

# REDUCING CORPORATE CRIMINALITY: THE ROLE OF VALUES

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## I. INTRODUCTION

Can businesses effectively regulate the behavior of their employees, and if so, what strategies should they use to best achieve that goal? Recent corporate scandals have evoked a heightened concern among members of the public, government officials, and business leaders about both whether businesses can regulate the conduct of their employees, and how to effectively secure employee adherence with corporate rules and policies. White collar crime is again on the public agenda.

White collar crime is crime committed by employees in for-profit companies to benefit either their companies or themselves. White collar crime has two principal characteristics. First, white collar criminals are typically well educated, employed, middle class and, at least historically, white males. Second, the crimes they commit tend to be nonviolent and to focus on monetary gain. The crimes involved are not emotionally driven, such as assault or rape, nor do they involve physical harm. Instead, they are efforts by individuals to achieve economic rewards outside the framework of the law.

Business-related criminal behavior is a key regulatory issue because if corporations are unable to effectively manage the lawfulness of their conduct, the government has a reason to heighten external legal regulation.

What can be done to minimize the likelihood of unlawful behavior in the world of for-profit organizations and corporate regulation? In this analysis, I argue for the importance of values, in particular legitimacy, as a central feature of the law, particularly in relation to the regulation of business. I focus on why legitimacy is often undermined and, conversely, how it can be more effectively maintained. First, legitimacy is important for internal regulation, as businesses with ethical cultures that are legitimate to employees are less likely to engage in wrongdoing. Second, legitimacy is also important for external regulation because it is central to people's willingness to obey the law, and follow the policies and practices imposed on for-profit organizations by legal authorities.

This article will address the advantages of legitimacy as the central element in a regulatory strategy. I argue that legitimacy is a better strategy than the command and control approach widely used today, but that it is difficult to implement because the approaches to governing and exercising legal authority that most effectively build and maintain legitimacy run counter to the intuitions and preferences of many people in positions of authority.

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## II. IS LEGITIMACY A DESIRABLE FRAMEWORK FOR LAW?

The central question in discussions about regulation is whether governance via legitimacy is a desirable and effective approach. And if governance by legitimacy is a desirable approach, then why is it so hard to achieve? In particular, why do societies keep moving toward the use or threat of force, particularly during times of crisis? Why, for example, did the United States respond to the events of September 11, 2001 with widespread repressive policies toward suspect groups, in particular the members of the American Muslim community?<sup>1</sup> And why did the British respond in similar ways to the same problem in the United Kingdom?<sup>2</sup> Similarly, why is the orientation of law and legal authorities toward corporations and their leaders in the wake of recent issues of malfeasance one of threat and potential sanctioning? While they involve different issues, these two government responses are similar in that both involve a reaction to wrongdoing that is framed in terms of the threat of punishment and directed at a suspect group. I will argue that there are several reasons related to the nature of the psychology associated with legal authority and its implementation.

### A. Legitimacy

First, it is important to define legitimacy, and we can do so only through a discussion of power. Power is the ability to shape others' gains and losses either by using threats or coercion to deter undesired behavior, or by promising rewards to promote desired behavior. A core aspect of social dynamics, therefore, is that power provides a means to shape behavior with the consequence that "the strong do what they can and the weak suffer what they must."<sup>3</sup> The argument that behavior in social settings is linked to the ability to reward and punish is also influential in political science, sociology, and economics, as well as in law, public policy, and management.

It is equally important, however, that under some circumstances, people are also influenced by others because they believe that the decisions made and rules enacted by others are in some way "right" or "proper" and ought to be followed.<sup>4</sup> In other words, people "relate to the powerful as moral agents as well as self-interested actors; they are cooperative and obedient on grounds of legitimacy as well as reasons of prudence and advantage."<sup>5</sup> Legitimacy is the belief that those in

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1. See Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 366 (2010).

2. See Aziz Z. Huq, Tom R. Tyler & Stephen J. Schulhofer, *Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom*, 8 J. EMPIRICAL LEGAL STUD. 728, 730 (2011).

3. THUCYDIDES, THE COMPLETE WRITINGS OF THUCYDIDES: THE PELOPONNESIAN WAR 331 (Richard Crawley trans., Random House 1951).

4. See DAVID BEETHAM, THE LEGITIMATION OF POWER (1991).

5. *Id.* at 27.

power deserve to rule and make decisions influencing the lives of everyone,<sup>6</sup> and the perception that they “ought to be obeyed.”<sup>7</sup> In work settings, legitimacy refers to the judgment that “the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”<sup>8</sup>

While legitimacy and power or coercion can be distinguished conceptually, in reality they often co-exist. Companies have both norms about what is right or proper and penalties and rewards for rule-breaking and rule-following. Hence, it is seldom the case that only one of these mechanisms exists within an organizational setting. What is crucial is the balance between them.

It may not be necessary for legal authorities to have legitimacy to achieve compliance, but it is nonetheless important. While some argue that it is impossible to maintain social order using only power and others suggest that it is possible but more difficult, it is generally agreed that legal authorities benefit from having legitimacy and that they find governance easier and more effective when there is a widespread feeling that they are entitled to define and enforce rules of conduct.<sup>9</sup> This is equally true of managerial authorities.

