WHEN TO PUNISH, WHEN TO PERSUADE AND WHEN TO REWARD: STRENGTHENING RESPONSIVE REGULATION WITH THE REGULATORY DIAMOND

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Originally published over two decades ago, 'responsive regulation' and its associated regulatory pyramid have become touchstones in the contemporary study and practice of regulation. Influential ideas and theories about regulation and governance have been developed in the intervening years, yet responsive regulation's simple pyramidal model continues to resonate with policy-makers and scholars alike. This article seeks to advance the vision and utility of responsive regulation, by responding to several key drawbacks of the original design and by offering an update to the pyramidal model of regulation that lies at the centre of the theory. It argues for a 'regulatory diamond' as a strengthened, renewed model for responsive regulation. Rooted within the responsive regulation literature, the regulatory diamond integrates into the one schema both 'compliance regulation' and 'aspirational regulation', thereby offering a more cohesive representation of the broad conception of regulation that underpins responsive regulation theory, and the limited but vital role of law within it.

I INTRODUCTION

'Responsive Regulation' and its associated regulatory pyramid have endured for the past two decades since their original publication to become touchstones in the contemporary study and practice of regulation.[1] Responsive regulation, with its related pyramid heuristic, remains unrivalled in its applicability to multiple regulatory contexts, in both a descriptive and normative sense.[2] New ideas and

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1 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

2 Peter Mascini, 'Why Was the Enforcement Pyramid so Influential? And What Price Was Paid?' (2013) 7 *Regulation & Governance* 48, 48; Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7 *Regulation & Governance* 2, 2.

thinking about regulation have been developed since the 1992 release of Ayres and Braithwaite's *Responsive Regulation,* including; 'polycentric regulation',[3] 'the open corporation',[4] 'decentred regulation'[5] and 'regulatory capitalism'.[6] There has even been a shift away from the language of regulation to consider 'governance' and, in particular, so-called 'new governance' techniques.[7] Responsive regulation theory is certainly not without its critics, yet its simple pyramidal model continues to resonate with policy-makers and scholars alike.[8]

This article seeks to advance the vision of responsive regulation, by updating the pyramidal model of regulation that lies at the centre of the theory. Firmly rooted within the Braithwaitian tradition, the article proposes an extension of the original responsive regulation pyramidal model: the *regulatory diamond*.[9]

The proposal is more than mere shape-shifting. This article posits that the regulatory diamond extends the normative and descriptive power of responsive regulation theory by responding to two key deficiencies of the original model. These are that the original pyramidal model is excessively focussed on compliance with behavioural standards, and, that the source of those standards, often assumed to be the law, is ill-defined in responsive regulation theory.

This article argues that 'rule compliance' is an impoverished view of regulation. Regulation, appropriately conceived, should not be synonymous with compliance mechanisms or enforcement of rules *only,* but rather should also encompass methods and mechanisms that encourage regulatees to go *beyond* compliance with legal rules to satisfy regulatory goals.[10] Responding to this understanding, the regulatory diamond integrates into the one schema both what this article calls *compliance regulation* and *aspirational regulation*. It also makes explicit the

3 Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 140.

4 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2010) ix.

5 Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 4.

6 David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of Political and Social Science* 12, 14.

7 Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342, 344.

8 See, eg, the entire 2013 special issue of *Regulation & Governance* devoted to responsive regulation on the occasion of the twentieth anniversary of the publication of Ayres and Braithwaite, above n 1; Parker, 'Twenty Years of Responsive Regulation', above n 2.

9 Responsive regulation theory first appeared in published form in a book co-authored by Ian Ayres and John Braithwaite: above n 1. In this article I sometimes use the term 'Braithwaitian'. I do so with the utmost respect for Ian Ayres' contribution to responsive regulation theory. I follow conventions in the regulatory literature, including Ian Ayres' own writings: see Ian Ayres, 'Responsive Regulation: A Co-Author's Appreciation' (2013) 7 *Regulation & Governance* 145. Ayres graciously notes that the success of responsive regulation in the decades since it was first published are 'the success of John's ideas': at 145. Braithwaite developed the idea of the pyramid in the early 1980s, and first presented it to an audience in 1983. He, far more than any other scholar has developed and championed responsive regulation in the years since. See John Braithwaite, 'Relational Republican Regulation' (2013) 7 *Regulation & Governance* 124.

10 Jonathan C Borck and Cary Coglianese, 'Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 139.

central role of law within the schema. In so doing, it highlights the strengths and limitations of the law for achieving regulatory goals.

Whilst the pyramid's end goal was rule compliance, the regulatory diamond suggests that compliance with certain legal standards is often not an endpoint but a waypoint — albeit a most important one — to improved regulatee behaviour. The regulatory diamond thereby offers a more cohesive and holistic representation of the concept of regulation that underpins responsive regulation theory and contemporary regulatory studies. Just as the pyramid offered a roadmap for regulatees to achieve compliance, similarly, the regulatory diamond offers a roadmap for going beyond mere compliance to achieving regulatory goals and realising the 'continuous improvement' meta-goal of regulation, as posited by Braithwaite and others.[11] In so doing, it also offers practical benefits for regulators and regulatees designing, understanding and operating within a given regulatory regime.

To be sure, this article does not seek to offer an exhaustive critique of responsive regulation, nor does the regulatory diamond respond to *all* the critiques that have been made over the years.[12] Of course, this exposes the regulatory diamond to many of the same criticisms as the original regulatory pyramid and to responsive regulation more generally. Nevertheless, by addressing many of the concerns associated with the original pyramidal model, it is hoped that the regulatory diamond is seen as a renewed and strengthened model of responsive regulation, and a worthwhile contribution to the regulatory design literature.

The article continues below with Part II providing a review of responsive regulation theory and its pyramidal model, and Part III elaborating on the aforementioned deficiencies of that model. Part IV introduces the regulatory diamond and its constituent parts, including compliance regulation and aspirational regulation, and details how this model represents an enhancement of the pyramidal model, and advances responsive regulation theory. Several real-world examples are offered, highlighting the increased utility of the regulatory diamond as a heuristic that could aid theorists, regulators and regulatees alike.

II RECAPPING AYRES' AND BRAITHWAITE'S *RESPONSIVE REGULATION*

Ayres and Braithwaite's *Responsive Regulation* has been a major theoretical force in the scholarly debate for over two decades.[13] Responsive regulation integrated the claims of the economic theory of regulation with game theory and built upon

11 John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007) 322.

12 There have been volumes written about Braithwaite and Ayre's regulatory pyramid.

13 As Ian Ayres pointed out in a 2013 article, the responsive regulation theory generates ever increasing annual citations in scholarly literature: Ayres, 'A Co-Author's Appreciation', above n 9, 145–6; Parker, 'Twenty Years of Responsive Regulation', above n 2, 2.

prior empirical research conducted separately by Ayres and Braithwaite.[14] The theory attempts to bridge multiple perspectives on regulation, combining elements of public, private and institutionalist theories.[15] Beyond its theoretical basis, the simplicity and easily communicated design of responsive regulation's pyramid is surely a contributing factor to responsive regulation's enduring popularity amongst regulatory scholars and practitioners, in and outside government.[16]

Responsive regulation offers a solution to the policy conundrum faced by many regulators: when to punish, and when to persuade?[17] Responsive regulation's primary theoretical claim is that, to be effective, regulators and regulatory instruments should adapt (i.e. be responsive) to the actions of the entities or the people they purport to regulate.[18] The regulatee's conduct will determine 'whether a more or less interventionist [regulatory] response is needed. Rule enforcers should be responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention.'[19] A regulator must be willing, and have the capacity to escalate their regulatory approach from soft words to hard deeds, and likewise be willing to de-escalate when met with goodwill and appropriate behaviour from the regulated entity.[20] The theory builds a dynamic model in which the strengths of the different forms of regulation compensate for others' weaknesses, and reduces the negative effects of coercive enforcement mechanisms as they are applied only to non-responsive or recalcitrant entities.[21]

A *Design of the Regulatory Enforcement Pyramid*

Ayres and Braithwaite captured the essence of their theory in the 'enforcement pyramid' (see figure 1).[22] The 'arresting image'[23] of the pyramid is '[t]he most distinctive part of responsive regulation'.[24] The pyramid depicts the relationship

14 See, eg, Ian Ayres, 'Playing Games with the Law' (1990) 42(5) *Stanford Law Review* 1291; Ian Ayres, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion' (1987) 87 *Columbia Law Review* 295; Ian Ayres, 'Determinants of Airline Carrier Conduct' (1988) 8 *International Review of Law and Economics* 187; John Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80 *Michigan Law Review* 1466; John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (SUNY Press, 1985); Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies,* (Oxford University Press, 1986).

15 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 53.

