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Why was the enforcement pyramid so influential? And what price was paid?

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Abstract

Although responsive regulation includes much more than the enforcement pyramid, it is the pyramid that has received most attention from academics and practitioners. This is despite the fact that the implementation of the strategy of gradual escalation has proved challenging in many respects. Why has the enforcement pyramid been so attractive? Apart from its scholarly and policy usefulness, this paper suggests it appeals to practitioners because it provides a theoretical endorsement of the professional autonomy to which practitioners aspire. It was and is still appealing to scholars because it provides a practical means to improve regulation which is congruent with the dominant neoliberal reflex to depoliticize the regulation of capitalist economies. All in all, because responsive regulation has very largely been reduced to the enforcement pyramid, the literature has neglected the normative issues surrounding the regulation of capitalist economies that were central to Ayres and Braithwaite.

Why was the enforcement pyramid so influential? And what price was paid?

1. Introduction

Although, as we will see, responsive regulation includes much more than the enforcement pyramid, it is the pyramid that has received most attention from academics and practitioners.

The enforcement pyramid offers a solution to the problem of how to choose between a persuasive and a punitive enforcement style (Braithwaite 2002, p. 29). It proposes that enforcement agents start with a persuasive style and escalate punishments only when a business consistently refuses to cooperate (Ayres & Braithwaite 1992).[1] In other words, enforcement agents ought to punish or incapacitate the lawbreaker when they encounter persistent opposition, and ought to consult or persuade when they encounter cooperation (Braithwaite 2007, p. 5). Moreover, enforcement agents should be patient and forgiving, and ready to de-escalate at the first sign of goodwill. The advantage of this responsive approach would be that the perverse effects of a punitive enforcement style are minimized because it is applied only to recalcitrant businesses. These perverse effects concern, for example, decreasing involvement with regulation, inefficiency due to time-consuming lawsuits, deteriorating relationships between inspectors and regulatees, individual and collective opposition by regulatees, and withholding information from inspectors (see, for example, Ayres & Braithwaite 1992, p. 83, n. 15; Short 2012, p. 663). Moreover, according to Braithwaite (2011, p. 486), by resorting to a more punitive enforcement style only when a more persuasive enforcement style has already been tried, the former comes to be seen as more

legitimate. When regulation is seen as more legitimate, compliance with the law is more likely.

John Braithwaite (2011, p. 484) attributes responsive regulation's influence directly to the enforcement pyramid: "responsive regulation has been an influential policy idea because it formulated a way of reconciling the clear empirical evidence that sometimes punishment works and sometimes it backfires, and likewise with persuasion." This quotation suggests the enforcement pyramid has been influential in practice because its suggested means are practically applicable and in theory because its underlying causal assumptions are tenable. However, it is doubtful whether the enforcement pyramid has solved all practical and theoretical problems connected with choosing between enforcement styles. After all, as we will see, research has shown that the implementation of the enforcement pyramid is challenging. This means there is a potential conflict here: John Braithwaite assumes the enforcement pyramid has been influential because it has offered a theoretically sound practical means for choosing between both enforcement styles. Yet implementation studies have shown that it is not evident that this approach is satisfactory.

This paper has two goals. The first is to elaborate on the last of three possible explanations for this potential conflict. The first possibility is that some of the problems connected with the implementation of the enforcement pyramid that have been mentioned in the literature have meanwhile been solved because the idea has evolved – for example, because of the invention of the strength-based pyramid (see note 1). The second possibility is that the problems connected with the implementation of the enforcement pyramid are smaller than those connected with the implementation of alternative means for choosing between a punitive and a persuasive enforcement style,

such as risk-based regulation (Black & Baldwin 2010). The third possibility – the one this paper develops – is that reasons other than practical applicability and empirical tenability have contributed to the enforcement pyramid's influence. This possibility cannot be ruled out in advance. It has been shown repeatedly that factors other than the quality of the content of social scientific ideas play an important role in their success (Bort & Kieser 2011, p. 672). Yet it is still unusual in the scholarly literature to take such other factors into account. Since John Braithwaite has primarily focused on applicability and tenability as reasons for the influence of the enforcement pyramid, this paper limits itself to other possible explanations for its influence.

