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Responsive Regulation in Context, Circa 2011

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PREFACE

RESPONSIVE REGULATION IN CONTEXT, CIRCA 2011

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In the fall of 2010, the University of British Columbia Faculty of Law welcomed a group of scholars from around the world to consider the state and evolution of responsive regulation, in both theory and practice. The occasion was the presence of Dr. John Braithwaite, the faculty's inaugural Fasken Martineau Senior Visiting Scholar.[1]

Given that we are on the cusp of the twentieth anniversary of Ian Ayres and John Braithwaite's seminal book, *Responsive Regulation: Transcending the Deregulation Debate*,[2] it is appropriate that this issue begins with John Braithwaite's own reflections on the responsive regulation project. On one level, the set of essays that follows his can be read as an attempt to advance our understanding of responsive regulation in three substantive areas: tax (see the essays of Judith Freedman and Dennis Ventry), financial regulation (the contributions of Edward Balleisen, Cristie Ford, Janis Sarra, and Dimity Kingsford Smith), and environmental regulation (with essays by Natasha Affolder and Oren Perez). But to segregate this body of work into discrete areas of substantive subject interest is to miss the provocative cross-currents that run between the contributions to this issue. A clear objective of the or-

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[1] We are grateful to the firm of Fasken Martineau DuMoulin LLP for their generous support of this multi-year initiative. We are also grateful to the co-sponsors of our symposium event: the Workshop and Conference Support Fund, Office of the Vice President Research & International, UBC; the Liu Institute for Global Issues; the HSS Research Fund, UBC; and the Conference Fund, UBC Faculty of Law.

[2] (New York: Oxford University Press, 1992).

ganizers of this conference was to consciously erode the barriers that prevent learning across subject areas, and across disciplines.

The value of these essays, as a collective, lies in the themes that cut across subject areas, in the intellectual doubts that arise from testing responsiveness in diverse contexts, and in the cases where responsive regulation both has and has not worked. The broad conversations emerging from comparisons between diverse regulatory contexts continue to renew, enrich, and add nuance to theories of responsive regulation today, nearly two decades later. Along with reviewing the significance of John Braithwaite's contribution in this issue, this introduction highlights three of these cross-cutting themes in particular: the civic republican potential (or lack thereof) inherent in regulatory interactions; contemporary nodal, networked, or multi-layered conceptions of regulation and governance; and the influence of meta-regulatory or new governance notions of ongoing regulatory learning, and their relationship to the responsive regulatory pyramid.

John Braithwaite's essay in this issue seeks to take stock of the evolution of responsive regulation over the past two decades, and to rearticulate a set of its fundamental principles. It is a welcome and illuminating exercise. As Braithwaite points out, the theory has been layered over—in helpful ways, but also in ways that potentially increase its complexity—with an "accumulation of debate, and a thicket of creative implementation and refinement."[3] Responsive regulation has also produced a number of distinct conceptual offspring, all of which share features with Ayres' and Braithwaite's original conception but which may emphasize different elements, or advance the conversation along different lines, and which are sometimes in tension with each other. John Braithwaite's essay in this issue registers these effects. The nine core principles of responsive regulation that he identifies are not a return to some static set of "first principles" circa 1992. There never was such a set. From the start, responsive regulation has emphasized the importance of praxis and context-specificity in its application.[4] Evolution through contex-

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3 John Braithwaite, "The Essence of Responsive Regulation" (2011) 44:3 UBC L Rev 475 at 476 [Braithwaite, "Essence"].

4 See Ayres & Braithwaite, *supra* note 2 at 99–100.

tual application and ongoing scholarly reflection is what had always been envisioned for it.

