Ambiguity and relational signals in regulator–regulatee relationships

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Abstract

Responsive Regulation translated an ongoing academic debate about behavior orientation and regulatory enforcement into a synthetic framework. Yet ethnographic studies reveal that ambiguity pervades regulator–regulatee interactions and suggest that the reality of regulatory encounters may be too ambivalent to fit the picture of the regulatory “game” at the heart of Ayres and Braithwaite’s theory. This article proposes to address this ambivalence by drawing the outline of a relational signaling approach to regulatory encounters. The regulatory game is deconstructed into several ideal types of regulator–regulatee relationships. Within each ideal type ambiguity is managed with relational signals, namely behaviors that take a specific signification depending on the nature of the relationship. A relational signaling approach can account for the varying meanings of cooperation, defection, and mutual social control across different regulator–regulatee dyads.

Keywords: ambiguity, ideal types, regulator–regulatee relationship, relational signaling, responsive regulation.

1. Introduction

Responsive Regulation has offered an original take on regulatory enforcement and compliance and the theorization of cooperation and conflict between regulator and regulatee (Ayres & Braithwaite 1992). Far from the stimulus–response model of many economic approaches to regulation and their search for “optimal” levels of enforcement, Ayres and Braithwaite helped popularize the notion that regulatory encounters are fluid, situated in contexts that vary from one case to another, and change over time. They also emphasized that regulators and regulatees have multiple motives; therefore, their respective behaviors cannot be understood only as self-interested calculation, but require a more complex and dynamic view of compliance motivations. Hence, rather than being unique and widely transposable, any solution to the problem of achieving durable cooperation between them has to be dynamic and multi-motivational. This view was popularized as the “enforcement pyramid,” a linear structure of escalating enforcement responses that embodies the tit-for-tat strategy of evolutionary game theory, but also corresponds to variations in the dominant motivations of regulatees, from trust and a sense of duty (at the bottom of the pyramid), to unfettered self-interest (at the top).

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Responsive Regulation’s lasting legacy lies in part in its ingenious mix of actionable normative theory – embodied most clearly in the “enforcement pyramid” – and references to an extensive, multidisciplinary literature that is analytical in nature, as well as the authors’ own empirical research. Thus, it has been appealing to practitioners, consultants, and social scientists. Yet it has faced growing criticism in the past few years (e.g. Baldwin & Black 2008; Mascini & Van Wijk 2009; Nielsen & Parker 2009).

Many commentators have criticized Responsive Regulation for assuming more order and structure in regulatory encounters than can be observed empirically. Against the idea that enforcement could be described with a rule of gradual escalation, the ambiguity of enforcement – what it means and how it matters for regulatees – and its ambivalence across different regulatory encounters, have been emphasized. Indeed, enforcement’s meaning and impact vary a great deal depending on context, regulation, and regulatee profile. Thus, “to some firms, naming and shaming may be seen as non-punitive, to others it may be viewed as far more punitive than a fine” (Baldwin & Black 2008, p. 86); prosecution might jeopardize future cooperation in certain regulator–regulatee dyads (Hawkins 2002) but be considered normal in others (Coglianese 1996); fines may be punishments for some and the price of doing business for others (de Bruijn et al. 2007, p. 19).

The impression that regulatory encounters cannot be summarized in a linear rule is strengthened by the ambivalence characterizing aspects of regulatory encounters other than enforcement, which has been well documented in ethnographic studies (Herzfeld 1992; Haines 1997; Hutter 1997; Fineman & Sturdy 1999; Gezelius 2003). For example, formality in regulator–regulatee interactions may sometimes be judged negatively by the other party (e.g. Hawkins 2002), and sometimes positively (e.g. Soss 2005). Similarly, involving a third party in the dyad’s matters without the consent of the other party can be considered a sign of distrust (e.g. Gunningham & Sinclair 2008, p. 17), but it can also happen without jeopardizing the quality of the relationship (e.g. Braithwaite 1985, p. 156). Ambivalence characterizes even the smallest, apparently trivial elements of regulatory encounters. For example, with regard to environmental policy in the UK, Hutter notes:

Inspectors interpreted the reception they received from the regulated according to the nature of their relationship. For instance, difficulties in parking could be interpreted as a company being awkward or as an understandable pressure on parking. Being asked to sign a visitor’s book would be seen either as a sensible precaution in case of fire or as obstructionist and rude. Inspectors also reacted differently to offers of coffee and lunch according to the social distance they wished to maintain between themselves and the regulated. Where there was a close and co-operative relationship inspectors would expect to be offered coffee and possibly lunch. (1997, p. 188)

Responsive Regulation was initially built to reconcile such contradictions (Braithwaite 2006, p. 887). Yet the picture of regulatory encounters that it offered via the enforcement pyramid also hid from view these important variations and the ambiguity of much behavior in regulatory encounters. Rather, Responsive Regulation implies and assumes that regulators could be able to identify which enforcement response would fit the unambiguous behavior of the regulatee.