The second goal of this paper is directly linked to the first. It argues that it is no accident that responsive regulation has predominantly been influential in academia as enforcement pyramid. It is congruent with the neoliberal reflex to depoliticize the regulation of capitalist economies. However, the focus of scholars on the enforcement pyramid implies that other crucial elements of responsive regulation have been neglected. The paper addresses the questions of what exactly has been disregarded in the literature and whether this has been problematic. It suggests that it would be desirable for scholars to return to the fundamental question about the relationship between market, state, and civil society in the civic republican roots of responsive regulation but to leave aside its normative assumptions.

The second section of this paper reviews the literature on the challenges of implementing the enforcement pyramid. This is important because the more challenging the implementation of the enforcement pyramid is, the more likely it is that factors other than applicability and tenability have contributed to its influence. The third section deals with other possible reasons for its influence in practice and in theory than practicality

and tenability. The fourth section discusses what has been underexposed in the literature because of the tendency to reduce responsive regulation to the enforcement pyramid and in what respects, if any, this underexposure has been problematic. The fifth section concludes.

2. Challenges facing the implementation of the enforcement pyramid

What challenges of implementing the enforcement pyramid has the literature mentioned?

One regulator that tried to implement a strategy of gradual escalation working with Braithwaite's colleagues at the Australian National University was the Australian Tax Office. Job and Honaker (2003) evaluated its implementation. They exposed a range of impeding factors, including shortages of facilities to train inspectors to behave in a flexible manner, local units ignoring the new policy due to lack of central control, insufficient normative leadership to implement the new policy, fear of a loss of status on the part of tax inspectors used to penalizing tax-evading citizens, misperceptions of the enforcement pyramid as an exclusively soft approach, and distrust of the top-down implementation of academic theories. This shows that the implementation of the enforcement pyramid requires protracted cultural changes that demand the active participation of both management and professional occupations (Job *et al.* 2006).

This is just one of many studies that have shown the ways in which the implementation of the enforcement pyramid can be difficult. The correlation between the efforts made by inspectors to establish compliance – the output – and the manner in which regulatees respond to these efforts – the outcome – (Winter 2006) has proven to be substantially more complicated than the original policy idea suggested (for the

theoretical assumptions underlying the enforcement pyramid, see Baldwin & Black 2008; Gunningham 2011; Mascini & Van Wijk 2009; Nielsen & Parker 2009; Etienne 2012). Several studies have shown that inspectors are not always able to unambiguously transmit their intentions to regulatees because of communication problems and that inspectors are not always able to apply the enforcement style they deem most suitable in particular situations because of institutional impediments.

As regards unambiguous communication, the enforcement pyramid assumes first that inspectors can transmit messages on how they will react to regulatees' intentions and behavior. However, sometimes there is not enough interaction between regulators and regulatees to successfully transmit these messages, or time lapses between visits are too long to send out consistent messages (Gunningham 2011). Moreover, regulators are not always able to decide for themselves when to contact regulatees. For example, the Australian Securities and Investments Commission does not enforce regulations on its own initiative and only reacts to complaints or accidents (Kingsford Smith 2011, p. 733). As a result, this inspectorate is dependent on the assertiveness of external actors for the messages they can give to financial companies. Additionally, sometimes inspection and enforcement activities are spread across different regulators with respect to similar activities or regulations. As a result, messages flowing between regulators and regulatees may be confused or subject to dispersion or interference (Baldwin & Black 2008, p. 63).

Not only must inspectors be able to determine when to send out which messages, but regulatees should also be able to understand these messages in order for the enforcement pyramid to be effective. However, "in large companies, it may be an intermediary such as a compliance professional alone who has both the required

understanding of the key regulatory issues and a capacity to put the 'business case' for resolving them, in credible terms, to senior corporate management" (Gunningham 2011, p. 333). Furthermore, regulatees may insufficiently grasp the language of the inspector. For example, a significant number of inspected foreign owners of small supermarkets and restaurants could not speak or understand enough Dutch to have a genuine dialogue, even though inspectors considered it necessary (Mascini & Van Wijk 2009).

