12 Responsive Regulation

In their 1992 book *Responsive Regulation*, Ian Ayres and John Braithwaite moved the regulatory enforcement debate away from a stale disputation between the proponents of 'deterrence' and 'compliance' models of enforcement. Both strategies had a place within regulation, said the two authors: 'To reject punitive regulation is naive, to be totally committed to it is to lead a charge of the light brigade. The trick of successful regulation is to establish a synergy between punishment and persuasion.'[1]

Thus the model of 'responsive regulation' was introduced, together with the concept of enforcement pyramids. This chapter examines the contribution of 'responsive regulation' theory and considers the critiques of this strategy. It then looks at three theories that set out to build on responsive regulation or to offer a broader approach—these are labelled 'smart regulation', 'problem-centred regulation', and 'really responsive regulation'.

Responsive Regulation

A central tenet of 'responsive regulation' as expounded by Ayres and Braithwaite was that compliance is more likely when a regulatory agency operates an explicit enforcement pyramid—a range of enforcement sanctions extending from persuasion, at its base, through warning and civil penalties up to criminal penalties, licence suspensions, and then licence revocations (Figure 12.1).[2] There would be a presumption that regulation should always start at the base of the pyramid. Regulatory interventions would thus commence with non-penal actions and escalate with more punitive responses where prior control efforts had failed to secure compliance.

The pyramid of sanctions is aimed at the single regulated firm, but Ayres and Braithwaite also apply a parallel approach to entire industries. Thus they propose a 'pyramid of regulatory strategies'[3] for industrial application (Figure 12.2). The idea here is that governments should seek, and offer, self-regulatory solutions to industries in the first instance but that, if appropriate goals are

[1] I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford, 1992), 25; see also J. Braithwaite, *To Punish or Persuade* (Albany, NY, 1985).

[2] Ayres and Braithwaite, *Responsive Regulation*, 35.

[3] Ibid., 38–9.

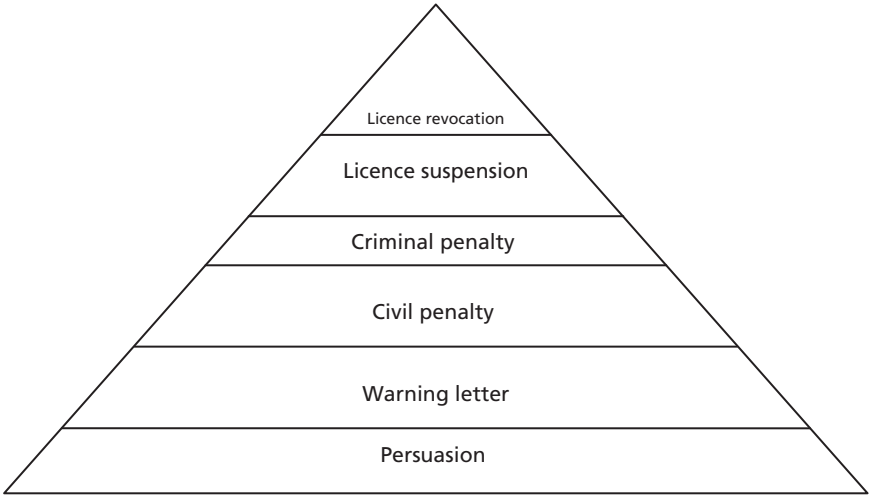

Figure 12.1. The enforcement pyramid

not met, the state should escalate its approach and move on through enforced self-regulation to command regulation with discretionary punishment and finally to command regulation with non-discretionary punishment.

Responsive regulation remains hugely influential worldwide and is applied by a host of governments and regulators. It has been further elaborated both by John Braithwaite and by the recent empirical work on the Australian Tax Office's Compliance Model led by Valerie Braithwaite.[4] The pyramidic regulatory strategy of enforcement, has, however, been the subject of a number of criticisms or reservations.[5]

The first criticism of the pyramidic approach is that, in some circumstances, step-by-step escalation up the pyramid may not be appropriate.[6] For example,

[4] J. Braithwaite, *Responsive Regulation and Restorative Justice* (Oxford, 2002); V. Braithwaite (ed.), Special Issue on Responsive Regulation and Taxation (2007) 29(1) *Law and Policy*. As elaborated, responsive regulation has three critical elements to its implementation: first, a systematic, fairly directed, and fully explained disapproval combined with, second, a respect for regulatees, and, third, an escalation of intensity of regulatory response in the absence of a genuine effort by the regulatee to meet the required standards.

[5] For critiques, see: R. Johnstone, 'Putting the Regulated Back into Regulation' (1999) 26 *Journal of Law and Society* 378–90; and the book reviews of *Responsive Regulation* at: (1993) 106 *Harvard Law Review* 1685–90 (Editorial); (1993) 98 *American Journal of Sociology* 1187–9 (Anne Khademian); (1993) 87 *American Political Science Review* 782–3 (John Scholz); (1993) 22 *Contemporary Sociology* 338–9 (Joel Rogers). On responsive regulation, see, e.g., N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford, 1998); J. Mendeloff, 'Overcoming Barriers to Better Regulation' (1993) 18 *Law and Social Inquiry*; R. Baldwin and J. Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59–94.

[6] The critique here draws on Baldwin and Black, 'Really Responsive Regulation'.

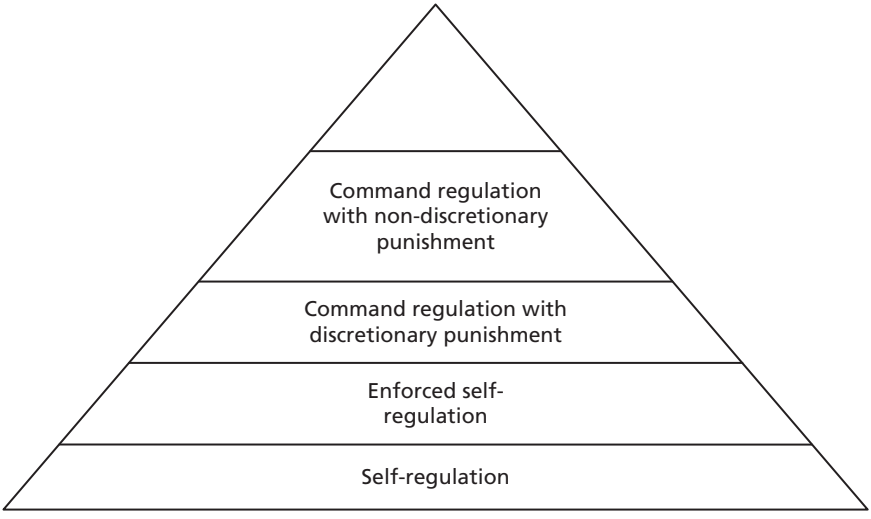

Figure 12.2. The enforcement strategies pyramid

where potentially catastrophic risks are being controlled it may not be acceptable to enforce by escalating up the layers of the pyramid.[7] In the case of non-compliance regarding high-risk activities, the appropriate reaction may be immediate resort to the higher levels of the pyramid.