How should ambiguity be addressed? One option would be to leave it to empirical description of contexts and circumstances. This is the approach taken by those who are
most suspicious of theorization. Another option would be to develop a rulebook of as many alternative strategies and responses as one could possibly observe. Doing so would lead to drawing a more realistic as well as a far more complex picture of regulatory encounters than can be found in Responsive Regulation. There would be a gain in comprehensiveness, but also a clear loss in parsimony. A third option would be to address the multiple meanings of similar behaviors across regulatory encounters by identifying the different regulator–regulatee relationships to which each of these alternative meanings corresponds. To keep this exercise simple, one could deconstruct the world of regulatory encounters into a limited number of coherent “ideal types,” understood in the Weberian sense as logical ideals that can help analysts make sense of reality, rather than as normative ideals indicating to practitioners and policymakers what reality should be like. I propose to follow this third route in the remainder of this article, because it promises to answer the issue of ambivalence in regulatory encounters with parsimony. Limited space imposes that only an outline of an alternative theory will be drawn here.

The article is structured as follows. I begin by drawing the consequences of pervasive ambiguity for an analysis of cooperation and defection in regulatory encounters. I argue that a shared focal goal could help regulator and regulatee make sense of their interactions, in spite of ambiguity. I then draw five ideal types of regulator–regulatee relationships on the basis of five distinct motivations, and identify how various behaviors qualify either positively or negatively within each type. The result is a picture of ambivalence across multiple cases rendered meaningful by reference to different types of relationship. Discussion and conclusions follow.

2. Coping with ambiguity in regulatory encounters

The empirical literature suggests that, far from having a fixed meaning transposable across situations, behaviors in regulatory encounters are often ambiguous not only for those who observe them but also for the participants to these encounters (e.g. Hawkins 1990; de Bruijn et al. 2007). This has implications for the theorization of regulatory relationships, for instance, in the game theoretic terms of “cooperation” and “defection,” as in Ayres and Braithwaite’s work.

What it means to have a cooperative rather than a conflictual relationship is not always clear: mutual expectations in a regulatory encounter can be ambiguous. Regulatory requirements may be formulated in very general terms so that compliance with them is open to interpretation. Besides, the meaning of the relationship may be challenged by the pursuit of conflicting goals: fulfilling certain goals may imply frustrating other goals as well, and, therefore, be experienced as adverse by regulator or regulatee. Hence, and depending on the level of discretion given to regulators (or left for them to take), the meaning of “cooperation” for a given regulator–regulatee dyad may be negotiated. As a result, one can observe, even within the same regulatory regime, cases where cooperation means more than conformity with the law and cases where it means less than that (Hutter 1997).¹

If cooperation is rigged with ambiguity, then so is defection. One’s breach of the other’s expectations could be many things: the regulator might willingly abuse its power (e.g. Soss 2005),² the regulatee might breach regulations intentionally, both might breach shared expectations because of the influence of external forces in their “surround” (Hawkins 2002), or they might defect by accident. Importantly, it is often impossible for
the other party to know for sure and in due time if the other party’s breach is intentional, constrained, or accidental.

How could regulator and regulatee make sense of their interactions and have a cooperative relationship if ambiguity pervades their interactions? Social psychology provides the elements of an answer. The way individuals make sense of their environment, and, therefore, also of their interactions with other individuals, is motivated: cognition is tightly linked with motivation (e.g. Kruglanski 1996; Lindenberg 2001; Dijksterhuis & Aarts 2010). For instance, if parties to regulatory encounters were focused on maximizing their self-interest, they would interpret their interactions in terms of gains and losses. However, if they were focused on doing their duty to obey the law, they would interpret their interactions in terms of conformity and non-conformity with legal rules.

Since regulator and regulatee might more often than not pursue mutually inconsistent goals, they might not make sense of their interactions in consistent ways, making cooperation difficult or impossible to achieve (e.g. Mascini & Van Wijk 2009). Ayres and Braithwaite’s take on this issue of inconsistency was that regulators should be able to get regulatees to see things in the desired way. They did not assume that regulators could successfully rewrite the regulatees’ motivations, which would be unrealistic. They rather assumed that regulators could determine which of the regulatees’ multiple selves is at the center of their attention (what social psychologists call the “focal goal;” Shah & Kruglanski 2002). Regulators could, thus, bring “to the fore” the regulatees’ law-abiding self, their socially responsible self or their trustworthy self.

Social psychologists have spoken of a “goal pull” effect to describe such a process (Shah & Kruglanski 2002), and have explained it as a manipulation of selective attention processes. In other words, if someone or something manages to grab one’s attention and direct it toward particular dimensions of a situation, this can influence one’s focal goal. All sorts of things might, thus, influence attention processes: words spoken or written, signs, behaviors. As such, they constitute a “goal signal” (Etienne 2011), which “either pulls your attention and resources away from the focal goal (and towards the alternative), or draws attention and resources towards the focal goal” (Shah & Kruglanski 2002, p. 380). Ayres and Braithwaite implied such a mechanism when they considered that, for example, “a socially responsible self (…) can be drawn to the fore in a regulatory encounter” (Ayres & Braithwaite 1992, p. 33).