Another necessary condition for the successful exchange of messages is that inspectors and regulatees interpret each others' intentions unambiguously. However, it has been shown that regulators are ambivalent about even the smallest, apparently trivial elements of regulatory encounters. Alternately, they interpret parking problems as resistance or an understandable problem, a required registration as visitor as a good preventive measure or as an insult, and the offering of coffee and lunch as self-evident hospitality or a subtle manner to please inspectors (Etienne 2012). Conversely, regulatees often perceive the enforcement style in a way that diverges from the inspector's intention, because they are inclined to focus on the most negative relational signal they receive from an inspector (Mascini & Van Wijk 2009). As a result, regulatees tend to perceive their behavior as more coercive than intended by inspectors. For example, in their study of nursing home directors Makkai and Braithwaite (1994b, p. 377) conclude that "managers are exquisitely sensitive to criticism and are capable of imputing stigmatizing intent to feedback from inspectors which is intended to be 'factual' rather than to 'put them down'." The consequence of the inclination of regulatees to focus on the most negative relational signal emanating from the inspector may be that the use of more punitive sanctions prejudices the relationships between regulators and regulatees that are the foundations for less punitive strategies. Hence, it

has proven easier to build trust than to rebuild it (Haines 1997, p. 220). Moreover, the constant threat of more punitive sanctions at the top can stand in the way of voluntary compliance at the bottom of the pyramid (Baldwin & Black 2008, p. 63).

The enforcement pyramid assumes not only that inspectors succeed in transmitting their messages unambiguously, but also that they are able to apply the most suitable enforcement style in specific instances. This requires, first, that inspectors acquire the skills to do so: "[F]ront line regulators must be skilled readers of intention, able to distinguish an honest mistake from a calculated choice being represented as a simple mistake, and able to discern how regulatees' attitudes are affected by regulators' actions" (Heimer 2011, p. 672). However, inspectors of the Dutch Food and Commodity Authority, for example, doubted their own ability to work responsively (Mascini & Van Wijk 2009). They said they did not know when and how they had to switch from a persuasive to a punitive enforcement style. Moreover, some inspectors misperceived a pyramidal approach as if this allowed them only to give advice to, and to negotiate with, regulatees. Furthermore, considerable differences existed between individual inspectors and teams with respect to the enforcement style they considered most suitable in concrete situations because they differed in their task definitions and perceptions of the businesses they inspected. Nielsen (2006) also found that inspectors in some regulatory areas were not able to show any kind of responsiveness, while inspectors in other areas were. However, those who were responsive were not so in the way that is recommended by the enforcement pyramid. In short: "[t]he theory may require more capacity to read and attend to each other's behaviour, intentions, attitudes, and reactions than is humanly realistic" (Heimer 2011, p. 673).

The ability to choose the most suitable enforcement style also depends on the right institutional embedding of inspectors.[2] However, the necessary legal institutions are not always present. Sometimes inspectorates lack the legal options to apply the higher levels of the pyramid and, consequently, are unable to allow conflicts to escalate. Moreover, particular agents may facilitate action at the bottom of the pyramid or at the top, but not at the middle levels, with the result that there is no capacity for gradual escalation (Gunningham 2011). Furthermore, enforcement agents may be dependent on other inspection agents in order to be able to move up the steps of an enforcement pyramid when conflicts escalate, and at some point a change has to be made from an administrative to a criminal justice procedure. However, the other enforcement agents may not provide the cooperation needed to move a step up on the enforcement pyramid, while administrative and criminal law procedures usually operate independently and are badly tuned to one another (Van de Bunt *et al.* 2007). Hence, "[r]egulatory systems are not in fact closely articulated – even in regard to th[e] core task of responding to regulatees' recalcitrance or cooperation – not least because the mix of tasks with which regulatory chores compete varies so substantially from one level to another" (Heimer 2011, p. 665). Often, it is even more difficult to coordinate activities necessary to progress up an enforcement pyramid because not only other governmental agencies but also non-governmental agencies like unions, consumer agencies, and trade organizations are involved in enforcement practices (Baldwin & Black 2008, p. 65).