Second, in some contexts it may be necessary, post-escalation, to move the regulatory response down the pyramid and to decrease the punitiveness of the approach—as where the regulatee has become more inclined to offer greater levels of compliance than formerly. Moving down the pyramid, though, may not always be easy, as Ayres and Braithwaite recognize, because use of more punitive sanctions may prejudice the relationships between regulators and regulatees that are the foundations for the less punitive strategies.[8]

Third, it may be wasteful to operate an escalating tit-for-tat strategy across the board. Responsive regulation presupposes that regulatees do, in fact, respond to the pressures imposed by regulators through the sanctioning pyramid. Corporate behaviour, however, is often driven not by regulatory pressure but by the culture prevailing in the sector or by the far more pressing forces of competition. Some authors, indeed, have distinguished between the

[7] Though see the argument that, where possible, persuasion should be the strategy of first choice because preserving the perception of fairness is important to nurturing voluntary compliance—discussed by K. Murphy, 'Moving Towards a More Effective Model of Regulatory Enforcement in the Australian Tax Office' (2004) *British Tax Review* 603–19.

[8] See Ayres and Braithwaite, *Responsive Regulation*, ch. 2; F. Haines, *Corporate Regulation: Beyond Punish or Persuade* (Oxford, 1997), 219; Johnstone, 'Putting the Regulated Back into Regulation'.

various motivations or characters of non-compliers.[9] These 'target-analytic' approaches suggest that in some situations it may be more efficient to analyse types of regulated firms and to tailor and target types of regulatory response accordingly. If, for example, research reveals that a particular problem is predominately being caused by firms that are ill-disposed to respond to advice, education, and persuasion, the optimal regulatory response will not be to start at the base of the enforcement pyramid—it will demand early intervention at a higher level. Whenever a group of regulatees is irrational or unresponsive to tit-for-tat approaches, the latter will tend to prove wasteful of resources. Similarly, an analysis of risk levels may militate in favour of early resort to higher levels of intervention (even where risks are non-catastrophic). The thrust of this argument is that, at least where the costs of analysis are low, it will be more efficient to 'target' responses than to proceed generally on a responsive regulation basis. (This is not, however, to deny the force of the anticipated rejoinder that, even in the light of such target analyses, it may make sense to start enforcing at the lowest point in the pyramid consistent with such analyses).[10]

Fourth, responsive regulation approaches look most convincing when a binary regulator–regulatee relationship is assumed. Such a scenario envisages the transmission of clear messages from regulator to regulatee. As Parker has suggested, it involves the creation of 'enforcement communities' in which regulator and regulatee understand the strategy that each is adopting and can predict each other's responses.[11] Such understanding may not develop, however, even in a binary relationship. In practice, moreover, such clear-cut binary relationships may be rarer than often is imagined. Regulatory regimes can be highly complex, and inspection and enforcement activities can be spread across different regulators with respect to similar activities or regulations.[12] As a result, responsive regulation may prove weak because the messages flowing between regulators and regulatees are confused or subject to interference. This may happen because regulatees are uncertain about who is

[9] For example, Kagan and Scholz point to three types of firm—R. Kagan and J. Scholz, 'The Criminology of the Corporation' in K. Hawkins and J. Thomas (eds), *Enforcing Regulation* (Boston, 1984), and Baldwin has suggested attention to four types of regulatee—R. Baldwin, 'Why Rules Don't Work' (1990) 53 *MLR* 321. The UK tax regulator, HM Customs and Excise, has come up with a further classification, identifying seven types of responses on a compliance continuum, and the appropriate regulatory strategy in each case: HM Customs and Excise Annual Report 2003–4, HC 119 (London, 2003), 123.

[10] On combining targeting and responsive approaches, see Braithwaite, *Responsive Regulation and Restorative Justice*, 36–40.

[11] C. Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26(2) *Journal of Law and Society* 215–39.

[12] See J. Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a "Post-Regulatory World"' (2001) *Current Legal Problems* 103–46. For a discussion of regulatory complexity in Defra, see R. Baldwin and J. Black, *A Review of Enforcement Measures* (London, 2005).

demanding what or which regulator needs to be listened to regarding a particular issue. Such regulatory 'white noise' may undermine the responsive regulation strategy because lack of clear messaging will detract from the impact of any responsive approach to sanctioning.

A fifth difficulty with responsive regulation is that escalating through the layers of the pyramid may not be the chosen (or the best) course of action because enforcement is not just a two-actor game in which the only factor that shapes the enforcer's response is the degree of cooperation forthcoming from the regulatee. As Mendeloff has argued, whether a responsive approach is optimal will depend on a number of other factors such as agency resource levels, the size of the regulated population, the kinds of standards imposed (and how these are received), the observability of non-compliance, the costs of compliance, the financial assistance available for compliance, and the penalty structure.[13] Enforcers may prove excessively tied to compliance approaches for a number of reasons, including their own organizational resources, cultures, and practices, and the constraints of the broader institutional environment. The agency may lack the tools or resources to progress to more punitive strategies; it may fear the political consequences of progression and may not have the judicial,[14] public, or political support for escalation; it may be reluctant to trigger an adverse business reaction to deterrence strategies; it may find it difficult to assess the need for escalation because it lacks the necessary information on the exact nature of a regulated firm's response to existing controls; and it may be disinclined to escalate unless it has sufficient evidence to make a case for the highest level of response (e.g. to prosecute or disqualify).[15] Alternatively, those at the top of the regulatory organization may have made a strategic decision to 'come down hard' on particular types of offence or offender for a range of reasons—media or political pressure, for example, or as a more general shift to a more 'deterrence' or punitive style across the board or with respect to particular regulatees,[16] or to compensate for weaknesses in other inspection and enforcement strategies adopted by the regulator. The risk-based approaches that UK regulators are obliged by law to adopt will, moreover, target regulatees according to risk analyses, and this will

[13] See Mendeloff, 'Overcoming Barriers', 717.