Regulators might well attempt to alter the motivations of regulatees and the way they make sense of what happens in regulatory encounters by manipulating their attention, yet whether they would always be effective is another matter. Ayres and Braithwaite focused specifically on situations where regulators and regulatees interact with one another repeatedly, and, thus, have multiple opportunities to influence one another. Lindenberg (2000a) speaks of “relational signals” to refer to the information thus exchanged in repeated interactions, through which one can infer the other’s interest in the relationship (see also Six 2007; Six et al. 2010). Hence, in repeated interactions, regulator and regulatee would come to understand their interactions through the same lenses, although from two different standpoints, thanks to relational signals.3 Importantly, this does not imply that all of their goals would align (in fact, each party’s own goals are a perturbing influence on the encounters; Hutter 1997), only that they would reach a common understanding of the nature of their relationship.

The outcome of such convergence is illustrated by Hawkins’ work. Hawkins notes how environmental inspectors in the UK would often begin with a “scientific” approach
of how to write consents to discharge polluted water for regulated industries and farms, yet eventually come to work according to a principle of equity, as a result of their repeated interactions with regulatees:

Field men, however, are constantly reminded that industrialists and farmers work on a principle of equity: they can readily discover the standards which their competitors must observe and may complain if they are being handicapped. But the agencies prefer to avoid complaints wherever possible, and this encourages an administrative inclination for equity of treatment, even though ‘scientific’ judgment may dictate otherwise. (Hawkins 1984, p. 26)

Repeated signals in regulatory encounters are critical for a shared motivated understanding between regulator and regulatee to emerge and to be maintained over time. Some of these signals are given off unwillingly. However, many of them are also sent intentionally. There are “positive” and “negative” relational signals: the former are used to express satisfaction with the relationship, and the latter to express dissatisfaction. Some regulators impose their own range of signals to regulatees:

An Industrial Air Pollution Inspector explained to a newly registered business that he would use first names and be known by his first name while he was satisfied with their environmental control. But if he had cause for dissatisfaction he would refer to the regulated by their formal titles and expect to be similarly addressed by them. (Hutter 1997, p. 188)

Regulatees also learn to read signals given off by regulators: “If we eat out together afterwards [the inspection], it means that it went well. If we don’t eat out together, it means that it did not go well.”

These may seem like trivialities, but as Hawkins put it, “in an environment of ambivalence what is mutually recognizable assumes immense importance” (1984, p. 207). In fact, “it is the social relationships that allow an actor to consider one interaction [with state agents] a failure but another a success” (Herzfeld 1992, p. 70). Thus, when both parties share a common understanding of their relationship, they also share a common understanding of what counts as a negative relational signal and what counts as a positive relational signal. As such, relational signals help regulator and regulatee disambiguate the meaning of their interactions.

As parties to regulatory encounters grow aware of the signaling dimension of their behaviors, they also proactively manage the relationship, sending positive signals and avoiding negative signals in order to maintain cooperation (and possibly build a particular kind of relationship, e.g. one of trust), in spite of their otherwise inconsistent goals. For instance:

The inspector’s ability to interrupt or prevent industrial production is a real fear for the manager, a threat to both his position and credibility in the company. So the manager ultimately acts (looks, sounds) compliant in the face of someone he regards as sufficiently powerful to prevent industrial production and embarrass him with his superiors and peers. (…) Moreover, in the uneasy imbalance of power there are future regulatory encounters to anticipate, so the manager’s de facto emotional labor includes managing the inspector’s emotions – “not winding him up.” For the inspector, we observe the reciprocal of these processes. Interpreting and
satisfying the political/hierarchically-defined conditions of regulation helps define his own organizational and social place, authority, and well being. Being “firm” and procedural (masculine) with a resistant manager is one way of bringing the regulated person into line. But, as we have seen, harsh confrontation or prosecution implies significant costs for the inspector. It may also be in tension with the composure required for “true,” professional performances. Therefore, the inspector’s emotion work involves a degree of “surface” acting to camouflage the anger or irritation of any deference loss. (Fineman & Sturdy 1999, pp. 650–651)

Besides, regulators and regulatees use relational signals to control one another. Positive signals are rewards, negative signals warnings. For instance, in relationships built on trust, threats or actual sanctions are perceived negatively. Thus, when threatened, regulatees might respond with negative signals of their own so as to emphasize that limits are being overstepped:

BC [the regional inspector] was terrific, I have known him for donkeys years. I overheard what the other person who was with him said, “let’s go and see who we can prosecute, who we can screw yes”. I spun round and said he is not to go on site . . . I was deliberately breaking the law in refusing the DOL entry in that regard, and I said I was prepared to stand on that. The two of them were welcome to go on site, we had forklift drivers we had all the witnesses available. We had everyone that was necessary for them to conduct their inquiry fully and completely. But not under threat. BC went out and talked to the other chap, came back and assured me that he would be kept on the mechanical investigation only, and that his views would be vetted before papered. (Haines 1997, p. 117)

In sum, the nature of the relationship determines the way regulator and regulatee socially control each other: it makes certain behaviors meaningful and others less so. It also makes certain behaviors unacceptable and others acceptable.