16 Mascini, above n 2, 53–6.

17 Ayres and Braithwaite, above n 1, 21.

18 Ibid 19–20.

19 John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008) 88.

20 John Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation' (2011) 44 *University of British Columbia Law Review* 475, 483–4.

21 Ibid 484; Mascini, above n 2, 52.

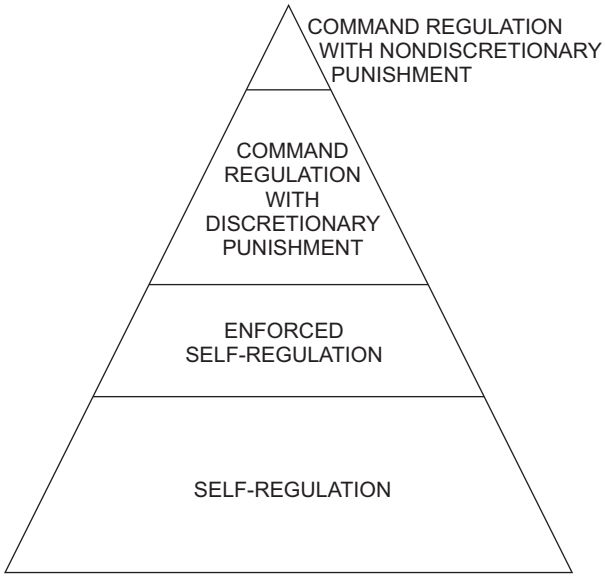
22 See Ayres and Braithwaite, above n 1, 19–53.

23 Ayres, 'A Co-Author's Appreciation', above n 9, 145.

24 Braithwaite, *Regulatory Capitalism*, above n 19, 88.

between regulatory devices and mechanisms, and visually demonstrates that no one regulatory method — neither self-regulation, co-regulation or command-and-control regulation — is optimal, and rather that a dynamic web of different regulatory techniques is preferred.[25]

Figure 1: Example of Enforcement Pyramid



Source: Ayres and Braithwaite, above n 1, 39.

Braithwaite explains that the broad, lower level of the pyramid is the most inclusive, collaborative and 'dialogue-based [regulatory] approach we can craft for securing compliance with a just law'.[26] At each successive level up the pyramid are ever more 'demanding and punitive interventions'.[27] Another way of viewing the pyramid is that 'self-regulation' is at the base of the pyramid, whereas coercive 'command-and-control' regulation is towards the apex, with a host of regulatory methods in between.

Dynamism is a vital component of the model and is a reflection of what Braithwaite, Makkai and Braithwaite conceive as the ultimate purpose of regulation: to 'catalyse continuous improvement' in the behaviour of the regulated firm or individual.[28] 'The hypothesis of responsive regulatory theory is that a regulatory

25 John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 32; Braithwaite, *Regulatory Capitalism*, above n 19, 88–92.

26 Braithwaite, *Regulatory Capitalism*, above n 19, 88.

27 Ibid 89.

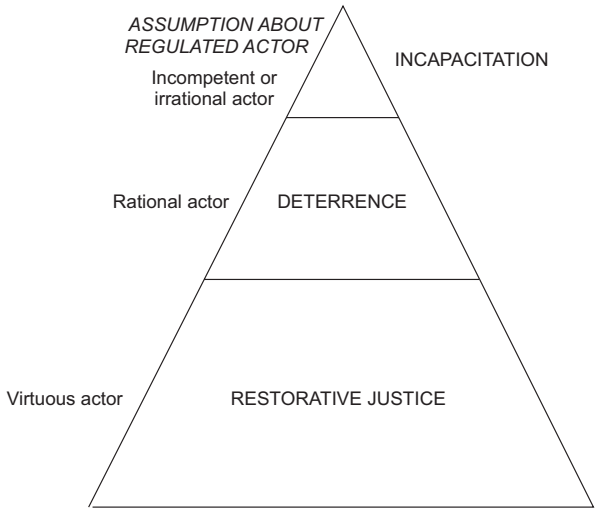
28 Braithwaite, Makkai and Braithwaite, above n 11, 322.

pyramid that creates a flexible space for innovation at the base of the pyramid will do better by continuous improvement than prescriptive command and control.'[29]

B *The Utility of the Pyramid*

As Braithwaite explains, the regulatory pyramid model can also be used to illustrate the fluid assumptions made about the regulated entity by the regulator, and in turn allow the regulator to respond with the appropriate regulatory action (see figure 2).[30] The process of regulation commences with an initial presumption that the regulated entity is a 'virtuous actor'.[31] That is, it will comply with the rules that regulator(s) are seeking to enforce, if it is simply made aware of its obligation and has the capacity to do so.[32] If education and persuasion and other similar collaborative efforts fail, the assumption made about the regulated entity shifts from it being virtuous, to it being a rational actor. In the business context, that is, the corporation will comply when it is economically rational to do so.[33] However, if costly and coercive methods of regulation still fail to gain compliance, the regulator's assumptions about the regulatee shift further, to question the competence and/or rationality of that actor.[34]

Figure 2: Image of responsive regulation's enforcement pyramid, showing assumptions made by regulator about regulated entity



Source: Braithwaite, *Regulatory Capitalism,* above n 19, 91.

29 Ibid.

30 Braithwaite, *Regulatory Capitalism*, above n 19, 90–1. See also Ayres and Braithwaite, above n 1, 50.

31 Braithwaite, *Regulatory Capitalism*, above n 19, 90–1.

32 Braithwaite, *Restorative Justice*, above n 25, 31–2.

33 Braithwaite, *Regulatory Capitalism*, above n 19, 90.

34 Ayres and Braithwaite, above n 1, 50–1.

Braithwaite offers an extreme example of this scenario: a nuclear power plant manager that has no engineering knowledge.[35] In such a situation, education or dialogic forms of regulation are inappropriate. Instead, that person must be removed from his/her job. Moreover, if the entire corporate team managing the nuclear power plant has no engineering competence to maintain such a plant, their licence to do so must be suspended or revoked.

As a heuristic, the regulatory pyramid offered by Ayres and Braithwaite, and the responsive regulation theory that underpins it, have been hugely influential. As a model of governance, the pyramid has been adopted by various regulatory agencies, ranging from Australian entities, such as the Australian Taxation Office and the Australian Securities and Investments Commission, to international organisations such as the *Organisation for Economic Cooperation and Development*. From the perspective of regulators, it has appeal: the presumption that persuasion may work in the vast majority of instances means that regulators can focus their efforts on the cheaper, more collaborative options to control behaviour, and resort far less frequently to the costly and time-consuming punitive measures at the tip of the pyramid. Similarly, from the perspective of regulatees, it has appeal: favouring less onerous modes of enforcement reduces the costs, both financial and otherwise, of compliance. This dynamic model not only suggests an efficient management of regulators' and regulatees' resources and capacities, but also develops constructive relationships between the regulator and the regulated.[36]

III SHORTCOMINGS OF RESPONSIVE REGULATION'S PYRAMID

Despite its popularity and utility, responsive regulation has not been without scholarly criticism.[37] These critiques range from questioning the utility and applicability of the model in specific and varied regulatory contexts, to whether the theory is overly state-centric and does not adequately respond to the 'decentred' nature of contemporary regulatory regimes.[38]

35 Braithwaite, *Restorative Justice*, above n 25, 32.

36 Braithwaite, 'Fasken Lecture', above n 20, 486–7.

37 See, eg, Black, 'Critical Reflections', above n 5; Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004); Fiona Haines, *Globalization and Regulatory Character: Regulatory Reform After the Kader Toy Factory Fire* (Ashgate, 2005); Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59.

38 See, eg, Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998); Levi-Faur, above n 6; Black, 'Constructing and Contesting Legitimacy', above n 3; Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot* (Edward Elgar Publishing, 2011); Burkard Eberlein et al, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2014) 8 *Regulation & Governance* 1; Kenneth W Abbott and Duncan Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations' (2013) 7 *Regulation & Governance* 95; Vibeke Lehmann Nielsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3 *Regulation & Governance* 376; Baldwin and Black, above n 37; Oren Perez, 'Responsive Regulation and Second-Order Reflexivity: On the Limits of Regulatory Intervention' (2011) 44 *University of British Columbia Law Review* 743.

As previously stated, a thorough treatment of these critiques lies beyond the scope of this article. Neither this article, nor the regulatory diamond model that is proposed herein, is intended to ameliorate all the concerns that have been raised in the literature against responsive regulation theory. (Although it should be noted that Braithwaite and other supporters of responsive regulation theory have defended the theory as having widespread applicability, even in the age of networked and transnational governance, including in situations involving multiple regulators and contexts.)[39] Instead, this article concentrates on two observations of the original responsive regulation pyramidal model. The first of these observations is that it has an ill-defined base-line. In other words: where are the standards to which compliance is sought derived from? Secondly, and perhaps most critically, with its singular focus on compliance with certain standards, the original model fails to reflect the full potential of the regulatory enterprise: in responding to societal needs and desires, to seek continuous improvement in the behaviour of those being regulated.