[14] On under-deterrence from low fines, see e.g. the complaints of the Environment Agency in *Annual Report* 2004, and the comments in the Hampton and Macrory Reports: P. Hampton, *Reducing Administrative Burdens* (London, 2005) (hereafter Hampton Report); and R. Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World* (Cabinet Office, May 2006) (hereafter Macrory Report); and NAO, *Fisheries Enforcement*, paras. 2.34–2.36.

[15] NAO, *Fisheries Enforcement*, para. 2.27 stated that fisheries infringements would be dealt with by means of written warnings in some cases, but only if 'the same evidence would be likely to stand scrutiny successfully if it were presented to a court'.

[16] e.g. J. Black, 'Managing Regulatory Risks and Defining the Parameters of Blame: The Case of the Australian Prudential Regulation Authority' (2006) *Law and Policy* 1; R. Baldwin, 'The New Punitive Regulation' (2004) 67 *Modern Law Review* 351–83.

cut across the use of more general 'responsive' strategies.[17] In this situation, regulatory policy overrides the individual nature of the regulator–regulatee relationship. It doesn't matter how cooperative the regulatee is, the regulatory official is liable to adopt a particular stance in order to pursue wider organizational objectives.

There may also be legal problems in applying a responsive approach.[18] In some areas, legislatures may have decreed that defaulters shall be met with, say, deterrence strategies, and this may tie the hands of the enforcing agency.[19] Responsive regulation calls for the availability of a wide range of credible sanctions, but, in some areas, legislators may have failed to provide regulators with the sanctions and investigative tools that allow a progression up the pyramid. The UK's 2006 Macrory review of penalties, for example, highlighted many sectors where regulators possessed no big stick that allowed them to 'speak softly'.[20] Although regulators commonly have prosecution powers, the fines imposed by the courts are frequently too low to provide a deterrent to the more calculating offenders, particularly small, itinerant operators who have few reputational concerns.[21] Alternatively, the stick may be so big (e.g. licence revocation of a major utility, or de-recognition of a political party) that it simply can never be used.

A further concern relates to the fairness and democratic accountability of responsive regulatory strategies. A danger inherent in a system that tailors regulatory responses to the compliance practices of individual firms is that it involves high levels of discretion and may tend to operate in a non-transparent manner. It may also raise issues of consistency of treatment across different regulatees. Such issues can be addressed by the generation of rules and guidelines to confine, structure, and check responsive strategies, but there are dangers that such structuring may straitjacket responsive regulation within costly bureaucratic controls and that the structuring guidelines used may give effect to important policies that are likely to be under-exposed to democratic scrutiny. It is, moreover, sometimes argued that a discretionary regime that is characterized by close relationships between regulator and regulatee is prone to 'regulatory capture'. Ayres and Braithwaite's answer here is to advocate a system of tripartism—in which Public Interest Groups (PIGs) are legally empowered parties within the regulatory process that can act as informed

[17] Statutory Code of Practice for Regulators 2007: section 4.

[18] On responsive regulation and legality, see J. Freigang, 'Is Responsive Regulation Compatible With the Rule of Law?' (2002) 8 *European Public Law* 463–72.

[19] For example, the US Federal Deposit Insurance Corporation Improvement Act contains a provision for prompt corrective action. This stipulates the different types of action the Federal Deposit Insurance Corporation should take when capital levels in a deposit taking institution reach particular levels.

[20] See Ayres and Braithwaite, *Responsive Regulation*, ch. 2.

[21] Macrory Report; see also Hampton Report.

representatives of regulatory beneficiaries and operate as counterbalances to industrial and agency pressures.[22] Critics have, however, questioned how such a system can be made to work within responsive regulation and have cautioned: that empowered PIGs may become 'shadow regulators';[23] that disputes about the representativeness of empowered PIGs can be expected; that gridlocks may result; and that regulatory processes will not be constructively underpinned by trust and cooperation where there is (as in the USA) a backdrop of adversarial legalism.[24]

Finally, as Gunningham, Grabosky, and Sinclair noted in their 'smart' regulatory pyramid,[25] there may be arguments for not confining the regulatory response to escalating punitive responses but for thinking laterally and breaking away from the punitive pyramid. This might, for instance, involve placing more emphasis on designing out potential mischiefs or relying on *ex ante* controls, such as screening, in order to manage a problem. Alternatively, emphasis could be placed on: avoiding undesirable consequences by restructuring the relevant industry; or relying on non-state controls rather than state sanctioning; or looking beyond individual non-compliers to systemic difficulties in the sector.[26] Put more broadly, it can be contended that responsive regulation does not provide a complete answer to the problems of designing tools for regulation—or of applying tools in different combinations. The solution, in many contexts, may not be to think of escalating up the punitive pyramid but to reconsider the enforcement toolkit and the general regulatory strategy being applied. Even, indeed, if an escalatory strategy makes sense, it may be necessary to go beyond responsive regulation for guidance on choices between the different possible routes upwards.

Smart Regulation

Smart regulation builds on 'responsive regulation', but considers a broader range of regulatory actors than its predecessor theory. The proponents of smart regulation, Neil Gunningham, Peter Grabosky, and Darren Sinclair,[27] argue that the Ayres and Braithwaite pyramid is concerned only with the interaction between two parties: state and business. Smart regulation,

[22] See Ayres and Braithwaite, *Responsive Regulation*, ch. 3.
[23] See Mendeloff, 'Overcoming Barriers', 719.
[24] See Scholz, Review of Ayres and Braithwaite, *Responsive Regulation*, 783; Mendeloff, 'Overcoming Barriers', 720, 729.
[25] See Gunningham and Grabosky, *Smart Regulation*, ch. 6.
[26] See Johnstone, 'Putting the Regulated Back into Regulation', 383.
[27] See Gunningham and Grabosky, *Smart Regulation*, 399–400.