None of the above implies that parties to a regulatory relationship would necessarily have the relational skills to successfully maintain cooperation, in spite of defection: a destructive spiral is always a possibility. Nonetheless, the ambiguity of defection and the widespread desire to avoid conflict will often translate in efforts to “neutralize” the threat posed to an ongoing relationship by a one-off breach of the other party’s expectations. There again, relational signals will play a crucial role to downplay the negative undertones of an apparent defection, but also to make any response to it acceptable, whether that response is a sanction, total inaction, or a compensation (e.g. bribes). Sometimes, efforts to maintain cooperation in such circumstances will not imply reducing the ambiguity of what happened – the sanction or the bribe – because the latter is unambiguously enough a negative signal. It will, rather, be about “ambiguating” the event (Lessig 1995) to achieve what Granovetter calls a “principle of neutralization”, namely “an account that (. . .) given the particular circumstances, no moral violation has occurred” (2007, p. 154; also Gezelius 2003). For example, Herzfeld (1992) comments on how the meaning of gifts given in exchange for non-prosecution of illegalities in Greece is negotiated so as to downplay the moral problems such a practice may raise. Similarly, Braithwaite noted that, in order to downplay the negative impact of a sanction, “The agency should ensure that its front-line person, the inspector, may say, if he wants, ‘It wasn’t my decision to go criminal,’ or, ‘I had to do my job and write up the
violation but I put in a good word for you and pleaded with the powers that be not to prosecute’ ” (Braithwaite 1985, p. 153).9

In sum, repeated interactions offer to parties of regulatory encounters the possibility of reaching a shared motivated understanding of their interactions, which includes the relational signals by which they manage their relationship.

How are we to identify these mutually recognizable signals, and how do they differ from one relationship to another? Taking an ideal-typical approach to this issue, which, as argued previously, enables one to account for diversity in a parsimonious way, I discuss several different types of regulatory relationships in the following section. I then discuss which behaviors and strategies would qualify as either negative or positive signals within each of these ideal-typical relationships.

3. Types of regulator–regulatee relationship

Most approaches of regulatory encounters by “types” tend to adopt the regulator’s point of view by slicing up the population of regulatees in various sub-populations characterized by a dominant attitude or motive. They then suggest how each sub-population should be targeted with a preferred enforcement strategy. This “target-analytic approach” (Baldwin & Black 2008) tends to downplay the constraint that the social relationship imposes on the regulator, as well as the regulator and regulatee’s potential capacity to influence one another. It might be more fruitful to consider types of relationships according to what logic may dominate and shape the interactions of a given regulator–regulatee dyad. Of course, the construction of such ideal types remains a simplification of reality, but it is one that does not take the regulator’s point of view, and, rather, focuses on which rules of interaction might hold sway in stable, ongoing regulator–regulatee relationships.

One can draw different types of regulator–regulatee relationships from empirical data: advocates of proximate approaches, either in terms of “frames” (Hawkins 2002) or “vocabularies of motives” (Mills 1940), have argued that the categories used to describe these should not be drawn from theory but from fieldwork. The approach taken here is different, drawing from the theoretical literature, rather than from the empirical literature. Theory-driven categories are defined in general terms applicable to a wide array of regulated areas and can be associated with empirical data in a step-by-step congruence search. I will discuss five types, which are quite comprehensive and yet distinct. Others may certainly be proposed in relation to specific regulated areas. Types of relationships are defined around the concepts of self-interest, legality, authority, judgment, and solidarity. These categories are drawn from multiple sources cited, but the main impetus comes from Lindenberg’s (2000a,b) theoretical work on solidarity in business partnerships, as well as on his typology of multiple rationalities.

Relationships of self-interest are built around a shared focus on resources (gains and costs).10 Social theorists have considered such relationships as fragile because self-interest is an unstable motivation.11 Ideally, cooperation may endure if regulator and regulatee continuously renegotiate what they expect from one another so as to accommodate changes in each party’s interests. Yet even this is unlikely to ever provide for unexpected “golden opportunities,” whereby a chance for a one-off profitable or undetectable defection presents itself. At best the relationship may then continue if one or the other’s defection is answered to by retribution (e.g. sanctioning) or compensation (e.g. bribing),
within the limits that the surround imposes (Langbein & Kerwin 1985; He 2005). The respective positions of regulator and regulatee in a self-interested relationship are determined by how resourceful they are and by their ability to put these resources to effective use.

By contrast, **legality** relationships are built around a common focus on legal rules. Regulatee and regulator hold different positions in a legality relationship, as it is the latter’s role to control that laws are complied with. Yet legality imposes itself on the regulator as well. This is because legality implies that one obeys the law, rather than a person. For instance, Soss quotes clients of a social service counter speaking of the bureaucrats they must regularly interact with: “**They have to follow the rules and so do I**” (Soss 2005, pp. 299–300). Legality relationships are the sort of state–society rapport that Weber called “rational legal domination:” it is less the content of the rule than its legal nature that justifies abidance; hence, compliance is a matter of duty, not of agreement with the content of the law. Legality relationships tend to be stable over time, yet may fail to address implementation issues or emergencies that are not provided for in existing rules.