This section elaborates on these two shortcomings of the regulatory pyramid. It concludes with a presentation and critique of Braithwaite's recent attempt to address the latter concern: the proposed 'dual pyramid' model.[40] This article's final substantive section, Part IV, then outlines an alternative solution to these shortcomings: the regulatory diamond.

A *The Fuzzy Role of Law in Responsive Regulation*

Surprisingly, Braithwaite's description of the pyramid — over the course of two decades — rarely expounds on the source of the behavioural standards the pyramidal regulatory responses are designed to enforce. The baseline of the pyramid is often assumed to be a set of *legal* standards applicable to the regulated entities — standards with which compliance is sought — although that is rarely made explicit.[41]

What makes this uncertain status of the law at the baseline of the pyramid all the more puzzling is that it is hard to deny the vital presence of the law, embedded within the enforcement mechanisms that populate the pyramid, even as Ayres and Braithwaite sought to diminish and even supplant the role of legal, command-and-control style regulation with their model.[42] Whilst rarely resorted to, the coercive, law-based enforcement options at the apex of the pyramid — the

39 Braithwaite has acknowledged that some readers may rightly criticise his work as being overly state-centric: Braithwaite, *Regulatory Capitalism*, above n 19, 87. However, he has also argued that these complex regulatory relationships can still be captured by responsive regulation: John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 538–9.

40 Braithwaite, Makkai and Braithwaite, above n 11, 318.

41 Braithwaite, 'Fasken Lecture', above n 20, 484; Indeed, a survey of Braithwaite's own writings on responsive regulation yields little clarity on this aspect. For example, in *Regulatory Capitalism*, Braithwaite wrote that the pyramid is part of a 'craft for securing compliance with a just law': Braithwaite, *Regulatory Capitalism*, above n 19, 88.

42 Ayres and Braithwaite, above n 1, 4.

'benign big guns'[43] — are the most critical elements that ensure the effective functioning of the pyramidal model. The pyramid of escalating enforcement actions that privileges dialogue-based, persuasive enforcement mechanisms functions effectively precisely because it operates 'in the shadow of the state',[44] possessing the draconian and punitive power of the law and its administrative agencies and courts. The foundational support of the law, rather than being a crutch, is an intrinsic source of power of responsive regulation.[45]

Some commentators suggest that leaving the possibility open for non-legal behavioural standards is appropriate, especially when considering the multiplicity of non-governmental actors that serve as regulators in various contemporary contexts.[46] Gunningham and Grabosky have argued that an overly statist (and legal) approach unnecessarily stunts the practical utility of the pyramidal model.[47] Regardless of the veracity of this claim, it is suggestive of the larger dialogue in the regulatory literature on the oft-disputed relationship(s) between regulation and law.[48] In light of that dialogue, gaining a better sense of the nature and possible sources of the standards that constitute the baseline of the regulatory pyramid would be helpful. More generally, a regulatory model that clarifies the role of the law and legal standards within a given regulatory regime — however significant or limited that role may be — would be useful in a theoretical and practical sense.

B *A Failure to Embrace a Full Conception of Regulation*

Notwithstanding the legitimate critiques of responsive regulation (only some of which I have touched upon above), a conceptually fraught aspect of the theory that has, arguably, not received enough critical attention is the misconceived equivalence that it makes between regulation and compliance. There is a stark dissonance between the responsive regulation pyramidal model and the broad conception of regulation embraced by Ayres, Braithwaite and the regulatory theorist community.

The regulatory pyramid neatly encapsulates this dissonance. Ultimately, if the regulator employs the pyramid and fulfils its objective, compliance with certain behavioural (and invariably legal) standards is achieved, whether through collaborative or adversarial regulatory processes. As Braithwaite observes, the pyramid is part of a 'craft for securing compliance'.[49] Put another way, the model

43 Ibid 19. See generally Tanja A Borzel and Thomas Risse, 'Governance without a State: Can It Work?' (2010) 4 *Regulation & Governance* 113.

44 Neil Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21 *Journal of Environmental Law* 179, 181.

45 Gunningham and Grabosky, above n 38, 396.

46 See, eg, Gunningham and Grabosky, above n 38.

47 Ibid 397–8.

48 See, eg, Morgan and Yeung, above n 15; Chris Dent, 'Relationships between Laws, Norms and Practices: The Case of Road Behaviour' (2012) 21 *Griffith Law Review* 708.

49 Braithwaite, *Regulatory Capitalism*, above n 19, 88.

is focussed on minimising harm and deterring 'poor' behaviour. In so doing, the pyramid fails to adequately capture the nature and full potential of regulation. Arguably, it overlooks half the picture. Indeed, this is all but acknowledged in Braithwaite's later works — as will be discussed below.[50]

Compliance with standards of behaviour is an important regulatory objective, but it is far from the only one. It is merely a subset of regulatory possibilities. Regulatory techniques may also be employed to go beyond compliance — to encourage behaviour to exceed those legal standards.[51] Responsive regulation's pyramidal model does not capture the full extent of what regulation is, nor its theoretical potential, even as conceived by the theory's own authors.

The broad definition of regulation that Braithwaite and others readily adopt is about social ordering and influencing behaviour.[52] In Braithwaite's own words, regulation is 'that large subset of governance that is about steering the flow of events, as opposed to providing and distributing'.[53] In a similarly broad fashion, Braithwaite and his co-authors state the goal of regulation to be 'continuous improvement' in the behaviour of the regulated entity or individual.[54] That is, it is *not* confined to mere adherence to rules or minimum standards, but also includes mechanisms that encourage people and regulated firms and entities to go above and beyond those standards.[55] Thus, the pyramid model — with its focus on compliance with certain rules — seemingly misrepresents Braithwaite's own 'continuous improvement' maxim that lies at the heart of the regulatory endeavour.

One of the central claims of responsive regulation is that the pyramidal model 'hold[s] out the possibility of nurturing the virtuous citizen, deterring the venal actor and incapacitating the "irrational" or dangerously incompetent actor'[56] (see figure 2 above). Whilst the model, I readily agree, indicates a regulatory structure for the second and third actions, it fails to grasp the full regulatory potential to encourage virtuous behaviour. On the contrary, the way the pyramid has been described by its inventors and applied in practice, it remains a model dominated by compliance. It nurtures *obedience* to the law and behavioural standards derived from it. It is this law-abiding conduct in the pyramidal model (ie the baseline of the pyramid) that is erroneously described in responsive regulation theory as 'virtuous'.[57]

50 See, eg, Braithwaite, Makkai and Braithwaite, above n 11.

51 See, eg, P N Grabosky, 'Regulation by Reward: On the Use of Incentives as Regulatory Instruments' (1995) 17 *Law & Policy* 257; Judith Healy, *Improving Health Care Safety and Quality: Reluctant Regulators* (Ashgate, 2011); Borck and Coglianese, above n 10.

52 Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2nd ed, 2012) 3.

53 Braithwaite, *Regulatory Capitalism*, above n 19, 1.

54 See, Braithwaite, Makkai and Braithwaite, above n 11, 199–200.

55 Braithwaite, 'Fasken Lecture', above n 20, 502; Healy, *Improving Health Care Safety and Quality*, above n 52, 7–9.

56 John Braithwaite, 'Responsive Business Regulatory Institutions' in C A J Coady and C J G Sampford (eds), *Business, Ethics and the Law* (Federation Press, 1993) 83, 89.

57 Ayres and Braithwaite, above n 1, 50.

A change in how Braithwaite refers to the pyramidal model over the years is also enlightening. In his earliest work on responsive regulation he refers to the heuristic model as the 'enforcement pyramid' but in his later works it is described simply as the 'regulatory pyramid'.[58] This slippage in labels is significant. Due to its popularity amongst academics and policymakers, the misnamed pyramid has contributed to constraining understandings of the possibilities of regulatory regimes. Responsive regulation's pyramid is only a partial representation of the regulatory possibilities. It reflects only the responsive regulatory approach to the *enforcement* of behavioural standards (as its original label accurately designated). Rewards, inducements and other regulatory mechanisms to encourage positive behaviour *beyond* those standards do not have a comfortable status within Braithwaite's regulatory pyramid.