As is reflected in John Braithwaite's contribution in this issue, many of the core elements of responsive regulation have remained quite stable over time. Among these are the emphases on the pyramidal regulatory structure, on regulation through engagement and dialogue rather than by dictat, on bringing third parties into what had been previously characterized as a binary regulator/regulatee interaction, and on the concept of the benign big gun. The claims that effective regulatory solutions would transcend what was once a bright line divide between public and private spheres, or that regulation should be able to move nimbly between deterrence-oriented and compliance-oriented strategies, are so ubiquitous today that it is almost difficult to remember that these were not mainstream arguments in 1992—in the days before the Open Method of Coordination in the EU, or the National Partnership for Reinventing Government efforts of Al Gore and Bill Clinton. Responsive regulation also has an abiding commitment to a civic republican notion of justice as non-domination, evolving through practical contexts well past neo-republicanism's theoretical apogee in the 1990s.[5]

There have also been some notable evolutions. For one thing, the game theory modeling that Ian Ayres brought to the 1992 book has largely faded out. Increasingly, in the two decades since this book was published, the responsive regulation project has been Braithwaite's, with Ayres's work moving along a separate trajectory. Responsive regulation today is not an attempt to transcend an unproductive debate between schools of thought on the pressing question of regulation, so much as it is a regulation-oriented instantiation of a broader set of commitments that Braithwaite has brought to his work across fields ranging from criminology, to tax policy, to peacebuilding. The focal shift sheds light on the orientation, the strengths, and perhaps also the limits of responsive regulation. Above all, what comes through in this 2011

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[5] See e.g. Frank Michelman, "Law's Republic" (1988) 97:8 Yale LJ 1493; Cass R Sunstein, "Beyond the Republican Revival" (1988) 97:8 Yale LJ 1539; Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

work is the centrality of the interpersonal relationship, and the need to strive toward respectful, legitimate, dialogic regulatory interactions in the pursuit of enlightened community building. Ayres and Braithwaite backgrounded their broader ideological commitment to republicanism in 1992, noting that it was "by no means necessary to accept this position to think that the ideas [they] advance may be desirable or practical."[6] Now, it is utterly core to the project. Consistent with this, as Braithwaite has described in further detail elsewhere,[7] the relationship between responsive regulation and one of his other signal projects, restorative justice, has been strengthened and deepened. Among other things this suggests that the responsive regulatory "big gun" may be even more "benign" this time around, with greater efforts being employed to avoid having to use it and more emphasis on conveying support, engagement, and a commitment to fairness and collaborative problem-solving.

The contributions in this issue speak to the republican potential in regulation. As Carol Heimer points out, at this stage it is difficult to imagine that regulation could still be something that "a regulator unilaterally does to a regulatee."[8] At the 2010 workshop, Mary Liston provided a careful account of what a precisely republican understanding of non-domination entails, as compared to liberal understandings of the same.[9] Republicanism entails considerably more. Our shared sense of the thickness of the republican account, and its resonance throughout John Braithwaite's work, helped to tease out the implications of the republican approach for each of our subject areas. Dennis Ventry's essay is most explicit here, proposing a front-line reform that could transform "the annual rite of taxpaying into a dialogue between citizens and their governments, a civics lesson for taxpayers as well as tax offi-

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6 Ayres & Braithwaite, *supra* note 2 at 18.

7 See John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

8 Carol A Heimer, "Disarticulated Responsiveness: The Theory and Practice of Responsive Regulation in Multi-Layered Systems" (2011) 44:3 UBC L Rev 663 at 663.

9 Working paper on file with authors.

cials, and an opportunity to improve the system year after year."[10] He echoes the eagerness for relational and dialogic approaches to regulation, and the aspirational desire that permeates much of the literature to develop "a participatory democracy dimension to . . . the creation and realization of regulation."[11]

Other authors were less sanguine about the emancipatory promise of regulation. The scholars that participated in our financial regulation panel, in particular, expressed reservations about the skewing effect of power imbalances in dialogic contexts. Responsive regulation is not oblivious to problems of power. In fact, it explicitly frames the concept of tripartism as a mechanism for injecting countervailing power against otherwise dominant parties,[12] and a way to deter regulatory capture by powerful regulated actors.[13] Where some of the authors in this issue question this argument, it is with regard to the feasibility of confronting the effects of power, or even recognizing them, in real-life regulatory contexts. Janis Sarra points to "power imbalances" as a factor explaining the limited traction of responsive regulation in the global context of oversight of structured financial product markets. She illuminates the dominant, but also the hidden, voices in financial product market regulation. She argues that dialogic and responsive approaches to regulation are "vulnerable to hearing only from the regulated".[14] Her work points to the need to do more to uncover the many voices that are not heard in current regulation, and regulatory scholarship. Cristie Ford argues that flexible approaches to regulation are more "porous" to external influence than prescriptive regulatory approaches. Her essay pushes regulatory scholars to more carefully engage with the vast literature on power, including what Peter Bachrach and Morton Baratz have framed in terms of agenda-setting