**Authority** relationships are built on status, and put regulator and regulatee in positions of superior and inferior. As a motivation, authority requires one to conform to the requests of someone whose status enables him or her to legitimately claim unquestioned obedience, irrespective of the content of the request. As such, authority relationships can easily address issues unwritten in legal rules, including unexpected or unimagined problems or concerns, as well as specific situations for which the general text of regulations would need to be specified. The pertinence and pervasiveness of authority relationships has been questioned: political theorists (Arendt 1972; Kojève 1942) consider authority to be, at best, a residual motivation in contemporary societies, at worse, a thing of the past. Others document authority relationships as a contemporary reality (e.g. Milgram 1974; Pyrcz 1981; Haines et al. 2008; Gezelius 2009), and conceive authority as an important principle of obedience (Uphoff 1989, p. 302).

**Judgment** relationships are built on a shared attention to facts and values. Parties to such a relationship are motivated to act on the basis of right/wrong or true/false considerations. Hence, cooperation is contingent on one’s support for/agreement with the content of what one is expected to do. Judgment may be a central motivation for cooperation, especially when the activity regulated is strongly linked with moral issues or scientific–technical issues. For example, Johnson et al. note that, in the US, negotiations between environmental regulators and the chemical industry are done “in a scientific way,” in the form of expert studies and technical discussions (2000, p. 356). Similarly, Gezelius (2003) notes that compliance and non-compliance with fisheries regulation can be conditioned by the degree of support/agreement with the regulation’s content. Judgment relationships, like legality relationships, impose equal constraints on both regulator and regulatee. They imply that all disagreements could be settled by argumentation, irrespective of other concerns. As such, they might work best in conditions where regulatees self-regulate (e.g. Braithwaite 1985) and regulators have important margins of discretion.

Finally, **solidarity** relationships are built on trust, itself emerging from repeated positive interactions (Blau 1986). Trust might seem an unlikely possibility within the realm of hierarchical regulator–regulatee relationships, especially if we consider Granovetter’s
view that “the concepts of trust and distrust refer to horizontal relations in which neither party can dictate to the others what she must do” (Granovetter 2002, p. 40). Yet regulatory scholars (including Ayres and Braithwaite), regulators, and regulatees often use the concepts of “trust” or “confidence” to describe regulatory encounters. This is a testimony to the capacity of individuals to discount sizeable chunks of their environments (notably differences of status between regulator and regulatee) and, rather, focus on what accommodates their objectives: an illustration of motivated cognition. It is even possible that a shared identity develops between regulator and regulatee in spite of their other obvious differences (e.g. Parker 2002). Trust relationships are ruled by a principle of solidarity (Lindenberg 2000a). However, the constraints that the surround of regulatory encounters imposes on both regulator and regulatee – especially with regard to the risks of “capture” – mean that such relationships can often be only of a weak, rather than strong, solidarity.15

These five profiles of regulator–regulatee relationships are ideal-types, not real examples of real relationships. Real cases would certainly present only some of the characteristics of one of these types, and would frequently present also the characteristics of another one of them, especially when considered diachronically. As such, ideal types, of regulator–regulatee relationships are interesting for organizing the description and classification of actual relationships, with regard to how they resemble or rather, do not resemble, one particular type proposed here. Ideal types are also of interest in order to draw hypotheses and build theories and, in our case, in order to shed light on ambivalence across different regulatory encounters. The approach in terms of relational signals exposed earlier in the article should translate as such: “to each type of relationship its peculiar set of signals.” The identification of these signals in the next section will enable addressing ambivalence in regulatory encounters.

4. Relational signals

Relational signals may vary considerably from one dyad to another. There are patterns, however, and the literature provides multiple hints on what might count as positive and negative relational signals for each type of regulator–regulatee relationship. Some of these signals have been mentioned already in the article, and the following paragraphs offer additional illustrations. Some are drawn from the empirical literature. Others are drawn from the theory behind the ideal types of regulator–regulatee relationships exposed earlier, and, as such, they remain hypothetical and subject to empirical validation. Illustrations of relational signals for each ideal-typical relationship are summarized in Table 1. Ambiguity characterizes many things that can happen in regulatory encounters, yet favors are among the most ambiguous of exchanges between regulator and regulatee (Herzfeld 1992; Rose-Ackerman 1999). Favors are called gifts or bribery/extortion depending on the standpoint from where they are judged. They signal self-interest or trust depending on the way they are presented, the moment they are made, and their conditionality on other favors being made in return. Regulatory relief conceded by the regulator in exchange for efforts from the regulatee is a positive signal in a relationship built on self-interest, yet also in one built on trust. Mutual assistance in times of need counts as an important positive signal in a solidarity relationship. However, material gifts or concessions need justification in order not to appear inappropriate in authority, legality, and judgment relationships.