Importantly, far from being solely a shortcoming of responsive regulation, this dissonance between the theoretical conception of regulation on the one hand, and practical discussions and models on the other, is replicated by many others in the regulatory field. Indeed, the false equivalence between regulation and enforcement/compliance is characteristic of much of the broader literature on regulatory theory and practice, which is dominated by an inherently negative apprehension of the subjects and purpose of regulation.[59] Alternative regulatory theories share responsive regulation's heavy focus on enforcement mechanisms to secure compliance with set behavioural rules. For example, according to Christine Parker et al, the key attributes of a regulatory regime are the establishment of behavioural standards, the monitoring of the subjects of regulation for compliance with those standards and avenues to enforce those standards.[60] That is, regulation is the means by which 'poor' behaviour is constrained, and punished as required. Similarly, Malcolm Sparrow, whilst noting his dislike of limiting regulation to merely preventing breaches of legal provisions, still refers to regulation's role as 'harm reduction'[61] and societal 'risk control'.[62]

As the titles of two significant recent scholarly texts evince, the practice of regulation is often reduced to the conduct of 'securing compliance' to minimum standards,[63] and regulatory theories to 'explaining compliance'.[64] Responsive regulation and the broader regulatory literature focus on environmental *protection* and safety *standards* and to a far lesser extent on the bolder regulatory goals of encouraging ever safer workplaces, and ever more sustainable environments.

58 See, eg, Braithwaite, Makkai and Braithwaite, above n 11, 318; Braithwaite, 'Fasken Lecture', above n 20, 480.

59 See generally Nielsen and Parker, above n 39; Haines, *The Paradox of Regulation,* above n 38; Black, 'Critical Reflections', above n 5; Morgan and Yeung, above n 15.

60 Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 1.

61 Malcolm K Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008) 4.

62 Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance*, (Brookings Press, 2000) 308.

63 Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004).

64 Christine Parker and Vibeke Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

Yet in contemporary understandings of the nature of regulation — including those held by the same theorists referenced in the preceding paragraphs — regulation is generally and broadly conceived. Far more than the traditional lay vision of governmental 'red-tape' and administrative laws, Levi-Faur refers to regulation as being 'mechanisms of control'.[65] In a similar vein, Morgan and Yeung suggest regulation refers to 'all forms of social control, whether intentional or not, and whether imposed by the state or other social institutions'.[66] Black concurs with these broad understandings, defining regulation as any attempt 'to alter the behaviour of others according to defined standards or purposes'.[67]

The phenomenon of regulation, argues Haines, is:

> better conceptualised as *governance*, where control originates from various public and private actors and is given effect not only through law, but also by private agreements, the implementation of non-government standards, accreditation schemes and a multitude of other potential control mechanisms.[68]

Regulation is an expansive phenomenon, and includes 'much more flexible, imaginative and innovative forms of social control [than the law] which seek to harness not just governments but also markets (as with economic instruments), business and third parties'.[69] It can involve not just direct legal intervention but also more 'subtle manipulation of incentives and the creation of opportunity structures'.[70] Regulation is perhaps better conceived as about maximising opportunities, not merely minimising risks, in the conduct of regulated actors.[71]

These broad understandings of regulation also correlate with popular, public-interest theories of the purpose of regulation. Baldwin, Cave and Lodge suggest that regulation is more than merely rectifying faults in the market, but encompasses the possibility of regulating for altruistic goals,[72] for example to protect human rights or social solidarity.[73]

Of course, it must be said that this observed dissonance in the literature is not universal. Coglianese and other regulatory scholars have written on the value and efficacy of 'flexible' regulatory practices that go 'beyond compliance', for instance in the environmental protection and energy efficiency regulatory practices.[74] So too, Gunningham, Sinclair, Kagan and Thornton's work (separately and together)

65 David Levi-Faur, 'Foreword', in Braithwaite, *Regulatory Capitalism*, above n 19, vii.

66 Morgan and Yeung, above n 15, 3–4.

67 Black, 'Critical Reflections', above n 5, 26.

68 Haines, *The Paradox of Regulation,* above n 38, 8 (emphasis added).

69 Gunningham, above n 45, 181.

70 Gunningham and Grabosky, above n 38, 133.

71 See generally Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law & Social Inquiry* 307.

72 Baldwin, Cave and Lodge, above n 52, 21–2.

73 Ibid 24.

74 See, eg, Lori S Bennear and Cary Coglianese, 'Flexible Approaches to Environmental Regulation,' in Michael E Kraft and Sheldon Kamieniecki (eds), *Oxford Handbook of US Environmental Policy* (Oxford University Press, 2012); Borck and Coglianese, above n 10; Gunningham and Grabosky, above n 38, 414.

also explores why some companies go beyond compliance with mandated standards to maintain their 'social licence[s] to operate'.[75] Nevertheless, these authors' works are the exception that proves the general rule.

C *An Attempt to Rectify the Dissonance: The Dual-Pyramid Model*

Braithwaite has himself acknowledged that responsive regulation's pyramidal model is inadequate in reflecting the 'continuous improvement' maxim that animates regulation. In a 2007 work on regulation in the aged-care industry, Braithwaite, Makkai and Braithwaite stated that the regulatory pyramid responds to weakness and 'a "fear" about a "risk"' — eg poor business behaviour — and seeks to control or minimise that risk.[76] They state that the pyramid model suggests that 'punishments are more useful than rewards'.[77]

Responding to this critique, Braithwaite, Makkai and Braithwaite proposed supplementing the regulatory pyramid with a 'strengths-based pyramid' (figure 3), whose goal is not deterring harm, but amplifying and encouraging positive behaviour.[78] '[T]he strengths-based pyramid responds to a "hope" that "opportunities" [of positive regulatee behaviour] can be built upon'.[79] The strengths-based pyramid contains a suite of escalating strategies that are designed to support and encourage the 'good' conduct of the regulated firm or individual building.

The authors argue that this 'combination of a regulatory pyramid and a strengths-based pyramid (both for self-regulators and for public regulators) will do better still by 'continuous improvement' than either pyramid alone, and certainly more than any single regulatory strategy.[80] Whilst I agree that the 'dual-pyramid model' represents an improvement in this regard over the original pyramid, it is a model not without its own shortcomings. The visual image of the dual-pyramid model represents a contradiction — it is, by its very nature, *discontinuous.* The idea of visually linking the two pyramids is rejected by the authors, who argue that they are composed of 'alternative rather than complementary strategies'.[81] Similarly, the labelling of the two pyramids is misleading and conceptually suspect. The authors do not characterise the strengths-based pyramid as being of a regulatory nature, but rather it is explicitly contrasted with the regulatory pyramid (see figure 3).[82] In so doing, the dual-pyramid model continues to limit our understanding of the regulatory processes it claims to model. It unnecessarily suggests that regulation is *only* about ensuring compliance with certain behavioural standards, whilst

75 Neil Gunningham and Darren Sinclair, *Leaders & Laggards: Next-Generation Environmental Regulation,* (Greenleaf Publishing, 2002) 136. See also and generally Gunningham, Kagan and Thornton, above n 72.

76 See Braithwaite, Makkai and Braithwaite, above n 11, 318.

77 Ibid 317.

78 Ibid.

79 Ibid 318.

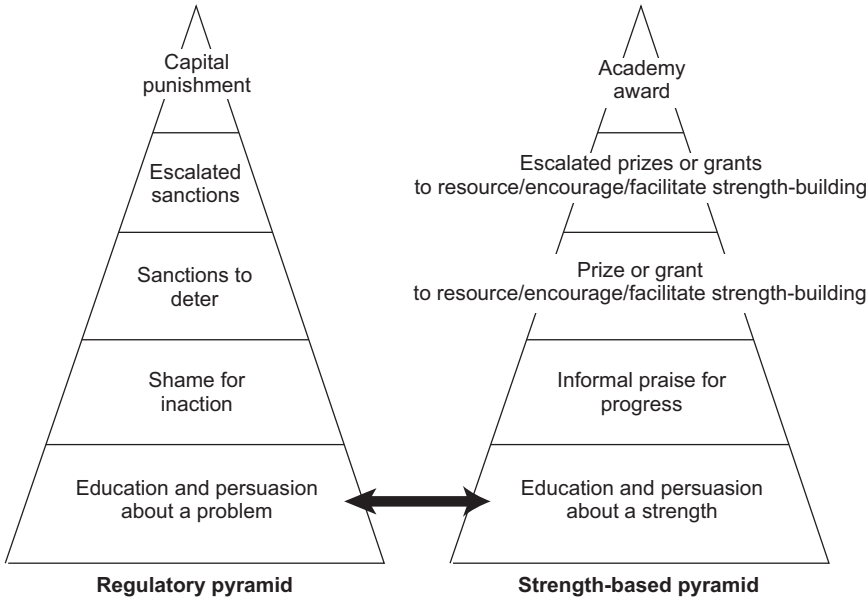
80 Ibid 322.

81 Ibid 319.

82 Ibid.

'better' behavioural improvement above and beyond those standards — which is achieved through the incentives and encouragement strategies in the strengths-based pyramid — is something *other* than regulation.[83]

Figure 3: The introduction of the strengths-based pyramid



Source: Braithwaite, Makkai and Braithwaite, above n 11, 319.