Seeking to gain influence over others based solely on the possession of power requires enormous expenditures of resources to create a credible system of surveillance through which authorities monitor public behavior to punish rule violators. In addition, resources must be available to provide incentives for desired behavior such as cooperation and rewarding people for acting in ways that benefit the authorities and the community. Recent empirical research suggests that these strategies of governance and management can be successful. For example, recent research suggests that deterrence strategies can shape crime related behavior,<sup>10</sup> but that the magnitude of that deterring influence is usually small if not non-existent.<sup>11</sup> The use of power, particularly coercive power, thus requires a large expenditure of resources to obtain modest and limited amounts of influence over others.<sup>12</sup>

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6. HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* 55–56 (1989).

7. Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 381 (1999); see Sherrie E. Human & Keith G. Provan, *Legitimacy Building in the Evolution of Small-Firm Multilateral Networks: A Comparative Study of Success and Demise*, 45 ADMIN. SCI. Q. 327, 328–29 (2000).

8. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995).

9. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 377 (2006).

10. See NATIONAL RESEARCH COUNCIL, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 46–47 (Alfred Blumstein et al. eds., 1978); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 2 (1998).

11. See Anthony Bottoms & Andrew von Hirsch, *The Crime-Preventive Impact of Penal Sanctions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 96, 121 (Peter Cane & Hebert M. Kritzer eds., 2010); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 818 (2010).

12. See *id.*

This is not to say, of course, that deterrence is irrelevant. We do not know how much illegal behavior would occur if companies believed that they could commit fraud or engage in other forms of illegal behavior with no risk of being caught and punished. Conversely, sanctions are often ineffective because society does not put sufficient resources into surveillance and enforcement to make the risks of rule-breaking credible.<sup>13</sup> If sufficient resources were allocated to that purpose, sanctions might more strongly influence behavior.<sup>14</sup>

In a review of the literature on American drug use, for example, a study of existing research found that only approximately five percent of the variance in drug use can be explained by individual judgments of the likelihood of being caught and punished by the police and courts.<sup>15</sup> This conclusion is typical of the findings of studies of compliance with the law—deterrence is found to have, at best, a small influence on people's behavior.<sup>16</sup>

More general reviews of deterrence research conclude that the relationship between risk judgments and crime is “modest to negligible”<sup>17</sup> and that the “perceived certainty [of punishment] plays virtually no role in explaining deviant/criminal conduct.”<sup>18</sup> According to Piquero, Paternoster, Pogarsky, and Laughran, a review of the literature results in “some studies finding that punishment weakens compliance, some finding that sanctions have no effect on compliance, and some finding that the effect of sanctions depends on moderating factors.”<sup>19</sup> Even studies on the most severe form of punishment—the death penalty—suggest that the argument that capital punishment deters crime “still lacks clear proof” because studies have failed to produce compelling evidence that executions influence the rate of crime.<sup>20</sup>

Studies on punishment suggest that it is not only an ineffective deterrent for society at large, but it is also minimally, if at all, effective in deterring the future criminal conduct of those being punished. Widespread punishment for minor crimes does not generally lower the rate of subsequent criminal behavior,

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13. See Paternoster, *supra* note 11, at 819.

14. *Id.*

15. Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501 (1993).

16. See Paternoster, *supra* note 11, at 818.

17. Travis C. Pratt et al., *The Empirical Status of Deterrence Theory: A Meta-Analysis*, in TAKING STOCK: THE STATUS OF CRIMINOLOGICAL THEORY 367, 383 (Francis T. Cullen et al. eds., 2006).

18. Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 JUST. Q. 173, 191 (1987).

19. Alex R. Piquero et al., *Elaborating the Individual Difference Component in Deterrence Theory*, 7 ANN. REV. LAW & SOC. SCI. 335, 335 (2011); see also Paternoster, *supra* note 11, at 818.

20. Robert Weisburg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. LAW & SOC. SCI. 151, 163 (2005); see also NATIONAL RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012).

as models of specific deterrence would predict.<sup>21</sup> Similarly, studies of more severe punishment like imprisonment report that more severe punishments are unrelated to lower rates of future criminality.<sup>22</sup> In fact, studies of juveniles suggest that incarceration actually increases the likelihood of later criminality.<sup>23</sup>

While the previously mentioned studies refer to the effectiveness of deterrence and sanctioning generally, studies specifically focused on white collar crime yield similar results.<sup>24</sup> Braithwaite and Makkai studied compliance among nursing home executives and concluded that there were no significant deterrence effects; in other words, whether the law was followed was not related to perceptions of the likelihood of being caught and punished for breaking the law.<sup>25</sup> Experiments in which participants indicated their likelihood of engaging in wrongdoing given different fact scenarios that varied the likelihood of being caught similarly did not find deterrence effects on people's decisions about how to act under different conditions.<sup>26</sup> In three studies on cooperation and employee conduct, I interviewed employees concerning their rule-breaking behaviors and their estimates of the likelihood of being caught and punished for wrongdoing, and examined the influence of employees' judgments of risk of detection and punishment.<sup>27</sup> The studies found minimal deterrence effects on employees' rule-following behavior.<sup>28</sup> Reviewing this evidence, Simpson described evidence supporting the existence of deterrent effects in corporate settings as "equivocal."<sup>29</sup> As noted, sanctions do not

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21. See BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 109–10 (2001); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 316 (2006).

22. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. LAW & SOC. SCI. 297, 302 (2007).

23. See NATIONAL RESEARCH COUNCIL, JUVENILE CRIME, JUVENILE JUSTICE 5, 152–153, 192, 201 (Joan McCord et al. eds., 2001).