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<th>Relationship</th>
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<th>Solidarity</th>
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<tr>
<td>A social exchange relationship</td>
<td>A vertical relationship from superior to inferior</td>
<td>A relationship determined by legal rules</td>
<td>A relationship determined by morality or science</td>
<td>An horizontal relationship of trust</td>
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<td>Considerations of gain and cost dominate</td>
<td>Orders are expected to be given and obeyed without question</td>
<td>Both regulator and regulatee are expected to follow legal rules</td>
<td>Considerations of truth or right dominate</td>
<td>Regulator and regulatee are expected to show solidarity to one another</td>
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<td>Positive relational signals</td>
<td>Regulatory relief</td>
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<td>Bribery/extortion</td>
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<td>Negative relational signals</td>
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Parties to a relationship of self-interest tend to see most appeals to motives other than self-interest negatively, including claims of authority or appeals to one’s duty to obey the law. As such, most sanctions are negative signals, as in other types of relationships, yet fines may also be neutral if seen as the price of doing business. Besides, absent latent moral dispositions (acquired in lengthy socialization processes), calls to the public interest or moral values are considered hypocritical (e.g. Banfield 1958).

Formalism (written rather than oral exchanges, frequent reference to rules, consistency, and rigidity) has been noted in the literature as an indicator of relational distance or defiance (e.g. May & Wood 2003; Gunningham & Sinclair 2008) that tends to be imposed by regulators against the regulatees’ desire for “individual, personalized consideration” (Merton 1940). As such, displays of formalism are often negative relational signals in a relationship built on trust (e.g. Hawkins 2002). However, formalism does not always work as a negative relational signal, especially in a legality relationship. Proceduralism protects against the regulator’s arbitrariness (Soss 2005); therefore, it may be a positive signal even when combined with controls or punishment (Tyler 2006). Formalism is also a mark of authority (e.g. uniforms) and, as such, it can contribute to strengthening authority relationships.

Decisions by one party to involve a third party in the regulator–regulatee contract are a negative signal when cooperation is personalized, which is the case in a trust relationship, as well as in an authority relationship. However, this may not be the case in interactions built on other grounds: legal advisers or other regulators may be legitimately called in to intervene in a legality relationship. Scientific or even moral experts may also be invited to participate in a judgment relationship without harm, and could, rather, be interpreted as signals that the nature of the relationship is fully acknowledged by the parties.

Monitoring is a reminder of hierarchy and legal constraints; as such it would be expected in legality and authority relationships. Studies of business relationships suggest that trust enables and implies the exclusion of mutual checks (e.g. Uzzi 1997; Lindenberg 2000a), therefore, monitoring could be negatively perceived in solidarity relationships as well. Yet relieving regulatees of controls completely would generally mean the end of the relationship: it is repeated controls that enable regulator and regulatee to develop and maintain such a relationship. In that respect, routine surveillance could contribute to cooperation if it was perceived as supportive (Short & Toffel 2010).16 Besides, controls may be watered down. Such regulatory relief may be just as much a by-product of a relationship of trust as a way to signal and perpetuate trust in the future. Since monitoring may also be interpreted as proof that the other party has doubts over one’s competence or morality,17 it might also be a negative signal in a judgment relationship.

In judgment relationships actors solve issues – in particular those arising from episodic defections – by arguing that their behavior is scientifically or morally sound. To do so, they refer to well-supported moral norms (e.g. Gezelius 2003) or techno-scientific evidence. All attempts to solve disagreements by means other than arguing (including claims of authority) are seen negatively. Sanctions are not necessarily negative signals if they are backed by a judgment-based agreement.18 Similarly, in legality relationships solving disagreements by means other than using legal argumentation is generally considered negatively. Conversely, both arguing and bargaining19 are negative signals in an authority goal frame, and so is the use of sanctions and force.20
This exploratory exercise certainly does not capture the idiosyncrasies of all real interactions nor even all the relevant signals that could be fitted into the five ideal-typical relationships considered here. It is also subject to empirical verification, as a number of distinctions above have been drawn from purely theoretical arguments. Yet the ideal-typical approach to regulator–regulatee relationships combined to a theory of relational signaling provides a picture consistent with the ambivalence reported in the empirical literature: certain behaviors may qualify as positive relational signals in certain types of relationships and as negative relational signals in other types of relationships.

5. Discussion and conclusions

What good are ideal types of regulator–regulatee relationships and corresponding sets of relational signals for analysts of regulatory encounters? Ideal types are only logical caricatures of real cases. Obviously, many regulatory encounters do not have the essential characteristics of these alternative regulatory games: one needs time and frequent interactions between the same individuals to build rapport and to obtain some level of congruence in the way parties understand and elaborate their interactions, and these conditions will not always be obtained. First or one-shot encounters illustrate how difficult cooperation can be when dominant views are not coordinated, making it more likely that certain behaviors in encounters will be interpreted negatively, even when they are not intended that way. For instance, Mascini and van Wijk (2009) report cases where mere informal warnings from otherwise accommodating regulators are perceived as unacceptable by regulatees. Waller (2007) also shows how unannounced inspections are perceived as a negative signal to which regulatees often respond negatively, even when inspectors strive to be “responsive” and constructive. Besides, even repeat players could deceive or frustrate one another (e.g. de Bruijn et al. 2007), so that their relationship might appear to be stabilized around a shared frame of understanding while, in fact, one of the parties would only pretend to see things as the other does (Elster 1989).