Braithwaite's corpus of work has, perhaps more than any other single scholar's, transformed our modern understanding of regulation to encompass activities going well beyond direct, government command-and-control style regulation. Yet even this revised dual pyramid model does not fully embrace the opportunity to recognise that going 'beyond compliance' may also be considered regulation, nor does it clarify the role of law within the model.

Healy, Mascini and others continue to express faith in the underlying theory of responsive regulation, even as they suggest altering responsive regulation's pyramidal model to better reflect theoretical critiques and contemporary regulatory challenges.[84] It is in this tradition that this article now offers an alternative model of responsive regulation: the regulatory diamond.

83 Ibid 319–20. See also Jolyon Ford, *Regulating Business for Peace* (Cambridge University Press, 2015) 204–5; Healy, *Improving Health Care Safety and Quality*, above n 52, 220.

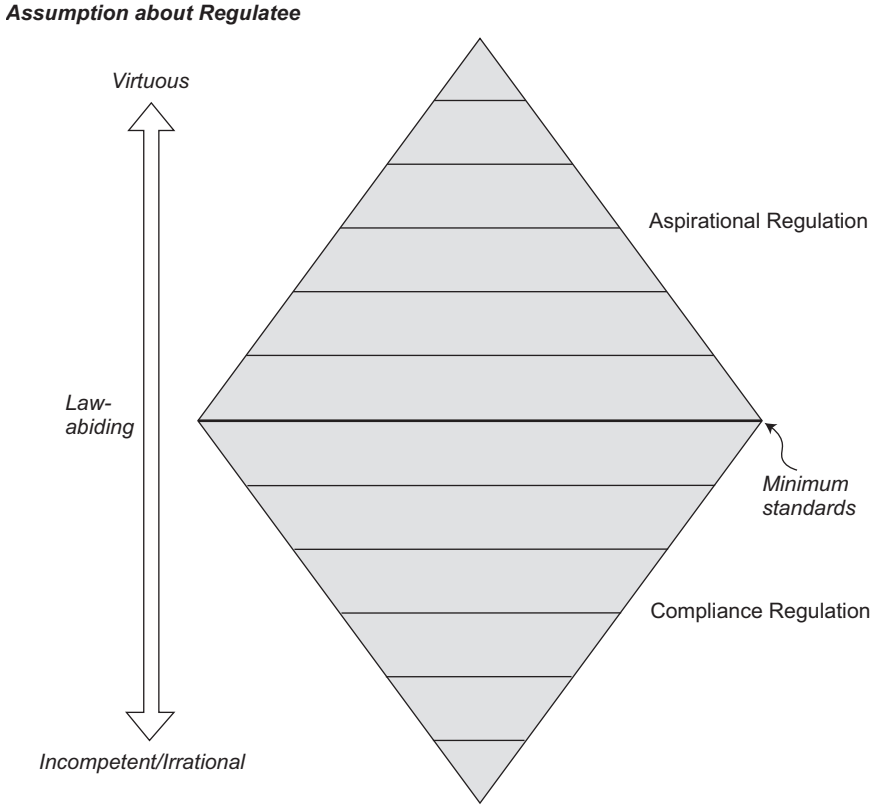
84 See, eg, Healy, *Improving Health Care Safety and Quality*, above n 52; Mascini, above n 2; Peter Grabosky, 'Beyond *Responsive Regulation*: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7 *Regulation & Governance* 114.

IV INTRODUCING THE REGULATORY DIAMOND

The regulatory diamond (figure 4) is an alternative theoretical model and heuristic that seeks to respond to the shortcomings of the pyramidal models laid out in the preceding section. The regulatory diamond provides an enhanced model of responsive regulation; one that clarifies the role of law within it, and that better reflects the broad, contemporary conception of regulation.

The following section introduces the key features of the regulatory diamond, noting how it is an improved visualisation of responsive regulation theory compared to the pyramidal models that have come before it. The section includes a series of real-world examples of regulation demonstrating the utility of the regulatory diamond as an explanatory and prescriptive device.

Figure 4: The Regulatory Diamond



To be sure, the regulatory diamond is an evolutionary, not revolutionary proposal. It builds upon the decades of scholarly work by Braithwaite and others in advancing responsive regulation theory, and adheres to the principles of responsiveness and

dynamism that lie at the heart of responsive regulation theory.[85] Nevertheless, the regulatory diamond offers several innovations that improve the theoretical coherence and practical utility of responsive regulation. Significantly, the regulatory diamond incorporates two types of regulatory activities: *compliance regulation* — the regulatory mechanisms employed to encourage adherence to certain behavioural standards; and *aspirational regulation* — the regulatory mechanisms employed to encourage regulatees to improve their behaviour beyond mere adherence to minimum standards. Furthermore, in the regulatory diamond the law comes from the shadows to take an explicit role in the web of regulation as the source of the behavioural standards with which compliance is being sought.

Whilst the regulatory diamond is intended to supersede the Braithwaitian pyramid, the substance of responsive regulation theory remains intact. Indeed, the diamond more accurately captures the essence of responsiveness, and of regulation, thereby providing a more precise model for those addressing societal problems from a regulatory perspective, be they in academia, government, business or civil society. Moreover, the inclusion of aspirational regulation in the model arguably provides a more optimistic tone for the entire regulatory project than compliance-centred models can provide.

A *Exploring the Diamond: Components of a Regulatory Regime*

More than the single- or even dual-pyramid models, the regulatory diamond correlates with Braithwaite's suggested long-term 'continuous improvement' objective of regulation. Whilst regulation may be frequently perceived as being only about punishment and the deterrence of proscribed behaviour, 'strategies that seek to influence behaviour should use both supports as well as sanctions … praise as well as punishment'.[86] Regulation should include both minimum behavioural standards and idealised behavioural goals, and regulatory mechanisms that seek to attain both.[87] Each of the three components of an idealised regulatory regime corresponds to a distinct element of the regulatory diamond heuristic (see figure 4):

(1) minimum standards of behaviour — represented by the mid-line;

(2) mechanisms to enforce those standards — represented by 'compliance regulation' in the bottom half of the diamond; and

(3) mechanisms to encourage and incentivise regulatees to exceed the minimum standards, and attempt to attain ever higher aspirational behavioural goals — represented by 'aspirational regulation' in the top half of the diamond.

As with the original regulatory pyramid, the shape of the regulatory diamond and the proportional space taken up by each layer on either side of the mid-line

85 See, eg, Ayres and Braithwaite, above n 1.

86 Judith Healy, *Improving Patient Safety Through Responsive Regulation* (Health Foundation, 2013) 4.

87 Gunningham, Kagan and Thornton, above n 72, 307, 309.

is deliberate and instructive. The wide mid-sections denote that these levels — representing education and dialogue-based mechanisms — are where the bulk of the regulatory interactions occur. As one moves further away from the mid-line, each successive layer denotes progressively more onerous and punitive (if moving down), or rewarding (if moving up) regulatory activities. In both cases the frequency of use of a particular interaction diminishes the further from the mid-line one moves. The two apexes of the diamond contain the most extreme and least-used regulatory mechanisms. These are reserved for the select few who have either strayed well below the legal standards and ignored or resisted less onerous regulatory actions, or who have far surpassed the relevant legal standards and embraced exemplary behaviour.

B *Visualising the Crucial but Limited Role of Law*

Keohane discerns that law remains critical to developing effective governance regimes (read: regulatory responses) for transnational societal problems, even in the age of globalisation and decentred regulation.[88] The regulatory diamond allows us to clearly and simultaneously see the role of law and its limitations within regulatory design. Contrary to the original regulatory pyramid, the regulatory diamond explicitly places law at the centre of the regulatory framework. In the regulatory diamond, the mid-line represents the set of minimum, mandatory standards of behaviour expected of the regulated entities. For most envisaged regulatory regimes, these take the form of explicitly *legal* standards that are codified, for example in legislation or subsidiary regulation, and can be enforced through legal means (ie through regulatory mechanisms that lie at or near the bottom tip of the diamond).

This brings law out from the shadows, and clarifies its role in regulatory design. Legal standards become the touchstone from which the two sides of the diamond emanate. (Whether the modes of compliance and aspirational regulation are also legal in nature is a separate question, and is not a necessary corollary of the legal origins on the standards being enforced.) We cannot commence a meaningful conversation about enforcement or encouragement mechanisms without first referencing the behavioural standards which we, at a minimum, seek compliance with, and ideally seek to go beyond. This should assist regulators and regulated actors in calibrating their regulatory activities and responses.