GOVERNMENT AS REGULATOR	BUSINESS AS SELF-REGULATOR	THIRD PARTIES (PUBLIC INTEREST GROUPS, ETC.)
DISQUALIFICATIONS	DISQUALIFICATION	DISMISSAL
PENAL SANCTIONS	SANCTIONS	DISCIPLINE
NOTICES	WARNINGS	PROMOTIONS
WARNINGS	GUIDANCE	REVIEWS
PERSUASION	EDUCATION	INCENTIVES
EDUCATION	ADVICE	TRAINING SUPERVISION
ADVICE	–	ADVICE

Figure 12.3. The three aspects of smart regulation

however, holds that regulation can be carried out not merely by the state, but by businesses themselves and by quasi-regulators such as public interest groups, professional bodies, and industry associations. The pyramid of smart regulation is, accordingly, three-sided, and considers the possibility of regulation using a number of different instruments implemented by a number of parties (Figure 12.3). It 'conceives of escalation to higher levels of coerciveness not only within a single instrument but also across several instruments'.[28]

The three-sided pyramid envisages a coordinated approach to regulation in which it is possible to escalate responses to non-compliance by moving not only up a single face of the pyramid but also from one face of the pyramid to another (e.g. from a state control to a corporate control or industry association instrument). This gives flexibility of response and allows sanctioning gaps to be filled—so that if escalation up the state system is not possible (e.g. because a legal penalty is not provided or is inadequate) resort can be made to another form of influence.[29] Seeing regulation in terms of these three dimensions allows the adoption of creative mixes, or networks, of regulatory enforcement instruments and of influencing actors or institutions. It also encompasses the use of control instruments that, in certain contexts, may be easier to apply, less costly, and more influential than state controls.

Smart regulation is, accordingly, more broadly based than responsive regulation in its classic form.[30] It, nevertheless, involves an escalation process

[28] See Gunningham and Grabosky, *Smart Regulation*, 399–400.

[29] Ibid., 403.

[30] The architects of responsive regulation might argue, however, that there is no inconsistency between the responsive and the smart approaches. John Braithwaite, indeed (in 'Responsive

and, as a result, runs up against many of the general difficulties that responsive regulation encounters and which were noted above. In addition, of course, the creation of regulatory networks and the processes of coordinating responses across three different systems, or faces of the pyramid, involves its own challenges.[31] As the advocates of this approach acknowledge,[32] such coordination is not always easy, and gives rise to special difficulties of information management, clarity of messaging to regulatees, resource and time constraints, and political differences between different institutional actors. Evaluating the case for an escalatory response presents challenges within the responsive regulation pyramid, but such evaluations will be all the more difficult when complex mixes of strategy and institutions are involved. Concerns about consistency, fairness, and accountability may, moreover, be even more acute than was the case with responsive regulation.[33]

Problem-centered Regulation

In both 'responsive' and 'smart' regulation, there is an emphasis on the processes, instruments, and institutions that can be used in order to further regulatory objectives. A broader focus, however, is offered by Malcolm Sparrow's 'regulatory craft' approach. In a version of risk-based regulation, this places problem-solving at the centre of regulatory strategy. It separates out the 'stages of problem-solving'[34] and stresses the need to nominate problems for attention; define problems precisely; determine how to measure impact; develop solutions or interventions; implement the plan; and monitor, review, and adjust the plan. It also accepts the 'dynamic nature of the risk control game'.[35] Central to Sparrow's approach is the need to pick the most important tasks and then decide on the important tools, rather than 'decide on the important tools and pick the tasks to fit'.[36]

Regulation and Developing Economies' (2006) 34 *World Development* 884, 888) has emphasized that responsive regulation conceives of NGOs and businesses as important regulators in their own right so that 'the weaknesses of a state regulator may be compensated by the strengths of NGOs or business regulators' (892).

[31] An important contribution of 'smart regulation' is its discussion of inherent complementarities and incompatibilities between different regulatory instruments. Gunningham and Grabosky, *Smart Regulation*, ch. 6 (by Gunningham and Sinclair).

[32] Gunningham and Grabosky, *Smart Regulation*, 402–4.

[33] See Braithwaite, *Responsive Regulation and Restorative Justice*.

[34] M. Sparrow, *The Regulatory Craft* (Washington, DC, 2000), ch. 10.

[35] Ibid., 274.

[36] Ibid., 131.

The 'craft'approach does regulatory theory a great service in, *inter alia*, drawing attention to the different tasks that regulators have to come to terms with, in emphasizing the importance of coming to grips with performance evaluation and shifting challenges, and in focusing on desired outcomes rather that mere compliance with the current rules.

The problem-centred analysis, however, is not without difficulties. What it does not do is paint a picture of the strategic choices that confront regulators in attempting to carry out different tasks or 'stages' of the problem-solving process. Sparrow tells us to target key problems and solve these by developing solutions or interventions and by 'implementing the plan'. He offers less help, however, to regulators who have to decide whether the solution to a given problem lies through the application of a 'responsive', 'deterrent', or some other approach.[37] We have no menu of options, nor are we offered an explanation of the potential interactions between different regulatory instruments and different strategies for coming to grips with the stages of the problem-solving process—matters that are more fully dealt with by proponents of smart regulation.

The 'problem-centred' approach, moreover, assumes, perhaps too readily, that regulation can be parcelled into problems and projects to be addressed by project teams.[38] This may well be the case in some scenarios—where, for instance, a particular pollution problem occurs for a narrow and identifiable set of reasons. In other situations, however, regulators may be faced with a host of different kinds of errant behaviour that cumulatively cause a set of related mischiefs. To focus on a mischief and define it as 'the problem' may not, accordingly, move regulators very far forward in their efforts to devise strategies for responding to it. As we will see in the next chapter, it is rarely the case that risk-based regulators can identify the target risk unproblematically. They usually have to make difficult decisions about the types of risks that they will target and how these are to be constructed—whether, for instance, they are risks attached to the operations of single firms or whether they are better viewed systemically, or whether problems are individual or cumulative in nature. What is important, in such scenarios, it could be argued, is the development of an acceptable scheme for detecting and identifying key risks to the achieving of regulatory objectives—and for pinpointing key risk-creators. This, it could be contended, has to be seen as logically prior to 'picking the important problems and fixing them'.[39]

[37] See Gunningham and Grabosky, *Smart Regulation*, ch. 6.

[38] Sparrow, *Regulatory Craft* (232) concedes that the problem-solving approach 'is predicated on the hypothesis that a significant proportion of day-to-day accidents, incidents, violations and crimes fall into patterns that can be discerned'.

[39] Sparrow, *Regulatory Craft*, 133.

Really Responsive Regulation

The theory of 'really responsive regulation', like that of 'smart regulation', seeks to take 'responsive regulation' forward. It does so by offering a more general framework for approaching regulation responsively and by addressing a number of issues that responsive regulation does not focus directly upon. 'Really responsive' regulation has two main messages. The first of these is that in designing, applying, and developing regulatory systems, regulators need to adapt their strategies to more than the behaviour of regulatees.[40] They need to be attentive and responsive to five key factors: the *behaviour, attitudes, and cultures* of regulatory actors; the *institutional setting* of the regulatory regime; the interactions between the *different logics of regulatory tools and strategies*; the *regime's own performance* over time; and, finally, *changes* in each of these elements.

WHY RESPOND TO THE ABOVE FACTORS?