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10 Dennis J Ventry Jr, "Americans Don't Hate Taxes, They Hate *Paying* Taxes" (2011) 44:3 UBC L Rev 835 at 843.

11 Dimity Kingsford Smith, "A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector" (2011) 44:3 UBC L Rev 695 at 702.

12 See Ayres & Braithwaite, *supra* note 2 at 81–86.

13 See *ibid* at 71–73.

14 Janis Sarra, "Risk Management, Responsive Regulation, and Oversight of Structured Financial Product Markets" (2011) 44:3 UBC L Rev 779 at 781.

power.[15] In that vein, but assessing the power of regulators as opposed to regulatees, Dimity Kingsford Smith argues that it is "lack of power" on the part of the Australian Securities and Investments Commission which in part explains the limits of responsive regulation in the financial services sector.

Responsive regulation has also been influenced by the development of networked, or nodal, approaches to governance.[16] Nodal governance builds on potential that has always been inherent in responsive regulation. From the beginning, responsive regulation envisioned a regulator-regulated relationship that was supported and augmented through tripartism and the involvement of a broader community of interests.[17] Since 1992, the work has been substantially fleshed out through scholarly learning about networks and nodes,[18] and about the relationship between regulation and other elements—social, economic—of the "license to operate".[19] Responsive regulation circa 2011 envisions regulators that work consciously within a web of other legal and beyond-legal relationships, drawing on those resources when escalating up the pyramid of sanctions.[20] The works in this issue demonstrate how far responsive regulation has come in the direction of nodal and network governance. The kinds of interventions being made by these authors were not possible in 1992, before we had a more granular understanding of the full range of actors contributing to governance.

Specifically, situating responsive regulation within detailed, messy, and dynamic accounts of regulatory activities demands, for a number of contributors to this issue, better accounts of the dynamic, multi-layered *interactions* of regulatory actors. Carol Heimer explicitly tackles the question of what the multiplicity and complexity of regulatory actors implies for the theory and

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15 Peter Bachrach & Morton S Baratz, "Two Faces of Power" (1962) 56:4 Am Pol Sci Rev 947.

16 See Peter Drahos, "Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach" (2004) 77:2 Temp L Rev 401.

17 See especially Ayres & Braithwaite, *supra* note 2 at 54–100.

18 See especially Drahos, *supra* note 16.

19 See Neil Gunningham, Robert A Kagan & Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford: Stanford University Press, 2003).

20 See Braithwaite, "Essence", *supra* note 3.

practice of responsive regulation by focusing on regulatory actors (and not just actions). She identifies the assumption at the core of responsive regulatory theory of a "a closely articulated system in which regulators at each level of the system fine-tune their actions to induce regulatee cooperation".[21] Her work, along with a number of other contributions to this issue, challenges this assumption. Natasha Affolder's essay on large infrastructure and natural resource projects cautions against an assumption of "networks" where multiple regulators are engaged in a common project. A close look at the empirical realities of large project regulation suggests that a model that posits a government regulator "harnessing" or mobilizing non-state actors such as local and transnational NGOs may overstate the degree of cooperation between these actors. Dimity Kingsford Smith questions whether a nodal or networking model of pragmatic responsiveness that encourages strategic intervention where a regulatory initiative might work ill fits the formality of a pyramidal approach to responsive regulation.

During the 2010 workshop, Susan Sturm presented a powerful visual image of the "regulatory constellation" which well captures not only the multiplicity of regulatory actors, but the fact that each is a moving target. The contributions to this issue are attentive not only to the interactions between regulatory actors but the *changing* relationships between these actors. Judith Freedman, in the tax context, draws attention to the shifting relationships between revenue authorities and business, providing the example of the work of Her Majesty's Revenue and Customs in the United Kingdom. Janis Sarra illustrates the complex and constantly moving global architecture of state and non-state regulation of structured financial product markets.