The law delineates the composition of the minimum behavioural standards and it is also, as in the original regulatory pyramid, a powerful compliance regulation instrument that dominates the lower tip of the diamond. However, adherence to the law is often not the *ultimate* or ideal regulatory goal.[89] Rather, law is a powerful, frequently used instrument to regulate behaviour, in the sense of deterring and reducing instances of behaviour deemed harmful to society. Where

88 Robert O Keohane, 'Global Governance and Democratic Accountability' in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Polity Press, 2003) 130.

89 Dent, above n 49, 714.

regulatory strategies other than conventional legal means or sanctions come into their own is in the aspirational regulation activities occupying the upper half of the diamond that seek to further the 'continuous improvement' goal of regulation. This is elaborated upon in the following section of this article.

Of course, the characterisation of the mid-line as composed of minimum *legal* standards does not discount the existence and regulatory effect of non-legal norms that also make claims on the behaviour and conduct of regulated actors.[90] These non-legal norms may derive from a variety of alternative sources and find their form in industry codes of conduct, internal operating guidelines for businesses, or personal codes, perhaps derived from religion and ethics. These norms of behaviour, even if widely socially accepted, may not correlate to legal standards.[91] When these norms represent 'tighter' standards than the binding law, they exercise a 'pulling power' on the regulated individual or firm encouraging them to go beyond the legal standards. Their practical effect suggests they should be considered an instrument of aspirational regulation and appear somewhere above the mid-line of the regulatory diamond. Examples of this type of aspirational regulation include companies' internally developed social charters and industry-based Corporate Social Responsibility ('CSR') codes, reflecting an individual firm's (or industry's) idea of its 'social licence to operate'.[92] Further illustrations will be provided in the following pages.

Importantly, there may be instances where few, if any, binding legal standards exist to address a particular societal concern, thereby also diminishing the viability of law-based compliance regulation mechanisms. By making explicit that the law is the basis of the mid-line standards, in those instances, the use of the regulatory diamond assists in noting the law's absence or weakness in generating behavioural standards. Nevertheless, even with a hazy or non-existent mid-line, the regulatory diamond heuristic usefully visualises that there may still be aspirational regulation mechanisms available to incentivise and encourage improved behaviour on the part of the regulated individuals or entities.

C *Visualising the Full Potential of Regulation with Aspirational Regulation*

As noted earlier, the mid-line of the regulatory diamond represents minimum standards: a set of legal behavioural standards which the regulated entity must adhere to. In the regulatory diamond model, the types of regulatory activities occurring above and below the mid-line may be different — normatively and practically — but both are, nevertheless, rightly conceived as being regulatory in nature.

The lower half of the regulatory diamond is an inverted Brathwaitian enforcement pyramid and the regulatory mechanisms that populate its levels represent

90 Ibid 716–17.

91 Ibid.

92 Gunningham, Kagan and Thornton, above n 72, 308.

compliance regulation. Its contents and how it works remain the same as in the original, and represent the dynamic range of enforcement mechanisms regulators have at their disposal to ensure compliance to minimum standards. The first level, just below the mid-line, is composed of the most dialogue-based, collaborative and voluntary regulatory responses possible to achieve compliance. If compliance is not forthcoming through persuasion, the regulator increases the punishment, 'escalating' down the diamond, level by level, until compliance is achieved.[93] The most onerous and severe regulatory instruments are confined to the small, lower apex of the diamond; reserved, in reality, for the small number of unrepentant, non-compliant actors that have refused to come into line despite the whole retinue of less onerous regulatory methods having been employed beforehand.[94] Just as Braithwaite observed: 'When deterrence fails, the idea … is that incapacitation is the next port of call.'[95]

However, even if compliance is achieved through persuasion, the regulatory diamond highlights that there remains a host of regulatory options to continue to improve the regulatee's behaviour 'up the diamond' from the mid-line. The upper half of the diamond represents aspirational regulation and consists of regulatory strategies that hope to encourage ever more positive and productive behaviour on the part of the regulated entity vis-a-vis the issue or problem at hand. The aspirational regulation half of the diamond is modelled on the strengths-based pyramid introduced by Braithwaite, Makkai and Braithwaite and also developed by Healy, in the contexts of aged and health-care regulation respectively.[96] Aspirational regulation acknowledges that the mid-line is composed of only *minimum legal* standards of behaviour, and that possibilities exist to improve the regulated entity's behaviour to surpass those standards and achieve ever higher behavioural goals. The inclusion of aspirational regulation strategies that inhabit the upper half of the diamond is designed to pull regulated actors up, above and beyond the requirements of the law, to embrace behavioural change that positively contributes to the problem or issue that is being regulated. It integrates into our regulatory model the continuous improvement goal of regulation that Braithwaite and others have recognised, and is aligned with public interest theories of regulation, as espoused by Baldwin, Cave and Lodge and others.[97]

Frequently, mandating minimum behavioural standards does not achieve the ultimate objectives and interests of a regulatory agency, and the societal needs or wishes they are attempting to fulfil.[98] For example, while the Australian *Criminal Code* helps minimise the commission of crimes and harm done to citizens,[99] it

93 Ayres and Braithwaite, above n 1, 35–6.

94 Ibid 53; Braithwaite, 'Fasken Lecture', above n 20, 504–5.

95 Braithwaite, *Restorative Justice*, above n 25, 32.

96 Braithwaite, Makkai and Braithwaite, above n 11; Healy, *Improving Health Care Safety and Quality*, above n 52.

97 See, eg, Braithwaite, Makkai and Braithwaite, above n 11, 199–200; Baldwin, Cave and Lodge, above n 53; Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990).

98 Sparrow, *The Character of Harms*, above n 61. See generally Bennear and Coglianese, above n 74.

99 *Criminal Code Act 1995* (Cth).

does not encourage good citizenship or community-mindedness. The fulfilment of these aspirational goals lying beyond mere adherence to the law is the objective of the aspirational regulation techniques in the upper half of the diamond.

Deciding what the legitimate and desirable goals of any given regulatory regime are, and what the appropriate mechanisms are to achieve such goals, is necessarily subjective and context-specific. The inclusion of aspirational regulation in the regulatory model brings into stark relief the need for clarity and legitimacy in the overarching goals of any given regulatory regime, and highlights the difficulty in discerning them. Applying the diamond demonstrates that mere satisfaction of the prescriptions of the legal standards is (almost always) not an endpoint in the regulatory relationship. The corollary of this is that the regulatory goals depend not just on a reading of the law and its behavioural requirements, but on one's understanding of society and ethics, and what constitutes such ephemeral ideas as the 'social good' in any given regulatory context.

By way of illustration, consider the context of workplace safety. The law determines minimum standards that every employer must adhere to at the risk of civil or even criminal prosecution for breaches (compliance regulation).[100] However, employers may also be encouraged (through education and inducement programs, for example) to conduct weekly training sessions and emergency drills, to provide health counselling and to install state-of-the-art health and safety features in their workplace — despite not being legally required to do so (aspirational regulation). The overall regulatory goal is 'to secure the health, safety and welfare of employees and other persons at work'.[101] The regulatory diamond model illustrates that adherence to legal standards only partially achieves this goal. The inherent limitations of law as a regulatory instrument mean that it must also be coupled with other aspirational regulation instruments to drive employers and employees to develop ever safer workplace environments. Indeed, the *Victorian Occupational Health and Safety Compliance Framework* incorporates so-called 'non-statutory guidance' that may, inter alia, include guidance on 'encouraging the implementation of optimum strategies for improving OHS performance (for example information about good management practice or describing "state of the art" technical solutions)'.[102] This is an example of a regulatory agency incorporating aspirational regulation into its regulatory regime, alongside traditional compliance regulation techniques.

D *Applying the Regulatory Diamond in Transnational Business Regulation*

Specific instances of aspirational regulation are common in the realm of transnational business regulation, where international law is not traditionally

100 For example, in Victoria, the applicable legislation is the *Occupational Health and Safety Act 2004* (Vic) and subsidiary regulations: *Occupational Health and Safety Regulations 2007* (Vic).

101 *Occupational Health and Safety Act 2004* (Vic) s 2(1)(a).

102 WorkSafe Victoria, *Victorian Occupational Health and Safety Compliance Framework Handbook* (2013) 14.

considered to be directly applicable to corporations and where national laws can often be circumvented.[103] That is, due to a dearth of coercive compliance regulation mechanisms, regulators — state, industry and civil society based — have attempted to develop more creative means of encouraging companies to adhere to behavioural standards derived from the law, even if not directly formally applicable to them, and even to surpass those standards.