It might be asked why the theory of 'really responsive regulation' should demand responsiveness to the above five factors, rather than to another group of considerations. Advocates of the theory argue that these five factors are appropriate because they encapsulate the central challenges that regulators face and which must be risen to if they are to achieve their objectives over time.

Taking on board the *behaviour, attitudes, and cultures* of regulatory actors (hereafter 'attitudes') involves taking on board a number of factors that shape the regulated firm's disposition and reaction to regulation. These will include its general attitude towards regulation and compliance; its reputation and position in the market; its internal cognitive and normative operating frameworks; and its particular power structures.[41] Further matters of relevance are how the firm's managers interact on a personal level with the regulators, whether relationships are cooperative or antagonistic, the fit between external regulatory demands and internal goals, and the way that managers perceive the fairness of the regulatory regime.[42] These are considerations that 'really

[40] See Baldwin and Black, 'Really Responsive Regulation', on which this section draws.

[41] As Braithwaite has pointed out, this may involve officials in escalating an issue up the organization until the regulator finds someone who will respond; more broadly, it means analysing the firm's compliance culture, organizational practices, and the ways in which it responds to its environment, including its market position: J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany, NY, 1985).

[42] For a summary from an institutionalist perspective, see C. Oliver, 'Strategic Responses to Institutional Processes' (1991) 16(1) *Academy of Management Review* 145. See also C. Parker, *The Open Corporation* (Cambridge, 2002). On the importance of perceptions of fairness regarding the regulatory regime for compliance, see L. Feld and B. Frey, 'Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation' (2007) 29(1) *Law and Policy* 102; E. Ahmed and V. Braithwaite, 'Higher Education Loans and Tax Evasion: A Response to Perceived Unfairness' (2007) 29(1) *Law and Policy* 121; V. Braithwaite, K. Murphy, and M. Reinhart,

responsive' theory says have to be responded to because the motivational postures, conceptions of interests, and cognitive frameworks of regulated firms (and regulators) vitally affect the regulatory relationship and the regulator's capacity to influence regulatee behaviour.[43]

The *institutional setting* of the regulatory regime refers to the organizational normative, cognitive, and resource-distribution structures in which the regulator is situated.[44] This includes: the patterns of formal and informal control over the regulator; its position in the infrastructure of a broader regulatory regime (e.g. a transnational or EU regime); and the distribution of resources, including strategic resources, within that regime. Such matters have to be taken on board by 'really responsive' regulators because regulation, and its potential, is vitally affected by the position that each organization (regulator or regulated concern) occupies with regard to other institutions. The actions of a regulatory agency, for instance, are strongly shaped by the distribution of resources, powers, and responsibilities between that body and other organizations—notably its overseeing government department.

The interactions of different *regulatory tools and strategies* have also to be responded to, says the 'really responsive' approach, because they impact pivotally on regulatory performance. Most regulators use a wide variety of control tools and strategies, but these often have divergent logics—they embody different regulator to regulatee relationships and assume different ways of interacting.[45] Thus, command-and-sanction-based instruments operate on understandings that are very different from those that underpin educative or economic incentive systems of control. There may be harmony or dissonance between these tools and strategies—so that, for instance, applying sanctions on a deterrent basis may undermine a concurrent strategy of 'educate and persuade' by killing regulator to regulatee communications. Communications problems are also caused when different logics are based on different assumptions, value systems, cultures, and founding ideas, so that messaging across logics involves distortions and failures of contact. It is, accordingly, essential for the 'really responsive' regulator to manage tool and strategy interactions and to avoid undesirable confusions of logic.[46]

'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29(1) *Law and Policy* 137; T. Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (New Haven, 1990).

[43] Oliver, 'Strategic Responses to Institutional Processes'.

[44] W.R. Scott, *Institutions and Organization* (Thousand Oaks, CA, 1995); W.W. Powell and P.J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago, 1991).

[45] Black, 'Decentring Regulation'.

[46] See Gunningham and Grabosky *Smart Regulation*; J. Black, *Rules and Regulators* (Oxford, 1997). Waller also refers to this, describing it as 'institutional integrity': V. Waller, 'The Challenge of Institutional Integrity in Responsive Regulation: Field Inspections by the Australian Tax Office' (2007) 1 *Law and Policy* 67.

Being sensitive and responsive to the regime's *performance* requires that the regulator is capable of measuring whether the tools and strategies in current use are proving successful in achieving desired objectives. It will demand not merely an assessment of secured compliance with the rules of the existing regime but also a quantification of performance in achieving agency objectives.[47] A really responsive regulation approach would, moreover, link assessments to appropriate modifications of tools and strategies for detection, response development, enforcement, assessment, and modification.

A really responsive approach holds such sensitivity and responsivenes to be of crucial importance, since regulators who cannot assess the performance of their regimes cannot know whether their efforts (and budgets) are having any positive effect in furthering their objectives. Nor can they either judge whether changes in tools or strategies are called for or justify their operations to the outside world. If they cannot modify and adapt their operations and strategies in the light of performance assessments, they will be saddled with poor delivery and will be incapable of dealing with the new challenges that all regulators are confronted with.

Finally, sensitivity to *change* can also be said to lie at the heart of acceptable regulatory performance. In virtually all sectors, regulatory challenges are in a state of constant shift. Thus, for instance, new risks and risk creators come on the scene, technologies and markets change, institutional structures are reformed, political and legal obligations alter, and public expectations and preferences mutate. If regulators cannot adapt to change, they will apply yesterday's controls to today's problems and, again, under-performance will be inevitable.

As for the exhaustiveness of the above five key factors, the 'really responsive' approach holds that regulators who attend to the above matters will have cause to come to grips with all of the main challenges that are identified by the prevailing regulatory theories. Regulators are thus called on to take on board: the importance of divergent interests (be these public, private/economic, or group); the significance of variations in cultures, values, ideas, communications regimes, and control systems; and the impact of intra- and inter-institutional forces.[48]

RESPONSIVENESS ACROSS TASKS

The second message of 'really responsive regulation' is that regulatory designs, developments, and operations should take on board the way that regulatory challenges vary across the core tasks that regulators have to carry out, both

[47] See Sparrow, *Regulatory Craft*, 192, 272–3.