24. See, e.g., Mark A. Huselid, *The Impact of Human Resource Management Practices on Turnover, Productivity, and Corporate Financial Performance*, 38 ACAD. MGMT. J. 635 (1995) (studying impact of deterrent management practices on behavior in an office environment). See generally G. Douglas Jenkins, Jr. et al., *Are Financial Incentives Related to Performance?: A Meta-Analytic Review of Empirical Research*, 83 J. APPLIED PSYCHOL. 777 (1998) (studying the effect of financial deterrents on office behavior).

25. John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 35 (1991).

26. See Paul Jesilow, Gilbert Geis & Mary Jane O'Brien, "Is My Battery Any Good?": A Field Test of Fraud in the Auto Repair Business, 8 J. CRIME & JUST. 1, 14 (1985); Paul Jesilow, Gilbert Geis & Mary Jane O'Brien, *Experimental Evidence That Publicity Has No Effect in Suppressing Auto Repair Fraud*, 70 SOC. & SOC. RES. 222, 222–23 (1986).

27. TOM R. TYLER, WHY PEOPLE COOPERATE 51–65 (2011); [hereinafter TYLER, WHY PEOPLE COOPERATE]; TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS 45–49 (2000) [hereinafter TYLER & BLADER, COOPERATION IN GROUPS]; Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct?*, 48 ACAD. MGMT. J. 1143, 1153 (2005) [hereinafter Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*].

28. TYLER, WHY PEOPLE COOPERATE, *supra* note 27, at 51–65; TYLER & BLADER, COOPERATION IN GROUPS, *supra* note 27, at 45–49; Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*, *supra* note 27, at 1153.

29. SALLY S. SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL 42 (2002).

have a particularly powerful impact, although researchers often note that it is difficult to actually monitor behavior.<sup>30</sup>

In addition to punishment, researchers have also considered the role of incentives in organizational contexts.<sup>31</sup> Based upon a workplace-based study in which employees were interviewed about the risk of punishment and possibilities of reward for different types of workplace behavior, Tyler and Blader estimated that around ten percent of the variance in employee behavior is shaped by incentives in the work environment.<sup>32</sup> These results suggest that, while they are somewhat effective, incentive systems also only have a limited impact on employee behavior.

In recent years, the limits of the utilitarian command and control model, which seeks to implement regulations through sanctions and incentives, have been emphasized in work settings.<sup>33</sup> In the legal literature on government regulation, skepticism surrounding command and control strategies has led to the flourishing of market-based models of regulation that emphasize economic incentive systems.<sup>34</sup>

The same research shows that changes in behavior motivated by promised incentives or threatened sanctions come at high material costs because they require either the provision of resources for surveillance or the widespread use of incentives. This leaves societies vulnerable, because disruptions in the control of resources brought on by periods of scarcity or conflict quickly lead to the collapse of effective social order when that social order is only based upon power.<sup>35</sup> When the public views law and legal authorities as legitimate, however, social order has an alternative basis for support during difficult times. It is precisely in times of economic crisis that legal authorities both most need the support of those they seek to regulate and are least able to either provide incentives or effectively enforce sanctions.

Further, when legal authorities can call upon the values of the regulated group to encourage desired behavior, either because of an internal ethical culture or because of the legitimacy of legal authorities, society has more flexibility in how it deploys

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30. See Donald C. Laigevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 72.

31. See Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct*, *supra* note 27, at 1153.

32. See TYLER & BLADER, *COOPERATION IN GROUPS*, *supra* note 27, at 47–48; see also Philip M. Podsakoff et al., *Relationships Between Leader Reward and Punishment Behavior and Subordinate Attitudes, Perceptions, and Behaviors: A Meta-Analytic Review of Existing and New Research*, 99 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 113, 135 (2006) (finding similar results).

33. See, e.g., David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 109–114 (2000); Jon G. Sutinen & K. Kuperan, *A Socio-Economic Theory of Regulatory Compliance*, 26 INT'L J. SOC. ECON. 174, 186–88 (1999). See generally Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997) (examining problems with deterrence through an economic framework).

34. See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 450–51 (2003).

35. Tyler, *supra* note 9, at 377.

its resources. In particular, it is better able to use collective resources to benefit the long-term interests of the law since they are not immediately required to ensure public order. While it may be necessary to have a police force or an army, societal viability is enhanced when those resources can be diverted into economic and social development. So, to the degree that public order flows from a shared internal commitment to organizational values or to the law and the legitimacy of legal authorities, society is better off.

In addition to resource concerns, there are several social costs to a society that relies on punishment to deter non-compliance. First, if people comply with the law only in response to coercive power, they will be less likely to obey the law in the future because acting in response to external pressures diminishes internal motivations to engage in socially desirable behavior.<sup>36</sup> This follows from the well-known distinction in social psychology between intrinsic and extrinsic motivation. Research on intrinsic versus extrinsic motivation shows that when people are motivated solely by the prospect of obtaining external rewards and punishments (i.e., extrinsic motivation), they become less likely to perform the desired behavior in the absence of these environmental reinforcements.<sup>37</sup> On the other hand, if people are motivated by intrinsic reasons for behaving in a certain way, then their compliance becomes much more reliable and less context-dependent.<sup>38</sup>

Second, the use of sanctions undermines value-based motivations because it sends a message to the potential targets of the sanctions that the authorities view them as untrustworthy and suspect.<sup>39</sup> As a result, people become more suspicious and less trusting of the law and legal authorities.<sup>40</sup> This is a particular issue with the internal cultures of organizations. If a company communicates an atmosphere of surveillance and sanctioning, it is communicating mistrust, which undermines employees' identification with the company and willingness to engage in self-regulation.<sup>41</sup> Of course, this argument should not be extended too far. Companies need to make clear that they do not advocate or condone wrongdoing, and that they will punish it. This can be communicated within the framework of a positive message about the type of people that the company believes that its employees are, and the type of behavior that it therefore expects from them.