Nevertheless, an ideal-typical approach of regulatory relationships, such as the one exposed in this article, can also be useful to understand these cases. Whether “one-shotters” or repeat players, actors often strive to build a meaningful interaction and are sometimes mistaken in believing that they have achieved some level of understanding with the other party. Besides, one can expect that regulator and regulatee would rarely, if ever, interact without any preconception or expectation of how the interaction is going to or should unfold. Therefore, their behavior in these circumstances can still be understood by reference to an ideal of a relationship where both regulator and regulatee would share a common frame of interpretation. In other words, I would argue that an ideal-typical approach of regulator–regulatee relationships should help us understand attitudes in all sorts of regulatory encounters; because ideal types are useful just as much for their proximity to reality as for their distance from it.

Unlike Responsive Regulation with the enforcement pyramid, this approach does not draw any picture, linear or not, of how the dynamic shift from one type of relationship to another would play out. Nevertheless, a relational signaling approach points to more than one path through which regulator–regulatee relationships may eventually change, which I can discuss only briefly here. The simplest scenario is that an abundance of negative signals uncompensated by positive ones leads to a deterioration of the relationship and possibly conflict, after which the relationship might rebuild on similar or different
bases. Yet one may also foresee more incremental shifts from one type of relationship to another. For instance, negative signals sent by one of the parties might not be counteracted with demonstrations of dissatisfaction from the other party, and, hence, the relationship might evolve towards something other than what it was. Such a shift would also be facilitated by the fact that certain behaviors are positive signals (or negative signals) in more than one type of relationship. For instance, regulatory relief may enhance dispositions to trust, but it may also be a continuation of an exchange built on self-interest.

Analytically, a focus on relational signaling is best suited for ethnographic studies of regulator–regulatee relationships over time, and may help regulation scholars explore old and new questions.

One of the little-studied issues a relational signaling approach could shed light on is the relationship between legality and authority (e.g. Haines et al. 2008). Authority is an important source of voluntary compliance when legal rules are so vague or general that they need to be specified by enforcement agents. In a sphere where they are given (or left to take) substantial discretion, regulators may require obedience to requests they formulate discretionarily. This is an issue rigged with ambiguity, in the sense that voluntary compliance with claims of authority may often result from “the mistaken belief that one’s duty to furnish it is comprehended through one’s obligation to obey the law” (Pyrcz 1981, p. 343). In other words, regulatees may mistakenly acknowledge claims of authority because they believe that the latter are legal.22 A thorough study of relational signals produced in these encounters might help understand how authority and legality may coexist separately, become mixed or, rather, trump one another.

Classic questions at the heart of Responsive Regulation could also be considered in a new light within a relational signaling approach. Capture is one of them. Capture can be sometimes considered from such a macro-level point of view that the same data could be interpreted as evidence of capture or as evidence of a relationship of trust (e.g. Haines 1997, p. 117; Parker 2002, pp. 10–11). Greater attention to the ambiguity of what happens in regulator–regulatee relationships and to how parties make sense of it as a function of their focal motivation would help analysts understand where and why regulators fail to retaliate in response to regulatee defection. Transparency is another issue that could be reconsidered from a relational signaling perspective. Exchanges of information are a crucial element of the interdependence that exists between regulator and regulatee in repeated interactions. Both good news and bad news have a relational signaling dimension, so that both selective disclosure of information and cover-up may sometimes happen, respectively, to send positive signals and avoid sending negative relational signals to the other party, thus contributing to sustaining a cooperative relationship. The idea of tripartism advanced by Ayres and Braithwaite in Responsive Regulation may be also reconsidered from a relational signaling perspective. When policies empower third parties so as to prevent capture, regulator and regulatee could choose to manage this external perturbation to their relationship by developing innovative ways of sideling third parties, partly because acknowledging the third party would be sending a negative relational signal.

Finally, considering the possibility of various types of regulator–regulatee relationships could contribute to questioning whether the dominant views on how best to regulate and produce compliance – arguably Ayres and Braithwaite’s work participates to these dominant views – provide an adequate starting point to study regulatory encounters in countries that do not share the traits of the US, Australia, the countries of
occidental Europe, or Japan (e.g. Gezelius & Hauck 2011). The latter countries, which have been overwhelmingly studied in the regulation literature, are countries where the rule of law prevails and capacities for cooperation between strangers exist. However, considerable potential for ambiguity around law, prosecution, or solidarity norms exists in countries where there are no such conditions (e.g. Herzfeld 1992; Rogov 2010), as well as in small homogeneous communities that could or can still be found in so-called developed countries (e.g. Banfield 1958; Gezelius 2003). Alongside a reflection on dealing with weak state capacities (Braithwaite 2006), an approach that takes the ambiguity of regulatory encounters could seriously contribute much to the understanding, and perhaps also the resolution, of regulatory issues in countries where regulatory effectiveness is extremely difficult to achieve.