[48] See Chapter 4 above and B. Morgan and K.Yeung, *An Introduction to Law and Regulation* (Cambridge, 2007).

with respect to individual firms and in developing strategies more generally—namely: *detecting* undesirable or non-compliant behaviour, *responding* to that behaviour by developing tools and strategies, *enforcing* those tools and strategies on the ground, *assessing* their success or failure, and *modifying* them accordingly. The case for looking 'across tasks' is that there is good evidence that the work to be done to achieve real responsiveness will vary significantly from task to task and that it would be a mistake to think that a strategy that works in relation to, say, the detection of non-compliers will prove as effective in relation to the securing of compliance or the assessing of performance. Really responsive regulation, moreover, seeks to identify how adopting particular approaches to certain tasks will impact on the execution of other tasks by means of other strategies—how, for instance, enforcing punitively will affect cooperative modes of detection.

How a really responsive approach would operate with respect to the five core tasks of regulation is thus worth noting.

DETECTION: THE IDENTIFICATION OF NON-COMPLIANT AND UNDESIRABLE BEHAVIOUR

These are issues that are often left out of account in approaches to enforcement. A focus on the Ayres and Braithwaite pyramid, for instance, tends to draw attention to the need to ensure compliance, rather than to develop intelligence on the extent to which compliance falls short of objectives.[49] Risk-based systems look more directly towards objectives but tend to look towards a given set of risks and a given approach to these—they tend to underemphasize the need to detect new and 'off-the-screen' activities of a non-compliant or undesirable nature.[50]

In contrast, the really responsive regulatory body would seek to detect such matters and develop ways to assess how reliable its detection processes are. It is, after all, only through performance sensitivity—by knowing the reliability of its detection (and, indeed, other procedures)—that it can form a view on such matters as levels of compliance and the balance between activities that are covered by regulation and those that escape the system. Such detection and assessment processes are essential, moreover, if the regulatory regime is to be adjusted so as to extend its coverage to previously uncontrolled behaviour.

Dealing with change is thus a key issue for the really responsive regulator. In a fluid world, it is necessary not only to develop but to adjust detection

[49] But see smart regulation's taking on board the need to go 'beyond compliance' in Gunningham and Grabosky, *Smart Regulation*, 153 and N. Gunningham, 'Beyond Compliance' in B. Boer, R. Fowler, and N. Gunningham (eds), *Environmental Outlook: Law and Policy* (Sydney, 1994).

[50] See Sparrow, *Regulatory Craft*, 273–5.

techniques to meet new challenges. Enforcement, moreover, is not a mechanical process in which the fact of compliance is a given, easily identifiable matter. As many have observed, compliance is often 'constructed' through processes of negotiations between different actors in the regulatory arena.[51] Detection strategies, accordingly, have to respond to shifts in concepts and constructions of compliance and have to relate such shifts to the achieving of regulatory objectives, changes in the construction of objectives, and changes in the translation of objectives into targets and problems. Adjustments of regulatory logic, in turn, have to be made.

The really responsive regulatory body will not only lay the foundations for its detection and other work by establishing clarity on objectives, it will be clear regarding the regulatory logic that it will apply and the role of different individual logics in relation to the task of detection. The really responsive regulator will also take on board the issue of attitudes and how this affects the carrying out of detection or other tasks. Of particular concern may be instances where detection work is prejudiced by conflicts or tensions between the attitudes of the regulators and those of the regulatees.[52]

Institutional environments also have to be taken on board. In relation to many regulated activities, enforcement is carried out, as noted, by a network of different bodies—agencies, local authorities, and others. These will often enforce the same legislation in different ways and will possess different systems for gathering information on regulatory activities and compliance. Such institutional fragmentation stands in the way of the easy evaluation of detection procedures and has to be responded to with efforts to coordinate, harmonize, or rationalize.

Broader institutional settings may also impact on the effective detection of non-compliance and the estimation of 'off-the-screen' activity. In the UK, the government's general stance on reducing informational burdens on business does not encourage the surveying of industrial activity, and, in a number of important fields, the regulated industry proves highly defensive in the face of regulation. Enterprises themselves tend to be important reserves of information on compliance and, as a result, their non-cooperation is likely to impede detection work and the use of quasi-regulatory sources of data (such as trade associations).

Such difficulties of detection are considerable, but have to be faced up to if regulatory enforcement is to further the achievement of objectives. If non-

[51] See, e.g., K. Hawkins, *Law as Last Resort* (Oxford, 2002), ch. 8.

[52] See the NAO's review of UK marine fisheries controls and its finding that: 'Regulations may lead fishermen to act in ways which they regard as unnatural, for example, having to throw fish back into the sea to preserve their quota by only landing the best quality fish or to avoid exceeding quota.' The NAO also found that the 'unnaturalness' of throwing dead fish back into the sea was likely to undermine self-regulation through voluntary compliance and to undermine both detection of non-compliance and enforcement of quotas (NAO, *Fisheries Enforcement*, 19).

compliant and errant behaviour is not detected, it cannot be dealt with by a tit-for-tat or any other strategy. If levels of compliance and undesirable behaviour are not known, it will be impossible to work towards optimal regulation to meet changes and new challenges or to evaluate performance and estimate whether resources spent on regulation are worthwhile.

RESPONSE: DEVELOPING RULES AND TOOLS

Within the responsive regulation approach, the central focus is the use of a hierarchy of enforcement tools as applied through a process of potential escalation. What tends to be assumed within responsive regulation is that a full array of tools is available and that the given toolkit or set of rules is appropriate on a continuing basis. In practice, however, few regulators possess the luxury of a full toolkit. It is the case, indeed, that—even if state regulation is focused on, to the exclusion of quasi-regulatory or corporate controls—over forty enforcement tools are encountered.[53]

Ensuring that enforcement tools are 'really responsive' is a significant task. In the first instance, enforcers have to be performance-sensitive—they must possess systems of performance assessment that tell them whether they need to adjust or expand their toolkits—this is a matter returned to below. In addition, even those who are aware of their needs for new enforcement tools, and who are open to designing and using new tools[54] need to have the capacity to adjust tools in order to improve performance and adjust to changing circumstances and challenges.

Really responsive regulators will, in addition, examine how different attitudes and tool logics will affect both the way that particular controls operate and the manner in which tools can be combined. As was seen in discussing detection work, a tool that operates with a self-regulatory logic (such as a system of catch declaration) will tend to operate inefficiently if it is at odds with the regulatees' attitudes—as where a fish quota and catch declaration system involves the 'unnaturalness' of offloading freshly caught (and dead) fish into the sea.

ENFORCEMENT: STRATEGIES FOR APPLYING TOOLS

The logics of different regulatory tools and strategies interact and may do so positively or negatively. Where there are conflicts, these can impede the achieving of objectives.[55] On the positive front, the proponents of 'smart

[53] See R. Baldwin and J. Black, *A Review of Enforcement Measures* (Defra, November 2005).