In turn, authorities, whether within a company or in government, never develop any basis for trusting the people over whom they exercise authority. The act of monitoring in and of itself prevents authorities from having confidence that people have internal values that would lead them to follow rules when not being watched.

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36. See TYLER & BLADER, *COOPERATION IN GROUPS*, *supra* note 27, at 65–68.

37. See Richard M. Ryan & Edward L. Deci, *Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions*, 25 *CONTEMP. EDUC. PSYCHOL.* 54, 60–65 (2000).

38. BRUNO S. FREY, *NOT JUST FOR THE MONEY* 13–33 (1997).

39. See TYLER & BLADER, *COOPERATION IN GROUPS*, *supra* note 27, at 43–44.

40. See *id.*

41. *Id.*; see Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*, *supra* note 27, at 1154.

Hence, a surveillance strategy sows the seeds of long-term surveillance because it does not provide a way to create the basis for trust. The way to determine if a person can be trusted to self-regulate is to allow him or her to act in unmonitored situations and see what pattern the behavior reveals.

Of course, this cannot mean that companies should not monitor their employees, since if there were no monitoring it would never be possible to identify and catch those who are taking advantage of the system. But there are different levels of obtrusiveness and surveillance. Companies benefit from deemphasizing surveillance and motivating desirable behavior by emphasizing trust and confidence in the values of their employees whenever possible. To draw an example from policing, it is difficult to imagine a world in which the police would never need to use force. But that is different from a policing strategy in which every interaction the police have with people on the street is one in which people are intimidated and threatened by police officers. Such a strategy would highlight the ability of the police to deploy force to compel compliance.

Third, legitimacy is valuable insofar as it has the ability to transform the relationship between people and authorities. When I wrote *Why People Obey the Law* in the 1980s, the ideal of a good citizen was very reactive:<sup>42</sup> a good citizen complied with the law. Today we have a much more active role in mind for citizens. We want them not just to comply with the law, but to be motivated by internal values to willingly obey the law. To the degree that people do this, the cost of surveillance and punishment diminishes. The benefit of self-regulatory models—that is, models that rely upon people to act on their values rather than their fears of sanctions—is that such models are linked to the actions for which people will take responsibility without fear of sanctions or promise of rewards. The legal system benefits when people voluntarily defer to the decisions made by judges and police officers and continue to defer over time. In the context of personal experiences with regulatory authorities, the legal system is more effective if people voluntarily accept the decisions made by regulatory authorities. Absent such acceptance, legal authorities must engage in a continuing effort to create a credible threat of punishment to assure long-term rule-following and decision acceptance.

In terms of the influence of law on people's everyday lives, there is evidence that, across a broad range of behaviors from paying income taxes to stopping at red lights, people do not always follow the law. From traffic laws to drug laws, from illegal immigration to non-payment of taxes, the problems involved in obtaining compliance in everyday life are clear. In each case, while most people comply with the law most of the time, legal authorities are confronted with sufficient non-compliance to absorb the resources normally devoted to social control. Further, in

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42. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3 (1990) (“[P]eople are viewed as shaping their behavior to respond to changes in tangible, immediate incentives and penalties associated with following the law . . .”).



situations such as the illegal downloading of music and the illegal copying of movies, levels of noncompliance are so high that effective regulation is very difficult.<sup>43</sup> The magnitude of these compliance problems should not be exaggerated, but the attention of legal authorities has been increasingly directed to the need for a better understanding of why people obey the law.

The acceptance of the decisions of legal authorities is similarly not effectively motivated by the risk of punishment, because while threats can sometimes compel obedience, they do not motivate voluntary deference. Absent such deference, people only respond to the presence of force. A force-based strategy creates long-term problems, because citizens who acquiesce in the presence of a legal authority who could use sanctions can renege in their absence. If citizens fail to fully accept legal restrictions as legitimate, further legal intervention will eventually be required. The legal system, therefore, must also be concerned with its ability to gain long-term compliance, not just immediate compliance. Willing deference based upon legitimacy leads to long-term acceptance, rather than short-term compliance.

Across the social sciences, there has been widespread recognition that it is important to understand how to motivate cooperation on the part of people within group settings. This is the case irrespective of whether those settings are small groups, organizations, or communities.<sup>44</sup> Studies in management show that work organizations benefit when their members actively work for company success.<sup>45</sup> Within law, research shows that crime and problems of community disorder are difficult to solve without the active involvement of community residents.<sup>46</sup> Political scientists recognize the importance of public involvement in building both viable communities and strong societies.<sup>47</sup> And those in public policy have noted the value of cooperation in the process of policy-making—for example, in stakeholder policy-making groups.<sup>48</sup> With this backdrop, it is important to ask whether the actions of legal authorities can aid in the production of social capital that might more generally engage cooperation.

Recent discussions of legal authority focus on this broader conception of the relationship between community residents and legal authorities, which suggests a new and broader conception of citizenship.<sup>49</sup> Rather than a conception of citizenship as simply accepting and deferring to legal authorities, citizenship is increasingly seen as connected to willing and active cooperation with authorities in

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43. See Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 661–65 (2006).

44. See generally TYLER, *WHY PEOPLE COOPERATE*, *supra* note 27.

45. See generally TYLER & BLADER, *COOPERATION IN GROUPS*, *supra* note 27.

46. Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. LAW 307, 330–31 (2009).