As regards political institutions, political forces resisting the escalation or de-escalation of conflicts must be absent. However, in practice political resistance often does exist. For example, Parker (2006) has shown that a hostile political climate can even undermine a pyramidal approach entirely. In order to set an example, the

Australian Competition and Consumer Commission sued rebellious lawbreakers, penalized them heavily and projected a negative image of them in the media. Australian companies raised a successful political lobby against this confrontational approach. Politicians forced the head of the anti-cartel authority to retire early and, subsequently, the enforcement of the cartel enforcement regulation became a matter of "enforcing the law 'softly,' and therefore ineffectively" (Parker 2006, p. 591). This implies that once the legitimacy of enforcement agencies is under pressure, for example because the media critically follow them after a crisis, there is a real chance that elites may refuse to allow officials the discretion that is needed to act responsively because they fear loss of reputation. This can imply either that they oppose a persuasive approach when the public demands a tough approach or that they do not allow a punitive approach when the public fears this threatens the viability of economic activities. In practice, both situations occur regularly. Under normal circumstances enforcement agencies are often blamed for over-regulation, while they are frequently blamed for indolence after accidents have happened (Almond 2009). In sum: "The capacity of a primary-level regulator to regulate responsively depends in part on the flexibility of the system created and recrafted by people working at other levels" (Heimer 2011, p. 691).

As regards economic institutions, the influence exerted by enforcement agents ought not to be impeded by competition pressures. However, in fact, the competitiveness of the market in which companies operate has a strong influence on the ability of governments to regulate effectively with an enforcement pyramid or any other form of regulation: "Corporate behaviour [...] is often not driven by regulatory pressure but by the culture prevailing in the sector or by the far more pressing forces of competition" (Baldwin & Black 2008, p. 63). The tendency of businesses to more or

less ignore enforcement agencies may be particularly salient in the current era, when most developed countries structurally economize on spending on enforcement agencies because they want to reduce the burden of regulation on businesses (Tombs & Whyte 2010). These cutbacks may seriously reduce the perceived likelihood of escalating enforcement sanctions for non-compliant businesses and, subsequently, the credibility of a regulatory agency that can remain on top when the going gets tough: ". . . credibility will be affected where regulators have inadequate staff, inadequate political support, or for whatever other reason are unable to enforce their will vis-à-vis powerful players" (Ford 2011, p. 606).

In sum: communication problems between regulators and regulatees as well as institutional impediments pose difficult challenges to the implementation of the enforcement pyramid. Miscommunication can result from ambiguous, infrequent, and interrupted contacts between regulators and regulatees, from the lack of organizational or legal infrastructure, or because of political or economic pressure rendering it impossible to apply the enforcement style deemed most suitable. Hence, the enforcement pyramid has been influential, although its implementation has proved challenging. This could imply that factors other than applicability have contributed to the prolonged influence of the enforcement pyramid among practitioners, while factors other than tenability have contributed to its influence among scholars.

3. Why was the pyramid attractive to practitioners?

John Braithwaite (2002) contrasts responsiveness with formalism. In order to be able to choose between different enforcement styles in concrete instances, inspectors require the exercise of discretion, flexibility, and contextual judgment. This may have

contributed to the influence of the enforcement pyramid on the regulators implementing this policy idea since it supports, inspires, and therefore tends to legitimize their sense of their own professionalism. John Braithwaite has indeed inductively based his ideas about responsiveness on the practice of regulators (Braithwaite 2011, p. 477). Hence, unsurprisingly, even before the enforcement pyramid was conceptualized inspectors were already inclined to work according to its underlying principles.

First, it has been established that inspectors are inclined to initially trust regulatees and to start with a persuasive approach and to switch to a punitive enforcement style only when they see no alternative. They often do not penalize rule breakings but instead attempt to move business in the right direction by negotiating and consulting (Silbey 1984). As long as businesses move in this direction and show a willingness to cooperate, inspectors normally do not choose a punitive approach (Wilthagen 1993). "Successful regulation [is] largely perceived by inspectors to be the outcome of a partnership, 'talking it through', hopefully 'educating' and increasing the commitment of the regulated. […] Prosecution then, [symbolizes] the breakdown or failure in the collaborative regulatory relationship for which the inspectors [take] personal responsibility. A tough approach is reserved for the 'obvious villains out there' and for the 'bullshitters'" (Fineman & Sturdy 1999, pp. 641–2). This means inspectors tend to start with a trusting persuasive style and switch to a punitive style only in reaction to persistent non-compliance of businesses.