[54] The evidence in Defra was that many enforcers are indeed open to designing and using new tools: see Baldwin and Black, *Reveiw of Enforcement Measures*.

[55] See Baldwin and Black, *Review of Enforcement Measures*.

regulation' suggest, with respect to *ex ante* regulatory strategies, that there may be a good deal to be achieved by combining different logics, tools, and strategies. Regulatory enforcement tools and strategies are often applied so as to achieve a number of purposes (e.g. detection and information gathering, as well as compliance seeking), and are based on different logics. Attention should, accordingly, be paid to positive interactions and combinations of tools, strategies, and logics, as these are encountered in dealing with specific regulatory tasks—how, for instance, risk-based regulation's difficulties in detecting new risks and risk-creators can be addressed by resort to a degree of random, regional, and routine enforcement.

Really responsive regulation can, similarly, suggest ways in which the messages of responsive regulation can be supplemented. Responsive regulation ranks enforcement tools in terms of punitive severity (the enforcement pyramid can, indeed, be seen as a severity pyramid). A problem in practice, however, is that tools may rank differently according to context. To some firms, naming and shaming may be seen as non-punitive, to others it may be viewed as far more punitive than a fine. In some contexts, moreover, it may be necessary to escape from the severity pyramid in favour of radically different control strategies. The 'smart regulation' approach does not overcome such difficulties by making the pyramid three-dimensional—escalation still operates on a single axis. The really responsive regulation perspective, though, does offer more assistance by dealing head-on with the issue of logics. It also takes on board the attitude of the firm. This will look to the way the firm perceives and reacts to different control tools (say, naming and shaming), and adverting to issues of attitude adds a dimension to analyses of logics and the interactions of these. Really responsive regulation thus provides a basis for assessing how best to apply a pyramidic approach to enforcement, for judging how responsive and other approaches can be combined, and for evaluating whether it is necessary to change logics—to move, for instance, from punitive to other modes of influence such as positive incentives or market-based mechanisms. Here there is a further contrast between 'responsive' and 'really responsive' regulation—the former tends to focus on the best ways to enforce a given broad strategy, whereas the latter emphasizes performance sensitivity and provides a basis for judging the case for instituting a sea-change in that strategy.

Really responsive regulation also takes on board institutional environments. Regulatory systems, as noted, more often than not involve numbers of organizations, and institutional complexities often impact on the application of different tools and strategies.[56] A really responsive approach points to

[56] As seen in fisheries—see NAO, *Fisheries Enforcement*, 34–5, for a discussion of confusions of institutional roles; duplications of inspections; inflexibilities in the deployment of resources across functions and institutions; and some complaints of over administration. Defra established a new

the need to analyse how variations in institutional characteristics and institutional interactivities affect, in quite particular ways, the carrying out of the various tasks that make up the process of regulation.

ASSESSMENT

A really responsive regulation approach helps to identify those key issues that have to be addressed if assessment processes are to prove valuable. Attitudes have to be considered—as has been noted, if regulatees' mind-sets are at tension with recording systems (e.g. for fish landings) the assessment procedure will be undermined. Institutional environments have to be taken on board so that there is coordination of data collection systems across different fisheries regulators and regulatees with their various budgetary and governance frameworks. The logics of different tools and strategies will also have to be considered, since these impact on assessment processes. Where, for instance, command and control methods are mixed with self-regulatory or advisory systems, there may be tensions that, as noted, will prejudice information flows and data collection schemes.[57] Performance sensitivity is, again, necessary, since assessments have to be reflexive—regulators must be able to measure their performance but also be able to evaluate the strengths or weaknesses of their measuring systems.

As for taking on board changes in objectives, industry conditions, or other matters, this usually demands that adjusting reforms are given consideration. A really responsive regulation approach would assess proposals for reforms of regulatory tools or strategies by looking at their 'logics effects' while taking into account issues of attitudes, institutional environment, needs for performance sensitivity, and adaptability to change. To take an example: one proposal might be to protect fish stocks by awarding Individual Transferable Quotas to fishermen (which, in effect, give individuals tradable property rights to sell specific quantities of fish).[58] The really responsive regulation framework would emphasize that such a system would change the regulatory roles of fishermen and state officials—with the market in quotas operating alongside the 'command' regime and taking over some of the functions of the regulator (e.g. allocating catch allowances). This would involve new mixes of attitudes, institutional responsibilities, and roles.

Marine Fisheries Agency in October 2005 to separate policy development from the delivery of enforcement, and it also set up a new Marine Fisheries Directorate. In 2006, a Regional Fisheries Manager for SW England was created as a pilot for further coordinating reforms. On the drive for such changes see, e.g., Prime Minister's Strategy Unit, *Net Benefits* (March 2004) ; Defra, *Securing the Benefits* (July 2005); *Securing the Benefits—A Stocktake* (July 2006).

[57] R. Baldwin, 'Is Better Regulation Smarter Regulation?' (2005) *Public Law* 485.

[58] A system found in New Zealand and Iceland—see NAO Report, p. 22.

MODIFICATION

In many regulatory enforcement regimes, policymaking cultures may contribute to excessive conservatism in regulation insofar as they look to address new policy challenges, rather than to assess and modify existing regimes. In contrast, however, field inspectors and their managers often possess a considerable (but unsatisfied) appetite for revising and rethinking their enforcement approaches.

What the really responsive regulatory body will be able to do is to assess the need for a given change, to see the implications across the five regulatory enforcement tasks, and to modify the regime in order to implement needed changes.[59] To take a specific example, the really responsive regulator of marine fisheries would deal with fluctuations in fish stocks by producing answers to such questions as: 'Do existing detection systems pinpoint the issues of compliance that relate to the threatened fish stocks?' 'Are new tools needed to detect and enforce in relation to threatened stocks?'[60] (Are new policies regarding such stocks required?) 'Does the present set of enforcement strategies need to be adjusted in order to prioritize currently threatened stocks?', 'Does the assessment system indicate how well the detection, response development, enforcement, assessment, and modification systems are coping with this newly defined risk to stocks?', and 'Can the regime be adjusted?'

THE CHALLENGES OF 'REALLY RESPONSIVE' REGULATION

The 'really responsive' approach makes considerable informational and analytical demands and it might be asked whether it is a strategy that can be operationalized. Taking account of cultures, institutions, logics, performance, and changes is by no means easy, and certain difficulties can be anticipated. Analysing and responding to varying cultures, for instance, demands both the collection of a considerable amount of information and the exercise of a substantial degree of judgement. If resources are limited, there may be problems in collecting the information necessary for 'real' responsiveness. The exercise of judgement also raises issues concerning the competence and consistency with which different regulatory staff make such judgements and the feasibility and cost of ensuring that there is such competence and consistency. One danger is that the processes for controlling such discretions—

[59] For Defra efforts to analyse needs for change following the NAO review, see Defra, *Review of Marine Fisheries* (London, 2004).