The third cross-cutting theme that we pull out here, which has had a substantial effect on responsive regulation circa 2011, has been the influence of recent work conducted under the aegises of meta-regulation and new governance.[22] One of the key elements of meta-regulation and new govern-

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[21] Heimer, *supra* note 8 at 665.

[22] See e.g. Charles F Sabel & Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (2008) 14:3 Eur LJ 271; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (New York: Cambridge University Press, 2002); Malcolm K Sparrow, *The Regulatory Craft: Controlling*

ance—which John Braithwaite's essay in this issue both embraces, with caveats, and then provocatively advances through a proposal for randomized controlled trials of justice interventions[23]—is the emphasis on embedding learning paradigms and building systematic learning processes into regulatory architecture. The move opens the possibility that incremental tit-for-tat regulatory interactions can be aggregated into context-specific, bottom-up learning, which can feed back into continual improvements to the regulatory approach. Significantly, meta-regulation and new governance envision learning both at the regulatory level, and at the regulatee level, and an energetic feedback loop between them.

One of the ways in which responsive regulation circa 2011 is consistent with the multiple-degrees-of-learning mandate is in the development of a more nuanced set of regulatory pyramids. The two original regulatory and enforcement pyramids have been reconceived and recast into a pyramid of supports, and a pyramid of sanctions.[24] Regulators move sequentially all the way through the pyramid of supports and then over to the pyramid of sanctions. The pyramid of supports is designed to support and enlarge the managerial capacities of regulated actors by way of education and persuasion, praise, prizes, and grants. The pyramid of sanctions also locates education and persuasion at its base, but then ratchets up through an alternative set of mechanisms: shaming, regulatory and criminal sanctions, and finally delicensing. Interestingly, the pyramid of supports in particular bears a strong resemblance to the notions of "benchmarking", or "rolling best-practices rulemaking" that have been developed by experimentalist scholars.[25] The concept here is that the pyramid of supports can "[pull] the performance of the most innovative actors up through new ceilings" and simultaneously "make it easier to increase demands upon laggards."[26] Whenever one regu-

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Risks, Solving Problems, and Managing Compliance (Washington, DC: Brookings Institution Press, 2000).

23 See Braithwaite, "Essence", *supra* note 3 at 512.

24 *Ibid* at 482, figure 1.

25 See especially Michael C Dorf & Charles F Sabel, "A Constitution of Democratic Experimentalism" (1998) 98:2 Colum L Rev 267 at 350–56.

26 Braithwaite, "Essence", *supra* note 3 at 481.

lated actor breaks through an old ceiling, regulators convey to others in the same industry that they are expected also to reach that ceiling, either by purchasing a leading actor's technology (providing that actor with a potential source of profit) or by inventing their own. Regulatory standards actually "roll", in that they are keyed to leaders' productive innovations rather than to static industry practices, or the lowest common denominator.[27]

The authors in this issue engage with the notion of learning-by-doing by trying to excavate what actually happens within street-level regulation. Doing so highlights the complexity, the contingency, and the challenge associated with both implementing responsive regulation well on the front lines, and building in the learning systems and habits needed to scale those experienced up to a regulatory system level. In this regard, some of the essays in this issue are more cautious about the feasibility of responsive regulation than is John Braithwaite himself. Some authors might take at least some issue with his claim that responsive regulation can be equated with another challenging task that we leave to "people of ordinary talents": parenting.[28]

A number of authors identify a preference in the literature for a focus on criminal and civil penalties, responsive regulation's "benign big guns". Dimity Kingsford Smith, writing on the Australian financial services sector, thus calls for renewed attention to regulation "lower down" the regulatory pyramid. The preference for too-much-too-late punitive responses may suggest a broader epistemological problem encountered at the front line, where regulators must be able to see patterns that sometimes are only completely clear in hindsight, and must read past "noise" events to discern underlying causes. Oren Perez also underlines the "demanding epistemic requirements" involved in implementing responsive regulation in concrete cases. As Judith Freedman uncovers, substantial street-level compliance challenges are inherent in a context (tax regulation) where there is a lack of consensus on what it means to be "non-compliant". Cristie Ford also describes the "micro level" incremental evolutions in regulatee practice, such as those around the automation of risk

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[27] On potential rule of law challenges produced by rolling best-practices rulemaking, see Cristie L Ford, "New Governance, Compliance, and Principles-Based Securities Regulation" (2008) 45:1 Am Bus LJ 1 at 41–45.