Second, inspectors use their discretion in order to adapt their enforcement style to the willingness and capacity of businesses to comply. For example, in his seminal ethnographic study Hawkins (1984) found that British water pollution inspectors classified polluters into four types. The first category was "socially responsible"

companies who acknowledged the importance of clean water. The inspectors perceived the members of this group to feel bad if they had caused pollution and to be prepared to be encouraged by inspectors to address the causes of pollution. The second category, "unfortunate companies", was perceived to lack the technical or financial means to take the necessary measures to relieve the causes of the pollution. Third, "reckless companies" were perceived as openly defying the tightening of regulations and refusing to comply. Finally, "calculating companies" secretively discharged polluted water when they thought they could get away with it.

The environmental inspectors adapted their enforcement style to the type of company they thought they were dealing with. First and foremost they classified companies on the basis of the latter's preparedness to take environmental issues into account besides their concern with profit making. Moreover, they also guessed the extent to which companies were financially and technically capable of implementing the measures deemed necessary by the inspectors. Inspectors held a company more responsible for complying with the rules the more they were convinced that it was in fact able to comply. Inspectors chose to negotiate and advise when they believed the companies were willing to comply with rules preventing water pollution, took a passive stance when they thought companies were unable to comply, and opted for a tough approach when they thought companies were able but unwilling to comply.

Since the enforcement pyramid seems to be derived from the way inspectors are inclined to behave in practice, it is understandable that inspectors often perceive it as common sense and react to it with "we already do that" (Job *et al.* 2006, p. 157), or apply it "without knowing it" (Nielsen 2006, p. 336).[3] Gunningham (2011, p. 206) has also noticed that responsive regulation as enforcement pyramid is easily recognizable

for its users: "the pyramidal approach 'has the great merit that when shown the various pyramids, many regulators and policy-makers immediately seem to understand them descriptively and offer examples.' [...] That is, connecting the theoretical construct of the pyramid to the concrete and practical experience of regulators is not a substantial problem …".

In sum: the theoretical endorsement of professional autonomy by the enforcement pyramid may have contributed to its influence among practitioners. This would imply that the applicability of the enforcement pyramid has not been the only reason for the enforcement pyramid's' influence in practice.

4. Why was the enforcement pyramid attractive for scholars?

A purely scientific reason for the influence of the enforcement pyramid would be the presence of research findings corroborating the behavioral assumptions underlying this policy idea. What other factors may have contributed to its influence in academia?

One important reason for the scientific success of social scientific knowledge is the extent to which it is congruent with deeply rooted convictions and beliefs about what the world is all about or ought to be (Gouldner 1970). This is also how Tombs and Whyte (2010) explain the influence of the enforcement pyramid. They argue that neoliberalism has become dominant as a political ideology internationally since the 1980s. This ideology aims to restrain the steering role of the state as regulator and to delegate that role to the market. According to Tombs and Whyte, the enforcement pyramid is compatible with neoliberalism because it treats punishment as a negative point of reference: "enforcement of the law … is set against its notional opposite, 'partnership'; and enforcement is conceptualized as something that might *compromise*

'partnership'" (Tombs & Whyte 2010, p. 51; emphasis in original). Allegedly, this means the enforcement pyramid is based on the assumptions that non-compliance by companies is exceptional and that the majority of them are compliant on the basis of some form of enlightened self-interest or some essentially moral commitment to doing what is right simply because it is right. The authors believe that these assumptions are naive and characteristic not only of the enforcement pyramid but, more generally, of most academic literature on popular arrangements of regulation (see also Malloy 2010, pp. 343, 345; Super 2008).