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Notes

1 Hutter, thus, underlines that regulators (and regulatees) have a “working definition of compliance,” one that often differs from conformity with the law (Hutter 1997, p. 80). This observation is easily generalizable because it draws from material gathered in a country (Great Britain) with very low levels of corruption. It is, therefore, all the more valid for countries where corruption is rife and regulatory encounters can drift far away from both the letter and the intent of the law (for example in Russia; Radaev 2004; Rogov 2010).

2 “Even the most rationalistic view of bureaucracy must also acknowledge its potential for caprice” (Herzfeld 1992, p. 47).

3 “Repetitive interactions and consistent signals are necessary for fostering shared expectations about compliance” (May & Wood 2003, p. 129). “Where contacts are well established, a series of unspoken understandings about the rules of the enforcement game exist between [regulators] and [regulatees] which endow relationships with a substantial measure of equilibrium” (Hawkins 1984, p. 144).

4 Interview with a safety manager working in the chemical industry, France 2006.

5 “Ambiguition” here is understood in Lawrence Lessig’s sense (Lessig 1995) as the act of making the meaning of an act less clear by giving it an additional, alternative meaning.

6 In the UK where Health and Safety Executive regulators strive to build such relationships with regulatees, Hawkins was one of many scholars to note that there is “a strong barrier to the use of prosecution, since formal action is readily regarded by those regulated as a hostile act, one deeply disruptive to good relationships” (Hawkins 2002, p. 128).

7 Reintegrative shaming (Braithwaite 1989) is one of several possible strategies to enable relationships to continue in spite of a defection.

8 Correlatively, Hawkins observes that sanctioning by British environmental policy regulators takes place when there is no moral ambivalence and, rather, a clear sense that something morally wrong was done (Hawkins 1990).

9 The non-acknowledgment of one party’s neutralization efforts by the other might then have destructive impacts on cooperation. For example, “The tendency to penalize violations, even if they are unintentional and do not lead to harm (…) has an alienating effect in the chemical industry” (Johnson et al. 2000, p. 361).
10 For example: “It is clear (…) that the inspector shared the sense of importance attached to minimizing economic costs. Indeed, the case further illustrates how control encounters can operate largely within, and even reinforce the primacy of, capitalist economic logics. This delimits conflict and its emotional texture by providing a common language (e.g. costs, markets, sales) and a notional shared ground” (Fineman & Sturdy 1999, p. 654).

11 “Self-interest is, in fact, the least constant thing in the world. Today it is useful for me to unite with you; tomorrow the same reason will make me your enemy. Thus such a cause can give rise only to transitory links and associations of a fleeting kind” (Durkheim 1893, p. 152).

12 Authority’s “hallmark is unquestioning recognition by those who are asked to obey” (Arendt 1972, p. 144). Authority is “a command reason that reduces the significance of other reasons that would otherwise prevail, and removes the point of weighing them” (Lukes 1990, p. 214).

13 “Legality is the carcass of authority; or more exactly its ‘mummy’ – a body that continues without soul or life” (Kojève 1942, p. 63).

14 Authority remains an important principle even when the ruler’s claims of authority (Uphoff 1989, p. 302) are not acknowledged by the ruled. For example, military rulers in Burma have claimed secular authority that Burmese citizens have refused them, and have also tried to symbolically claim the authority recognized to monks (Jordt 2003).

15 For the distinction between weak and strong solidarity, see Lindenberg (2000a).

16 Short and Toffel convincingly argue that “routine inspections lack the ‘cuing’ or ‘framing’ effect of actual sanctions or direct threats” (2010, p. 371).

17 “Evaluation and inspection are public assertions of societal control which violate the assumption that everyone is acting with competence and good faith” (Meyer & Rowan 1991, p. 59).

18 For example, “an Australian inspector tells the story of persuading a manager that something which was not really required by the law ought to be done to make the mine safer. After writing the manager’s agreement to make the changes in the ‘record book’ kept for the purpose at the mine, the interaction finished with: ‘If I come back and find it not done, we agree that work will be stopped until it is done.’ The manager, genuinely persuaded that the change ought to be made, concurs. A few weeks later the inspector finds that, because of a strike and other production problems, the manager has not got around to making the change. The manager is unhappy when the inspector stops production, but he hardly thinks he has been unfairly treated” (Braithwaite 1985, p. 103). This relates to the “principle of neutralization” (Granovetter 2007) mentioned earlier.

19 On the distinction between arguing and bargaining see Elster (2000).

20 “Authority precludes the use of external means of coercion. Where force is used, authority itself has failed. Authority, on the other hand, is incompatible with persuasion, which presupposes equality and works through a process of argumentation. Where arguments are used, authority is left in abeyance. Against the egalitarian order of persuasion stands the authoritarian order, which is always hierarchical” (Arendt 1958, p. 82).

21 This can be done, for example, with questionnaires (e.g. Six et al. 2010).

22 Richard Nixon was contributing to such confusion when declaring in his third interview with David Frost (on 19 May 1977): “Well, when the President does it that means that it is not illegal” (New York Times, 20 May 1977, A16). The same observation may hold for a number of regulatory encounters.

References