47. See, e.g., ROBERT PUTNAM, *BOWLING ALONE* (2000).

48. Peter J. May, *Regulation and Compliance Motivations: Examining Different Approaches*, 65 PUBLIC ADMIN. REV. 31, 32 (2005).

49. See, e.g., Tyler, *supra* note 46.

creating and maintaining order in the community.<sup>50</sup> Cooperation is essentially voluntary if non-cooperation risks little or no sanction. In particular, *not* reporting transgressions is something that is virtually undetectable.

People's willingness to report transgressions is therefore linked to a broader loyalty or sense of duty to the community and its authorities. Such cooperative behaviors are thus general civic activities akin to more traditionally studied forms of political participation. In other words, the issue that is being raised with respect to crime is the same type of issue raised with regard to any matter affecting a community: how can citizens be motivated to become involved in deciding how to manage their community, and engage in behaviors oriented toward doing so?

Legitimacy forms the basis for a self-regulatory strategy. The self-regulatory model argues that the values embodied in legitimacy have the potential to motivate employees to feel a personal responsibility for bringing their behavior into line with corporate rules and policies. It is based on the assumption that people are motivated to align their behavior with the rules of organizations or groups they belong to when they view those groups as being legitimate. The use of such a self-regulatory model has long been advocated in discussions of legal regulation of business,<sup>51</sup> and has been advanced with particular frequency in recent years.<sup>52</sup> The empirical issue is whether employees' ethical values can in reality—as hypothesized by self-regulatory model—provide a viable basis for encouraging employee policy adherence.

According to such a model, employees can be intrinsically motivated to follow organizational rules: that is, they will do so out of their own desire, and not out of the contingencies established by the organization for their behavior. The self-regulatory model specifically depends upon the role of employees' values in shaping intrinsic motivation to follow rules. The success of this approach depends upon the power of employees' values to motivate their rule- and policy-following behavior in the workplace. Such a model depends first, upon the ability of organizations to create internal cultures that emphasize legitimacy; and second, upon

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50. See *id.*

51. See PHILIP SELZNICK WITH PHILIPPE NONET & HOWARD M. VOLLMER, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 101–02 (1969).

52. See, e.g., Marius Aalders & Ton Wilthagen, *Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Safety and Health and the Environment*, 19 *LAW & POL'Y* 415 (1997); John M. Darley et al., *Enacting Justice: The Interplay of Individual and Institutional Perspectives*, in *THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY* 458 (Michael Hogg & Joel Cooper eds., 2003); Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 *LAW & POL'Y* 363 (1997); Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 *ACAD. MGMT. J.* 698 (2000); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 *S. CAL. L. REV.* 1181 (1998); Suchman, *supra* note 8; Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 *B.U. L. REV.* 361 (2001); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law*, 28 *HOFSTRA L. REV.* 707 (2000).

the legitimacy of external law and legal authority. Ideally, internal legitimacy has sufficient effect that the question of external legitimacy never arises.

Research suggests that certain values, such as legitimacy, can motivate self-regulatory behavior in organizational settings. This includes studies focused on legitimacy,<sup>53</sup> morality,<sup>54</sup> and the general role of fairness in shaping social behavior.<sup>55</sup>

Tyler and Blader provide one example of research on this topic.<sup>56</sup> We report two studies (one of a sample of corporate bankers, and another of a large and diverse sample of American employees) focusing on the internal legitimacy of organizational rules.<sup>57</sup> Analysis of both samples indicates that employee rule-following and policy-adherence was strongly influenced by legitimacy.<sup>58</sup> Interestingly, when the broad sample is divided into categories reflecting the dimensions separating white-collar and blue-collar employees, similar findings emerge in both groups.<sup>59</sup> The link between legitimacy and compliance, therefore, applies to workers generally.

In addition to examining the factors shaping everyday behavior the literature also suggests that the legitimacy of law and of legal authorities also shapes deference to the law and the willingness to accept the decisions of legal authorities when people have a personal experience such as going to court or dealing with a police officer on the street or when they are driving.<sup>60</sup>

### *B. The Difficulty of Maintaining Social Order Based on Legitimacy*

Legitimacy is thus a highly desirable feature of social systems with many appealing features as a possible basis for the rule of law.<sup>61</sup> Why, then, is it so difficult to create and maintain a legal system based upon legitimacy, and why do legal authorities use instrumental approaches based upon utilitarian models?<sup>62</sup>

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53. See, e.g., TYLER, *supra* note 42; TYLER & BLADER, COOPERATION IN GROUPS, *supra* note 27; Human & Provan, *supra* note 7; Hurd, *supra* note 7; Suchman, *supra* note 8; Tyler, *supra* note 9; Tom R. Tyler et al., *Armed, and Dangerous (?) : Motivating Rule Adherence Among Agents of Social Control*, 41 LAW & SOC'Y REV. 457 (2007); Monica A. Zimmerman & Gerald J. Zeitz, *Beyond Survival: Achieving New Venture Growth by Building Legitimacy*, 27 ACAD. MGMT. REV. 414 (2002).

54. See, e.g., Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC'Y REV. 549 (1996); Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*, *supra* note 27.

55. See, e.g., Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993); Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*, *supra* note 27; Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 103–106 (2003).

56. See Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*, *supra* note 27.

57. *Id.* at 1146, 1149.

58. *Id.* at 1553.

59. *Id.*

60. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 101 (2002).

61. See *id.* at 101; TYLER, *supra* note 42, at 19–27; Tyler, *supra* note 9, at 393–94.

62. TYLER, WHY PEOPLE COOPERATE, *supra* note 27, at 147–48.

Why is the immediate response of legal authorities to a crisis, whether it is an issue of terrorism or financial misconduct, to focus on threats and sanctioning?