However, in their book introducing the enforcement pyramid, Ayres and Braithwaite (1992, p. 17) have distanced themselves explicitly from neoliberalism and regulatory strategies that "go soft" (as acknowledged by Tombs & Whyte this issue). As civic republicans, "they are unsympathetic to the libertarian view that the state should be kept weak because it poses a threat to freedom, to the socialist view that the market order should be weakened because it is exploitative, and to the liberal view that the community and associational orders should be kept weak because they threaten individualism. Instead, they agree with those neo-corporatists who advocate a mixed institutional order, one where markets, community, state and associations each exercise countervailing power over the others and check the grave dangers when any one of these institutional orders dominates" (see also, Braithwaite, 2006, p. 885). As regards the regulatory strategies they have derived from their normative framework, they all "center on regulatory delegation that is underwritten by escalating (and increasingly undelegated) forms of government intervention" (Ayres & Braithwaite 1992, p. 158).

Is it possible, then, for the enforcement pyramid to plausibly be criticized for fitting well with a neoliberal program even though this contradicts the original

intentions of Ayres and Braithwaite? This may indeed be all too possible because, as the aforementioned implementation studies show, responsive regulation is often reduced to the enforcement pyramid. This means that the dominant interpretation of responsive regulation has been severed from its ideological foundation. After all, it has predominantly been interpreted as a purely instrumental solution to the theoretical policy problem of choosing between enforcement styles. Yet responsive regulation was originally firmly based on the political ideal of civic republicanism. Something similar has happened in the academic debate on the delegation of regulation to non-governmental actors, or "new governance" (Black 2008). Even though this reform agenda has predominantly been discussed in terms of efficiency – delegation is often presented as more efficient than centralization – it has actually been driven more by ideological fear of a tyrannical state (Short 2012).

Hence, studies on popular regulatory arrangements like the enforcement pyramid and the pluralization of regulation tend to transform political issues concerning the relationship between governance and capitalist interests into instrumental problems (Shamir 2010). According to Foucault, such transformations are characteristic of neoliberal forms of "governmentality" (Lemke 2001, 2002). The aim of governmentalities is to suggest that certain power relations, such as the relation between market and state, are given in order to place them outside of contestation (Lemke 2002, p. 57; Harcourt 2011). As such, the depoliticization of responsive regulation by reducing it to the enforcement pyramid fits neatly into the neoliberal program of finding technical solutions to policy problems rather than rethinking the balancing of relations between market, state, and civil society.

To summarize: because responsive regulation has often been reduced to the enforcement pyramid since the early 1990s, attention has focused on implementation problems at the expense of the original question of the most desirable ways to regulate capitalist economies. As such the scientific influence of the enforcement pyramid may indeed have resonated with the neoliberal reflex to depoliticize political problems even though Ayres and Braithwaite explicitly did not want to do so. In other words: apart from tenability, the influence of the enforcement pyramid in academia may have depended on its unintended congruence with liberal values favoring limiting the role of the state in capitalist economies that have dominated during the last few decades.

5. Studying the regulation of capitalist economies without being guided by normative assumptions

Since the early 1990s responsive regulation has inspired practitioners and scholars predominantly as an enforcement pyramid. Apart from its scholarly and policy usefulness, this paper has suggested that it has also appealed to practitioners because it provides a theoretical endorsement for the professional autonomy to which practitioners aspire. Moreover, it has also suggested it was and is still appealing to scholars because it provides a practical means for better regulation which is congruent with the dominant neoliberal reflex to depoliticize the regulation of capitalist economies. All in all, because responsive regulation has predominantly been reduced to the enforcement pyramid, the normative issues regarding the regulation of capitalist economies that were essential to Ayres and Braithwaite have been neglected in the literature.

How to assess this blind spot? On the one hand, one can argue that it is a good thing. After all, doing research based on normative assumptions can undermine the willingness to postpone and question personal judgments in relation to empirical

findings (Houtman 2003, pp. 6–9; Malloy 2010, p. 350). The manner in which Pearce and Tombs (1990) have handled findings that may have contradicted their own assumptions illustrates this. They have interpreted potentially contradictory findings for their preference for a punitive enforcement style a priori as if they were not contradictory. For example, it has been found that some companies invest in expensive environmental technologies while knowing their competitors do not, that some companies behave in a much more socially responsible manner than is legally required, and that some ask for tighter governmental regulation on their own initiative (Kagan & Scholz 1984). This *could* imply that operating in a capitalist market is not inherently incompatible with corporate social responsibility and, hence, that the exercise of tough coercive powers by the state is not always necessary and desirable. However, the argument that it is "*theoretically* untenable that certain corporations can do anything other than attempt to maximize long-term profitability" absolves Pearce and Tombs (1990, p. 425; emphasis added by PM) from *empirically* scrutinizing their own normative assumptions. This example illustrates that it is difficult to reconcile holding normative assumptions with approaching science as institutionalized skepticism (Merton 1973).[4] As such, the underexposure of the normative issues regarding the regulation of capitalistic economies by those who reduce responsive regulation to the enforcement pyramid can be regarded as positive.