[28] Braithwaite, "Essence", *supra* note 3 at 518.

and compliance processes in financial firms, which may fly under the regulatory radar even though cumulatively they amount to very significant shifts. Similarly, Carol Heimer illuminates the pragmatic considerations that explain the disconnect between the awareness of street-level regulators that there need to be timely regulatory responses and the lags that inevitably occur: staff shortages, staff dependencies on people working at other levels of the regulatory system, garden-variety corruption. Pointing to these and other factors, she concludes that at the street level, "responsiveness is just barely possible, at least some of the time."[29]

Directions for Future Research

This issue captures a moment in the still-vibrant and continuously evolving scholarship on responsive regulation. It reminds us, potently through Edward Balleisen's outline of avenues for historical inquiry into the global financial crisis, and through Cristie Ford's valuable dissection of the subsets of scholarly work that responsive regulatory theory has spawned, that there is a need to study and explain what has come before, and to build on existing literature.

But for many contributors, this is also the moment to ask: what do we not know about responsive regulation? What areas appear immune to responsive regulatory experimentation? What can we learn from the failures of responsive regulatory approaches? What scholarly directions and what methods for new research are needed in the years ahead? What are the hidden assumptions and unacknowledged blind spots in the literature? These are the sorts of questions Oren Perez encourages regulatory scholars to engage with by adopting a second-order reflexivity that would reveal "the presuppositions and commitments that are shared by those who engage in the debate."[30] Edward Balleisen takes some useful steps forward here, exploring the shared ideologies underlying dominant modes of thought, including the "continual

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[29] Heimer, *supra* note 8 at 689.

[30] Oren Perez, "Responsive Regulation and Second-Order Reflexivity: On the Limits of Regulatory Intervention" (2011) 44:3 UBC L Rev 743 at 760.

emphasis on *homo economicus Chicagus*".[31] He stresses the need for ethnographic studies to uncover the history of institutions, financial products, and sets of ideas. He pushes scholars to begin the task of "investigating the potential links between the conceptual frameworks at the core of conservative economics and the sort of policy defaults that operated within regulatory agencies, or for that matter, the risk-management structures within financial firms."[32]

At the methodological level, the time is ripe to increase the degree of clarity around the precise players and mechanisms with which we are concerned. Who has agency in our accounts, and what are the implications of focusing on a particular layer within a multi-layered regulatory structure? What can we say about how real life mechanisms function—the precise ways in which regulators move up and down the regulatory pyramid, the obstacles to inter-regulatory coordinated action, the quality of information being gathered? Are there feasibility limits imposed on responsive regulation, and can we think of strategies for husbanding regulatory energy and channeling the dialogic project toward high priority areas?

This much we can say with conviction: learning by doing requires continued close attention to context and cross-cutting themes, precisely along the lines of this issue. This is explicit in Natasha Affolder's essay.[33] It documents the prevalence of case studies on large project regulation, but the absence of any synthesis of these case studies. She advances three avenues for descriptively thick new research on environmental regulation (regulation through contracts, monitoring agencies, and international standards) that can cut across existing case studies and deepen existing accounts of large project regulation. And so the responsive regulatory project continues.

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31 Edward Balleisen, "The Global Financial Crisis and Responsive Regulation: Some Avenues for Historical Inquiry" (2011) 44:3 UBC L Rev 557 at 584.

32 *Ibid*.

33 "Why Study Large Projects? Environmental Regulation's Neglected Frontier" (2011) 44:3 UBC L Rev 521.