key principles of restorative justice that include listening, empowering, healing, procedural justice and widening the circle when problems are not reaching resolution. The most difficult of problems require us to be thoughtful about our willingness to use a variety of both supports and sanctions. Responsiveness also requires us to be thoughtful about the dynamic sequencing of supports and sanctions. Most of all it requires communication of the message that we are willing to fail, learn and adapt fast because the world is a very complex place (Harford, 2011). Yet the regulator, and the community that supports it, will not go away until the problem is solved and the community is safe.

Responsive regulation as a model of how to escalate community concern has been applied in Australia and its region (the Pacific, South-East Asia, particularly New Zealand) and in parts of Europe such as the United Kingdom, Ireland and the Netherlands (Ivec & Braithwaite, 2015). However, there is no regulator we know in North America that could be described as a responsive regulator. While Valerie and John Braithwaite's work on responsive regulation has been much more cited by scholars than their work on restorative justice, the response of *practitioners* in North America has been quite the opposite. Thanks to the work of so many wonderful North American scholarly and practice champions restorative justice has had a wide, if not deep, impact on practice across North America and the world. In fact, it is very difficult, if not impossible, to visit any country in the world that does not have some kind of restorative justice program led by some inspiring restorative justice thinkers. In human services, restorative roots may be shallow in most countries, but at least they are taking root.

This is not true of responsive regulation, which has had little impact on the human services in any country, nor on scholarly writing in the human services field (though see Burford & Adams, 2004 and the associated special issue; Healy & Dugdale, 2011: Harris, 2011; Ivec, Braithwaite, & Harris, 2012; Dow & Braithwaite, 2013). Our hope is that this volume might change this and help stimulate new synergies in the relationship between restorative justice and responsive regulation in the human services. The final chapter of the book draws together the lessons of that politics of hope for a restorative and responsive regulation of human services that builds a freer society.

Note

1. Rankism means an elitist regulatory strategy of signalling that some people are better than others for no strong reason. Sexism and racism are just the two most common kinds of rankism. In many former colonies we see a continuation of colonial institutions in their academies in the tradition of the Royal Society that create an upper class of scholars and accomplish that by allowing existing members of the academic elite to "black-ball" the election of new fellows to the academy.

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