One reason could be that legal authorities overestimate the effectiveness of the utilitarian approach to the implementation of laws and regulations. They could believe, for example, that threat deters immediate behavior and that punishment lowers recidivism.<sup>63</sup> If research does not support this argument, as is suggested by the literature reviewed above,<sup>64</sup> then why would it represent the conventional wisdom within law?

At least some of this conventional wisdom is likely based on behavior that legal authorities see occurring in front of their very eyes every day. People faced with authorities may comply in the moment, when the threat of those authorities is palpable (although evidence suggests that they often resist). Then, later (and, more importantly, outside the scope of plausible surveillance), when their behavior is not motivated by the immediate threat of punishment, they renege. As a consequence, those in positions of authority have the continual experience of seeing power work to influence behavior, when in fact that influence is extremely short-lived. People in power therefore come to think that the threat and use of force is a more viable and effective strategy than it actually is. This is the "myth of self-interest." Studies show that people expect others to be more strongly influenced by self-interested judgments, for example about potential rewards and punishments than they actually are.<sup>65</sup> This is especially true of people in positions of authority.<sup>66</sup>

In reality, as I have detailed above, reviews of the literature consistently show that the threat and use of force is generally ineffective.<sup>67</sup> Variations in the likelihood of being caught and punished have a minor impact on criminal behavior at best. Whether people are punished is not reliably related to lower levels of future criminal conduct and more severe punishment is not linked to less criminality in the future.<sup>68</sup> When this widespread lack of empirical support for force-based approaches is compared to the general belief in the effectiveness of such models, the question is why this widely held, but mistaken, belief persists?

To some extent this continuation in a flawed belief reflects the self-fulfilling nature of theories and models. Ferraro, Pfeffer, and Sutton discuss the dominant role of economic models in organizational theory and the similar lack of strong empirical support for such models in that context.<sup>69</sup> They argue that whether or not

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63. See Richard Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985).

64. See *supra* notes 17–30 and accompanying text.

65. Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53, 54–55 (1998).

66. See *id.* at 59–61.

67. See *supra* notes 17–30 and accompanying text.

68. See HARCOURT, *supra* note 21, at 109–10.

69. Fabrizio Ferraro et al., *Economics Language and Assumptions: How Theories Can Become Self-Fulfilling*, 30 ACAD. MGMT. REV. 8, 9–10 (2005).

a theory appears self-evident is more strongly related to whether it is consistent with cultural myths than whether it is supported by empirical evidence.<sup>70</sup> This leads to the question of why people find it so compelling to think of people as utilitarian. Does utilitarianism in some way comport with our understanding of everyday experience? At least in the case of authorities, I argue that it does because power produces compliance in the everyday personal experience of legal authorities.

Once people have such a conception of their own and other's motivational nature, it is difficult to let go of those beliefs even when the evidence for them is discredited. As Baron notes: "We tend to hold to our beliefs without sufficient regard to the evidence against them or the lack of evidence in their favor."<sup>71</sup> Psychologists refer to this as "belief perseverance."<sup>72</sup>

Instead of openly considering evidence questioning their beliefs, research suggests that people engage in psychological strategies to blunt the impact of discordant information upon their beliefs.<sup>73</sup> One approach that people use is to look primarily or exclusively for confirming information that allows them to maintain their beliefs. For example, people shape the way they frame their study of problems in ways that support their prior views. There is a general tendency, for example, to frame deterrence studies as questions of whether deterrence works, in the sense that its effects can be shown to be significantly different from zero.<sup>74</sup> Against this relatively low standard deterrence effects are often found and researchers can conclude that deterrence is effective.<sup>75</sup>

An alternative approach is to ask how much of the variance in a behavior a model explains. As an example, MacCoun reviewed the literature on deterrence in the case of drug use and suggested that only about 5% of the variance in drug use was explained by variations in the certainty and severity of punishment.<sup>76</sup> Compare the message of Ziliak and McCloskey with that of MacCoun. The former suggests it is not enough to say deterrence has a statistically significant influence on behavior,<sup>77</sup> while the latter suggests, consistent with the Ziliak and McCloskey argument that even when there are statistically significant effects, deterrence

70. *Id.* at 20–21.

71. JONATHAN BARON, *THINKING AND DECIDING* 195 (2000).

72. Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037, 1038 (1980); cf. Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 889 (1975) (discussing "impression perseverance").

73. Anderson et al., *supra* note 72, at 1038.

74. See STEPHEN T. ZILIAK & DEIRDRE N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE* 33–41 (2008) (explaining the general limitations of quantitative studies' reliance on statistical significance alone).

75. Cf. *id.* (explaining the "sizeless stare of statistical significance," where significance does not indicate the magnitude of the detected effect).

76. Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501 (1993).

77. See ZILIAK & MCCLOSKEY, *supra* note 74, at 33–41.

explains at best a very small proportion of the variance in law related behavior.<sup>78</sup> In other words, a relationship between two variables can be found to be statistically significant but can nonetheless explain so little of the variance between them that it is of little consequence.

This line of argument can be extended to studies that compare deterrence effects to the influence of other factors. Tyler and Blader did this in two studies of employees and showed that risk was relatively unimportant in shaping compliance relative to the legitimacy of the companies' internal culture.<sup>79</sup> I examined this same question in a larger survey of 4,430 employees and found that instrumental factors explained 1% of the variance in required compliance while social factors, including legitimacy, explained 19% of the variance.<sup>80</sup> As noted above, the influence of instrumental factors was statistically significant, but not as strong as the influence of social factors.