On the other hand, one may also adopt a more critical stance toward those who have reduced responsive regulation to the enforcement pyramid. After all, it also means that they have not built on the theoretical ideas of the originators of responsive regulation regarding the regulation of capitalist economies. Many other scholars have tried to understand this in ways that illuminate the relationships between market, state,

and civil society without being guided by normative assumptions. For example, those who have specified the conditions under which self-regulation offers more or fewer chances of success (Saurwein 2011; Short & Toffel 2010) have not depicted self-regulation as inherently "good" or "bad". Similarly, Gilad (2011) did not morally evaluate compliance systems when she showed that the original goals of regulation fade because of the ways in which accountants within companies convert them into a form that managers are willing to comply with. These are only two of many studies showing that moralizing is superfluous when trying to understand the way capitalistic economies are regulated. It may be designated a missed opportunity that those who have reduced responsive regulation to the enforcement pyramid have seldom studied the regulation of capitalist economies in value-neutral terms.

In short: it is a good thing that the moral evaluation of the regulation of capitalist economies has been neglected by those who have reduced responsive regulation to the enforcement pyramid. But it is a bad thing that they have neglected the question of how the relationship between market, state, and civil society in the regulation of capitalist economies "is" or can be understood without being guided by normative assumptions. Therefore, it would be desirable for scholars to return to the fundamental question about the relationship between market, state, and civil society in the civic republican roots of responsive regulation but to leave aside its normative assumptions. In this way scholars of regulation can help advance the study of the regulation of capitalist economies, which is needed now more than ever.

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Notes

[1] John Braithwaite, Toni Makkai, and Valerie Braithwaite (2007) later extended the idea of the enforcement pyramid with that of the "'strength-based pyramid"'. The goal of the latter is to look for strengths in the performance of regulatees and then to seek to expand them. Regulators should start supporting the innovations and improvements made by regulatees before moving on to the enforcement pyramid. The more innovative and exemplary a regulatee is, the more rewarding the support of the regulator ought to be. The strength-based pyramid emphasizes even more than the enforcement pyramid does that a punitive approach should be postponed as long as possible.

[2] Institutions are defined here as the formal and informal patterns of acting that are conceived of as self-evident and that are reproduced even in the absence of sanctions, while attempts to change them are resisted (Zucker, 1991).

[3] However, this conclusion is primarily based on ethnographic studies, since two surveys show a different picture. Nielsen (2006) found only mixed evidence for the responsiveness of Danish

inspectors, perhaps because she lacked data on a crucial indicator of responsiveness: the inspectors' perception of the motives for the rule breaches by the regulated companies (Nielsen 2006, pp. 413–14, nn. 3, 14). Instead she used the history of the breaches of the inspected companies and the inspectors' perception of the general motivational posture of the targeted companies as measures of responsiveness (Nielsen 2006, pp. 406–7). Braithwaite *et al.* (1994, p. 370–2) found that where inspectors perceived nursing home directors to be amoral calculators or incompetent managers, the inspectors were more likely to use all forms of compliance strategies (i.e. compliance and deterrence) then when they perceived nursing home directors as political citizen's. This means inspectors did not face up to all non-compliant nursing home directors actively and did not differentiate their enforcement style between nursing home directors deemed willing but unable to comply and those unwilling to comply, which is at odds with the logic underlying the enforcement pyramid.

[4] Naturally, prejudices need not be restricted to those favoring a punitive enforcement style. This may apply equally to proponents of self-regulation who assume that employers and employees share a mutual interest in corporate social responsibility or those who assume that maintaining a balance between regulation and self-regulation offers the best chance of a just society.