The United Nations has also been a locus for transnational aspirational regulation of businesses with its efforts to internationalise CSR-style commitments. Initiatives, such as the *United Nations Global Compact* and its *Guidelines for Business and Human Rights*, seek to promote the respect of human rights and the environment among the international business community, even as the UN documents themselves acknowledge that businesses, generally speaking, have no formal international legal obligations to do so.[104] Other examples of this type of aspirational regulation from the arena of transnational business regulation include fair-trade labelling of clothing, coffee and other goods.[105] These initiatives, advanced by non-government organisations ('NGOs') but often co-opting the private sector as well, seek to leverage consumer buying patterns to improve the wages and treatment of farmers and workers in developing countries that produce goods consumed in more affluent countries.[106]

The problem of international trade in so-called 'conflict diamonds' from war-torn western African countries provides a useful example of how the regulatory diamond can increase the explanatory and prescriptive utility of responsive regulation theory. The trade in conflict diamonds continued for many years, largely unregulated. There were simply no laws banning the mining or trade in conflict diamonds.[107] In regulatory diamond parlance: the mid-line was absent. In the 1990s, however, NGOs such as *Global Witness* and *Partnership Africa–Canada* began to publicise details of the conflict diamond trade, accusing *DeBeers* and others in the diamond industry of complicity in this trade, thereby implicating them in the conflicts and atrocities linked to the mining of conflict diamonds in countries like Angola and Liberia.[108] *Global Witness* and their peers attempted to leverage market forces to prompt those companies to abide by even higher standards of integrity than those demanded by law — an example of

103 Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

104 United Nations, *Global Compact*, <www.globalcompact.org>; John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101 *American Journal of International Law* 819; John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011).

105 See, eg, Peter Leigh Taylor, 'In the Market but Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change' (2005) 33 *World Development* 129, 130.

106 See, eg, Fairtrade Australia and New Zealand, *Fairtrade* <www.fairtrade.com.au>.

107 See generally Robert R Fowler, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA* (S/2000/203, 10 March 2000) ('The Fowler Report'); Ian Smillie, *Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade* (Anthem Press, 2010).

108 Global Witness, 'A Rough Trade: The Role of Companies and Governments in the Angolan Conflict' (1998), <http://www.globalwitness.org/sites/default/files/pdfs/A_Rough_Trade.pdf>; Philippe Le Billon, 'Angola's Political Economy of War: The Role of Oil and Diamonds, 1975–2000' (2001) 100 *African Affairs* 55.

aspirational regulation.[109] Eventually, after years of mounting public and political pressure to clamp down on such activities, the *Kimberley Process Certification Scheme* was launched in 2000, and formally adopted in 2002.[110] Involving public interest groups, the United Nations, individual states and the diamond industry, the *Kimberley Process* aimed to prevent conflict diamonds from entering the market.[111]

Mining in conflict diamonds was not made illegal internationally as such, but nevertheless the various stakeholders — including DeBeers, the largest diamond conglomerate — publicly agreed that the trade in these diamonds was fuelling armed conflicts in western Africa and should be halted. A regulatory framework was developed to achieve that end, with the *Kimberley Process* at its centre.[112] This framework included voluntary assurances by companies not to trade in such diamonds,[113] but most importantly it included a commitment on the part of *Kimberley Process* signatory countries to enact laws banning such trade.[114] Due to almost universal participation, the *Kimberley Process* has effectively helped crystallise a new global legal standard prohibiting trade in conflict diamonds, even though no relevant international law existed. It created a new mid-line for the regulatory regime governing conflict diamonds, and activated a host of domestic legal means of enforcing those standards (compliance-regulation).[115] Today, over 99% of diamonds traded globally are overseen by the *Kimberley Process,* and certified as being from conflict-free sources.[116]

Similarly, the so-called 'conflict minerals' legislation enacted into US law in 2010 is another example of aspirational regulation enacted by a government regulator. It has had massive repercussions for some of the largest global electronics manufacturers. Buried deep in the 800 plus pages of the *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010* is an obscure provision that does not so much ban the mining of conflict minerals (which would have been a classic example of command-and-control style regulation), as leverage market forces to

109 Global Witness, above n 109; Le Billon, above n 109.

110 Kimberly Process, *About: The Kimberley Process,* <http://www.kimberleyprocess.com/en/about>.

111 Ibid.

112 J Andrew Grant and Ian Taylor, 'Global Governance and Conflict Diamonds: The Kimberley Process and the Quest for Clean Gems' (2004) 93 *Round Table: The Commonwealth Journal of Interntional Affairs* 385.

113 These assurances are referred to as a 'System of Warranties' offered to consumers certifying the diamonds being purchased are not conflict diamonds. These warranties were established by the World Diamond Council (the peak industry body involved in the development of the *Kimberley Process*). The warranties are part of the diamond industry's effort to combat the conflict diamond trade and are aligned with, although not strictly a part of, the formal state-based *Kimberley Process.* For more, see World Diamond Council, 'Conflict Diamonds and the Kimberley Process Fact Sheet' <http://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20%28Conflict%20Diamonds%20and%20the%20Kimberley%20Process%29.pdf>.

114 Kimberley Process, 'Kimberly Process Certification Scheme' (2003), ss II, III, IV. In particular s IV(d) <http://www.kimberleyprocess.com/en/kpcs-core-document>.

115 Ibid.

116 World Diamond Council, 'Eliminating Conflict Diamonds: Diamond Facts' <http://www.diamondfacts.org>.

encourage consumer electronics manufacturers to cease using certain minerals sourced from central African countries in their products.[117]

The legislation demands that all companies listed with the US Securities and Exchange Commission ('SEC') and that sell phones, televisions or other electronic devices in the US must 'disclose annually' the use of conflict minerals in their products.[118] The legislation created a new minimum standard of supply-chain due diligence and disclosure for companies, but did not outright ban the use of conflict minerals.[119] The authors of the legislation understood that an outright prohibition would have been untenable both politically and commercially, and would have been subject to legal challenge by companies affected. As it was, the law's disclosure requirements were sharply criticised by Republican lawmakers and corporate interest groups, with one Congressman referring to it as being a 'massive paperwork burden on US companies'.[120] Furthermore, a lawsuit was filed challenging the constitutionality of the SEC's conflict minerals reporting requirements.[121] That litigation remains ongoing at the time of writing.[122]

By requiring companies to conduct and then publicise their supply-chain audits, the conflict minerals law hopes to harness market forces to shame companies into abolishing the use of conflict minerals in their supply chains. Importantly, this is not shaming them into *compliance*, because the mining and use of conflict minerals is not deemed illegal under US law, but rather (merely) unethical. Whilst there are fines for non-compliance, those refer only to the submission and quality of the reporting, not whether or not the audit identifies conflict mineral use.[123] The deadline for filing the first company reports on conflict minerals in their supply chain with the SEC was 2 June 2014, and the second round of filing closed on 1 June 2015. This has already prompted several high-profile companies to commit to becoming entirely conflict-mineral free.[124] This type of legislation is an example of aspirational regulation — it encourages a higher standard of corporate conduct notwithstanding the legality or illegality of the underlying action.

117 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 1502, 124 Stat 1376 838, 843 (2010).

118 Ibid.

119 Ibid.

120 Marlin Stutzman, *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision*, House Financial Services Subcommittee on Monetary Policy and Trade of the Committee on Financial Services (21 May 2013), 4 <http://financialservices.house.gov/uploadedfiles/113-23.pdf>.

121 *National Association of Manufacturers v Securities and Exchange Commission,* 748 F 3d 359 (DC Cir, 14 April 2014).

122 See generally Squire Patton Boggs, *SEC Seeks Rehearing in Conflict Minerals Case* (5 October 2015) <http://www.conflictmineralslaw.com/2015/10/05/sec-seeks-rehearing-in-conflict-minerals-case/>.

123 US Securities and Exchange Commission, 'Conflict Minerals Final Rule' (13 November 2012) <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

124 See, eg, Intel, *In Pursuit of Conflict-Free Minerals* <http://www.intel.com/content/www/us/en/corporate-responsibility/conflict-free-minerals.html>; Hewlett-Packard, *Conflict Minerals* <http://www8.hp.com/us/en/hp-information/global-citizenship/human-progress/conflictminerals.html>.

E *Visualising Continuous Improvement: Virtuous Behaviour Is More than Just Law-Abiding Behaviour*

In the same way as in the regulatory pyramid, the 'quality' of the behaviour of the regulated entity — and the subsequent assumptions made by the regulator — can be mapped along the vertical axis of the regulatory diamond.[125] Braithwaite had three major labels categorising assumptions about a regulatee's conduct (see figure 2): virtuous (at the base), rational (in the middle) and incompetent/irrational (at the apex). However, unlike Braithwaite's model, when mapping assumptions of the regulated entity onto the regulatory diamond, the virtuous actors are not at the mid-line (as might be expected since the mid-line corresponds to the baseline in the pyramidal model), but *well above it*. 'Virtuous' as a label appears near the apex, 'law-abiding' at the mid-line and 'incompetent/irrational' at the lower tip of the diamond. Mere compliance with minimum legal standards should not necessarily give rise to an assumption of virtue.[126] Behaviour at this level of the diamond (again, corresponding to the baseline of the original pyramid) is invariably a mixture of virtue and rationality, and the assumption of the regulated entity's behaviour could better be characterised as simply 'law-abiding'.