Similarly, Trevino, Weaver, Gibson, and Toffler compared the effectiveness of rules and punishment to the internal values and culture of integrity in companies in a study of 10,000 employees in six industries.<sup>81</sup> Compared to compliance-based programs, values-based programs had fewer reports of unethical conduct, higher levels of ethical awareness, more employees seeking advice about ethical issues, and a higher likelihood of employees reporting violations.<sup>82</sup> Here again, a relative comparison reveals the superiority of a values-based approach.

The perceived dominance of deterrence is further aided by the tendency to collect data based upon the framework of existing theory. In America, national surveys collect information on crime rates, arrest rates, and sentencing. These can be linked to statistics on the certainty and severity of punishment, as well as the length of sentences.<sup>83</sup> However, it is not possible to compare influences to those of legitimacy in most cases because legitimacy is not assessed; there are no national survey research studies dedicated to the periodic measurement of the legitimacy of law, the courts, or the police or administrative regulatory agencies.

### III. THE MYSTIQUE OF UTILITARIANISM

#### A. *The psychological attraction of instrumental models*

The motivation to govern instrumentally is not only the result of an unwillingness to let go of an unsupported theory. Adopting utilitarian models is also psychologically attractive to the people in authority. Such models support illusions

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78. See MacCoun, *supra* note 76, at 501.

79. Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct*, *supra* note 27, at 1553.

80. TYLER, WHY PEOPLE COOPERATE, *supra* note 27, at 57.

81. Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 132 (1999).

82. *Id.* at 138.

83. See TOM R. TYLER, PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS 9–19 (2007).

of competence, good character, and security, all of which provide important psychological benefits to authorities.

Psychological studies suggest that people generally exaggerate their own competence and ability both relative to task difficulty and to the competence of others.<sup>84</sup> Such illusions are psychologically satisfying and are associated with high levels of self-esteem.<sup>85</sup> As Kahneman suggests, “[m]ost of us view . . . our own attributes as more favorable than they truly are, and the goals we adopt as more achievable than they are likely to be,”<sup>86</sup> and “[p]sychologists have confirmed that most people genuinely believe that they are superior to most others on most desirable traits.”<sup>87</sup> Having power accentuates this tendency and leads to perceived control over outcomes “beyond the reach” of a power holder.<sup>88</sup>

Given their high levels of perceived self-competence, leaders naturally want to control decisions, and to facilitate that goal, concentrating resources in their hands makes sense. If someone is more competent than others, there are plausible justifications for them to be the person who decides what will happen. Utilitarian models maximize the perception of both leaders and followers that leaders are in control. Leaders create this impression when they engage in top-down management through a model in which they direct the incentives and sanctions. There never seems to be a shortage of authorities with confidence in their unique skills and insights into problems.

An interesting example of this phenomenon is found in research on the accuracy of professional judgments. Researchers often find that professional legal authorities, such as police officers, have higher confidence in their judgmental abilities than do laypeople.<sup>89</sup> These authorities believe that their experience gives them the capacity to make better decisions, even though research frequently fails to support this belief. For example, experts are not generally found to be better at detecting deception or making eyewitness identifications than are lay people.<sup>90</sup> Similarly, studies of decision making by jurors typically use decisions made by judges as a reference standard for the right answer, inferring that departures from what a judge would decide reflect the lesser ability of lay decision makers.<sup>91</sup> Studies, however, also suggest that judges are subject to the same types of heuristics and biases found

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84. Mark D. Alicke & Olesya Govorun, *The Better-Than-Average Effect*, in *THE SELF IN SOCIAL JUDGMENT* 85, 102–04 (Mark D. Alicke et al. eds., 2005); Mark R. Leary, *Motivational and Emotional Aspects of the Self*, 58 ANN. REV. PSYCHOL. 317, 321 (2007).

85. Shelly E. Taylor & Jonathan D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCHOL. BULL. 193, 199 (1988).

86. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 255 (2011).

87. *Id.* at 258.

88. Nathanael J. Fast et al., *Illusory Control: A Generative Force Behind Power's Far-Reaching Effects*, 20 PSYCHOL. SCI. 502, 502 (2009).

89. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 337–38.

90. See Gary D. Bond, *Deception Detection Expertise*, 32 LAW & HUM. BEHAV. 339, 347–48 (2008).

91. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966).

in the decisions made by lay people,<sup>92</sup> and are not necessarily more likely to ignore inadmissible evidence or deal with many of the limits in the ability to manage information or apply the law which are often noted in critiques of the abilities of jurors.<sup>93</sup>

An extension of this argument is that a decisive leader is better able to govern than a group. This, in turn, leads to support for the idea that: "What this country needs most, more than laws and political programs, is a few courageous, tireless, devoted leaders in whom the people can put their faith."<sup>94</sup> Conversely, studies show that it is deliberative and participatory processes that are central to the rule of law and the creation of legitimacy,<sup>95</sup> so that concentration of power in an individual who makes policy decisions and implements them instrumentally is less likely to produce popular legitimacy.<sup>96</sup> This utilitarian approach to social order may have advantages at least in the short term, which will be discussed below, but there has been and continues to be a "romance of leadership" whereby leaders' ability to shape outcomes is exaggerated both by followers and by leaders themselves.<sup>97</sup> While such an exaggerated belief in competence may be beneficial to leaders' necessary self-confidence, it undermines legitimacy insofar as it leads leaders to be dismissive of others and unwilling to work collaboratively.