[60] The NAO noted the view of fishing concerns that Defra's data on fish stocks were generally a year out of date and adrift of fishing experience at sea—NAO, *Fisheries Enforcement*, 19.

through rules, guidelines, and review processes—can render the regulatory process unresponsive and poorly placed to react to new challenges.

A yet additional complication is that cultures and attitudes may vary within firms and across tasks. A firm, for example, may prove to be highly resistant and uncooperative in relation to the regulator's detection work, but it may be very compliant once its behaviour is placed at issue—as where it is secretive and defiant on disclosure but 'comes quietly' when its errant ways are discovered. The challenge here is to develop regulatory analyses that are sufficiently fine-grained to accommodate such variations, rather than to settle for using a crude across-the-board mode of evaluation.

Moving to the need to be responsive to the institutional and political contexts of regulation, difficulties may be that these are intrinsically hard for regulators to evaluate because they change and vary across tasks. Adapting to such evaluations may, also, prove very difficult, since the regulator may be saddled with a particular remit or set of limited powers—as was the experience of the UK's financial services regulatory regime in the period up to the 2007–9 credit crisis. This can be a special problem in relation to some regulatory tasks—as was seen in the wake of the credit crisis—when the devising of new powers and control tools for financial regulators was constrained by governmental concerns to limit regulation in order to preserve the UK's regulatory competitiveness and its position in league tables of good places to do business.[61]

Regulating really responsively can prove particularly difficult when powers are fragmented or shared. It is often the case, as noted, that risks and social or economic problems are controlled by networks of regulators, rather than bodies enjoying the luxury of a regulatory monopoly—networks in which regulation is 'decentred' rather than simple and focused.[62] In these circumstances, taking on board institutional environments may involve resource intensive investigations and analysis. It may be necessary, for example, to assess the possibilities of coping with such matters as: divergence between the various networked regulators' aims, objectives, and institutional environments; variations in regulatory cultures; differencies in capacities, skills, and resources; and varying capacities to modify their operations.[63] If, furthermore, we look across the different tasks of regulation, we can see that institutional environments arguably impact on the discharging of all of these—and not necessarily in the same ways. This is a further analytical challenge for aspirant 'really responsive' regulators.

[61] See, e.g., G. Tett, *Fools Gold* (London, 2009).

[62] Black, 'Decentring Regulation'.

[63] See, e.g., pp. 157–63 above and W. Kickert, E.-H. Klijn, and J. Koppenjan (eds), *Managing Complex Networks* (London, 1997); H. Sullivan and C. Skelcher, *Working Across Boundaries* (Basingstoke, 2002).

In paying attention to compatibilities of powers and tools there are also numerous challenges. Most notably, a significant amount of information is likely to be required—especially since different strategies, powers, and tools might be used in different combinations in carrying out different tasks. Thus, a regulator might employ a combination of deterrence and educative strategies in order to encourage a firm to reduce risks, but it might apply a set of incentives together with a selection of disclosure rules in order to assess performance in risk reduction. Analysing how such combinations will play out is likely to prove demanding informationally but also analytically.

In relation to performance assessment, being 'really responsive' demands that this covers the existing regime across the five core tasks of regulation. It will also require an understanding of those activities that detract from (or potentially detract from) the achievement of objectives but which are beyond the scope of the current regulatory regime or are 'off the screen' in the sense that they are going undetected.[64] In order to set the basis for such sensitivity, the regulator must, first, be clear regarding the objectives of the regulatory regime and the degree to which the rules lack congruence with those objectives. A causal connection has also to be established between regulatory inputs and substantive outcomes, but this is often extremely difficult—it is often, for instance, hard to show that a harm's non-occurrence was the result of the regulator's actions. A further challenge to those who would seek to evaluate regulatory performance is that modern regulation involves delegation of many control functions to the firms being regulated. These processes of 'meta-regulation' make assessment of a firm's internal controls a central element of evaluation but such a layering of regulatory controls makes performance assessment particularly difficult. This is not least because there is often a divergence between the values and processes that underpin managerial and regulatory systems. The further complication to be noted by the really responsive regulator is that the degree to which, and the way in which, assessment procedures can be 'delegated down' to firms' internal control systems will vary across the tasks of regulation.

Finally, a really responsive regulator faces challenges in dealing with the need to adapt to change. Changes, such as the arrival of new risks and risk-creators, have to be adapted to, but this may be hard for a number of reasons. The regulator may have become committed to a perspective on mischiefs or risks that is technically or intellectually deficient. If this is the case, it will prevent adaptation to developing challenges through the carrying out of such tasks as developing new rules and tools that will assist in detection and the ensuring of compliance with relevant requirements. Even if the regulator has properly adjusted its perspective, it may find it difficult to respond with new

[64] See Baldwin and Black, 'Really Responsive Regulation', 77–80.

rules and tools because of institutional constraints—the regulator may not have rule-making powers and may have to rely on an unresponsive legislature—or, indeed, legislatures at different governmental levels.

To summarize on the challenges to be faced by regulators who would be 'really responsive' it can be said that these are multiple and of different kinds. The approach makes severe informational, analytical, and resource demands. It also may be difficult to apply because externally imposed constraints may hamstring the regulator—notably governmental positions on such matters as resourcing, regulatory style, institutional structures, or business conditions. The proponents of 'really responsive' regulation would argue, however, that there are always limits to analysis and adaptability and that the contribution of their theory is to provide a framework for addressing regulatory issues. Limited resourcing is no reason, they would say, to eschew the use of a broadly based analytical framework.

Conclusions

The 'responsive regulation' debate that Ayres and Braithwaite brought to the attention of regulators and scholars has come to settle on the construction of the regulatory agenda—on identifying and addressing the array of issues with which regulators have to come to grips if they are to achieve their objectives in an acceptable manner. The concept of 'responsive regulation' moved the regulation debate forward from prior disputations and, similarly, the other approaches discussed here have sought to build on that contribution to come to grips with the growing challenges that are presented by ever more complex combinations of regulatory institutions and instruments. It is clear from the above discussion that, for most theories of regulatory strategy, there are two central questions regarding the approaches that they offer: Are they conceptually satisfactory? Are they capable of implementation in real-life circumstances?