Assumptions about the regulated entity progressively worsen as we descend the regulatory diamond — in identical fashion to moving up the regulatory pyramid. However, the opposite is the case as we ascend the regulatory diamond from the mid-line. Those entities that are responding to aspirational regulation mechanisms to achieve behavioural outcomes that far exceed the legal standards can be assumed to be acting virtuously.

Nevertheless, the simplicity of ascribing labels based on generalisations is terribly fraught. Conceivably, there could be sound business considerations as to why a regulated firm may wish to climb the diamond, rather than descend it. Rationality — especially when it comes to business regulation — remains the most powerful motivator, over and above any sense of moral obligation to the community or perceived social responsibilities.[127] Depending on the context, assumptions of regulatees' behaviour do not just remain with regulators, but infiltrate broader society through social media and the actions of public interest groups. This may provide a powerful, pragmatic incentive for regulated entities to improve their performance — even sometimes to exceed applicable legal standards despite the immediate financial cost. In the corporate regulatory environment, exposure of corporate practices that may be legal but are perceived as in some way unethical can have profound reputational and financial impacts on a firm. Acting virtuously, it could be said, is sometimes good for business.

125 See figures 2 and 4.

126 See generally David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Press, 2005).

127 Ibid.

The exposure of poor wages and working standards in Asian factories manufacturing Nike running shoes in the 1990s[128] and Apple iPhones in the 2000s[129] are two cases in point. Legal standards in the respective countries were being adhered to, yet through the actions of US-based public interest groups, pressure was exerted, and brands and reputations besmirched. These actions gained widespread attention and amounted to not insignificant pulling power on these retail firms to launch investigations and ultimately force improvement in the working conditions of workers throughout their supply chain.[130]

The corporate reaction to the 2012 Bangladeshi sweatshop fire and 2013 building collapse is also instructive in this regard.[131] Before these tragedies that involved the deaths of thousands of low-paid garment workers, little public attention was given to the poor wages and working conditions of Bangladeshi garment manufacturers. However, in their wake, European- and American-based retailers that sourced clothing from Bangladesh were compelled to respond to these two man-made tragedies. This was not simply due to the human toll incurred, but also due to the widespread public outrage at the perception that transnational clothing brands were complicit in the poor working conditions of workers and the inadequate safety standards that led to the large loss of life.

In May 2013, facing consumer backlash and even threats of outright boycotts,[132] several prominent European-based clothing labels, retailers and NGOs finalised the *Accord on Fire and Building Safety in Bangladesh* — a legally binding agreement to which dozens of retailers are now signatories.[133] The Accord compels retailers to pay for inspections of Bangladeshi garment factories and any necessary improvements in safety standards. The *Bangladesh Worker Safety Initiative* — a similar industry-based initiative — was launched by American retailers in July 2013, committing millions to improve the safety and conditions

128 Tim Bartley and Curtis Child, 'Movements, Markets and Fields: The Effects of Anti-Sweatshop Campaigns on US Firms, 1993–2000' (2011) 90 *Social Forces* 425.

129 Stephen Frost and Margaret Burnett, 'Case Study: The Apple Ipod in China' (2007) 14 *Corporate Social Responsibility and Environmental Management* 103.

130 See, eg, Nike CEO Phil Knight talk of the impact of the public campaigns: Phil Knight, 'Nike in the Global Economy' (Speech delivered at the National Press Club, Washington DC, 12 May 1998); John H Cushman Jr, 'Nike Pledges to End Child Labour and Apply US Rules Abroad', *New York Times* (New York), 13 May 1998, D1.

131 See, eg, Anis Ahmed and Ruma Paul, 'Bangladesh's Worst-Ever Factory Blaze Kills Over 100', Reuters (online), 25 November 2012 <http://www.reuters.com/article/2012/11/25/us-bangladesh-fire-idUSBRE8AN0CG20121125>; Serajul Quadir and Ruma Paul, 'Bangladesh Factory Building Collapse Kills Nearly 100' Reuters (online), 24 April 2013 <http://www.reuters.com/article/2013/04/24/us-bangladesh-building-idUSBRE93N06P20130424>. For an Australian perspective, see also ABC Television, 'Australian Retailers Rivers, Coles, Target, Kmart Linked to Bangladesh Factory Worker Abuse', *Four Corners*, 24 June 2013 <http://www.abc.net.au/news/2013-06-24/australian-retailers-linked-to-sweatshop-abuse/4773738>.

132 See Sarah Whyte, 'Shoppers Threaten Boycott of Retailers Who Avoid Safety Pact', *Sydney Morning Herald* (online), 17 May 2013 <http://www.smh.com.au/business/retail/shoppers-threaten-boycott-of-retailers-who-avoid-safety-pact-20130516-2jp9y.html>.

133 'Accord on Fire and Building Safety in Bangladesh' (13 May 2013) <http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf>. For full text of the Accord and updates, see generally <www.bangladeshaccord.org>.

of Bangladeshi garment factories.[134] That is, Western retailers, at the urging of governments and community groups, acted to seek to raise working standards in a country thousands of kilometres away. Neither initiative was compelled by law, but nor were they the result of newfound altruism on the part of the industry. Notwithstanding the possibility that there may well have been an element of virtue motivating some industry executives, these two self-regulatory initiatives were rational attempts to improve their business' public relations, ward off further criticism, and pre-empt any onerous governmental regulation.

V CONCLUSION: INCREASED UTILITY FOR REGULATORS AND REGULATEES ALIKE

The original pyramid heuristic has had great success in popularising and sharing the theoretical insights of responsive regulatory design with practitioners — in government, business and not-for-profit sectors.[135] It is hoped that rather than obfuscating the value of responsive regulation, the regulatory diamond will strengthen it as a theoretical and practical model. The regulatory diamond heuristic represents an advance in the visualisation of regulation, one that better reflects the continuous improvement maxim that motivates the regulatory enterprise, and the entirety of possible regulatory strategies to achieve that goal.

The regulatory pyramid took enforcement of behavioural standards as the goal of regulation. Yet, this runs contrary to our modern conception of regulation, as encompassing attempts to alter social behaviour. The regulatory diamond resolves this dissonance by integrating into the one model the three core components of an optimal regulatory framework: standards, compliance regulation and aspirational regulation.

For regulators, the diamond heuristic visually demonstrates that compliance with behavioural standards is but half the solution to the problem they are addressing. Their view of the regulated entity is no longer dominated by negative conceptions of an entity that needs to be curtailed and compelled to comply with minimum legal standards. With the diamond, the conception that pervaded responsive regulation theory is moderated by the understanding that regulated entities can also exceed such standards, and positively contribute to addressing the societal problem in question. From the regulated entity's perspective, the diamond also provides some added insights. It highlights not simply the punitive measures they risk for non-compliance, but also the rewards, incentives and other regulatory techniques they may be subject to, which may encourage them to go beyond compliance. It presents the risks and opportunities that may come their way depending on their choice of action or inaction. In the business context, the

134 See generally Alliance for Bangladesh Worker Safety: <www.bangladeshworkersafety.org>.

135 Braithwaite, 'Fasken Lecture', above n 20, 475–6; Parker, 'Twenty Years of Responsive Regulation', above n 2, 2; Ayres, 'A Co-Author's Appreciation', above n 9, 145–6; Pauline Westerman, 'Pyramids and the Value of Generality' (2013) 7 *Regulation & Governance* 80, 80–1.

regulatory diamond assists in creating a 'market for virtue'.[136] In particular, by adding the inducements and other aspirational regulation mechanisms, it presents to regulated entities tangible options to adopt 'better' business practices (as adjudged by the regulator), and reap the rewards.

Of course, providing yet another regulatory tool does not avoid the perennial challenge confronting policy-makers and concerned actors that Ayres and Braithwaite articulated over three decades ago: when to punish, and when to persuade.[137] However, the regulatory diamond suggests the addition of a third consideration: when to reward.

Nevertheless, in any given circumstance, the challenge remains to populate each level of the regulatory diamond with regulatory mechanisms that efficiently and effectively secure compliance with established minimum behavioural standards for the issue in question, and encourage regulated entities to go above and beyond those standards and continuously improve their behaviour. The regulatory diamond provides a heuristic to visualise the regulatory regime in its entirety, and how the different regulatory mechanisms relate to one another. It is hoped that the regulatory diamond, as a theoretical model and practical heuristic, will encourage continuous improvement not just in the response to regulatory regimes but also in their design, and help realise the full potential of regulatory relationships.

136 Vogel, above n 126, 162.

137 Ayres and Braithwaite, above n 1, 21.