Exaggerated confidence leads people to take on tasks that are more complex or risky than they can actually manage.<sup>98</sup> As a result, leaders step confidently into situations they cannot handle well. The management literature shows that once people embark upon a course of action they cannot handle, they tend not to question their competence when their strategy begins to unravel but rather to throw more and more resources into that course of action.<sup>99</sup> Instead of reexamining his or her sense of competence, the optimistic leader takes credit for success, but not failure. This is effective when the goal is persistence, but harmful when that persistence leads to a failure to recognize a failing strategy.

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92. Chris Guthrie et al., *Blinking On The Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007); Jennifer K. Robbennolt, *Evaluating Juries By Comparison To Judges: A Benchmark For Judging?*, 32 FLA. ST. U. L. REV. 469, 509 (2005).

93. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES 168 (2007); Robbennolt, *supra* note 92, at 492–93.

94. T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY 248 (1950).

95. Marcia Grimes, *Organizing Consent: The Role of Procedural Fairness in Political Trust and Compliance*, 45 EUR. J. POL. RES. 285, 306–08 (2006).

96. *See id.*

97. James R. Meindl et al., *The Romance Of Leadership*, 30 ADMIN. SCI. Q. 78, 78–79, 100 (1985).

98. E.g., Thomas Åstebro, *The Return to Independent Invention: Evidence Of Unrealistic Optimism, Risk Seeking Or Skewness Loving?*, 113 ECON. J. 226, 236–38 (2003); Eta S. Berner & Mark L. Graber, *Overconfidence as a Cause of Diagnostic Error in Medicine*, 121 AM. J. MED. S2, S6–S8 (2008); Ulrike Malmendier & Geoffrey Tate, *Who Makes Acquisitions? CEO Overconfidence and the Market's Reaction*, 89 J. FIN. ECON. 20, 21 (2008); Paul D. Windschitl et al., *Are People Excessive or Judicious In Their Egocentrism?: A Modeling Approach to Understanding Bias and Accuracy in People's Optimism*, 95 J. PERSONALITY & SOC. PSYCHOL. 253, 267–70 (2008).

99. *See* JOEL BROCKNER & JEFFREY Z. RUBIN, ENTRAPMENT IN ESCALATING CONFLICTS 231–32 (1985).



A second illusion is the illusion of good character. People view others as less motivated to act upon values, or to behave in a just and moral way, than they are in fact.<sup>100</sup> As a consequence, they view themselves as appropriate decision-makers because their decisions are more likely to be linked to what is right and proper, rather than to their own self-interest. Also, because other people are viewed as acting based upon self-interest, appeals to their values are likely to be ineffective, leaving utilitarianism as the only viable basis for influencing others' behavior.<sup>101</sup>

Consider, for example, negotiations. Negotiations require people to make inferences about other people's actions and what those actions indicate about their character. Researchers have found that the Chinese are less likely to make dispositional attributions about others than are Americans.<sup>102</sup> Why? In general, in interactions with others the Chinese are less likely to view others as acting out of poor motives, such as self-interest or a desire to win, and instead view the other parties' actions as flowing from situational forces. Because they make situational attributions, viewing behavior as caused by forces within the situation rather than the character of the actors, they are less likely to interpret the actions of others as reflecting untrustworthy or self-interested character, and they are more able to successfully engage in cooperative interactions. They are less likely to refuse to deal with the other party because they think they are being dishonest, untrustworthy or immoral.<sup>103</sup>

Finally, because authorities have control over resources and power they feel secure and protected. There is psychological reassurance in a perception of possession of superior force capabilities when entering an uncertain situation. As an example, the police seek to project force and dominate situations using their possession of a variety of types of weapons: guns, clubs, Tasers, mace, etc. Ironically, while being psychologically reassuring, this approach creates a problem for the police because it leads to anger and resistance in those who they are attempting to control. Relationships are defined by the police in terms of dominance and subordination through the use of power, and the people they are dealing with then respond within a framework of resistance and defiance.<sup>104</sup>

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100. David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480, 497–99 (1985).

101. Tom Tyler & Lindsay Rankin, *The Mystique of Instrumentalism*, in IDEOLOGY, PSYCHOLOGY, AND LAW 537, 560 (Jon Hanson ed., 2012).

102. Michael W. Morris & Michele J. Gelfand, *Cultural Differences and Cognitive Dynamics: Expanding the Cognitive Perspective on Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 45, 61–62 (Michele J. Gelfand & Jeanne M. Brett eds., 2004).

103. See Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCHOL. 949, 968 (1994) (finding that the Chinese are more likely to make situational attributions than Americans are).

104. See JOHN D. MCCLUSKEY, POLICE REQUESTS FOR COMPLIANCE 76 (2003); cf. Harold H. Kelley & Anthony J. Stahelski, *Social Interaction Basis of Cooperators' and Competitors' Beliefs About Others*, 16 J. PERSONALITY & SOC. PSYCHOL. 66, 87–89 (1970) (examining in a game theory setting how people tend to behave based on beliefs about the other actor's motives).

Is there evidence addressing this concern in the context of immediate resistance? Using the area of policing, where resistance is an everyday occurrence and security a serious issue, McCluskey uses evidence collected in observer-based studies of police-citizen encounters in Indiana and Florida to explore the role of police coercion in motivating citizen compliance.<sup>105</sup> According to a force-based model, the police should be able to increase citizen compliance by projecting authority. McCluskey tests this argument using observer ratings of police behavior.<sup>106</sup> Focusing on police requests for citizen self-control, McCluskey found that for initial requests by the police for compliance “[s]urprisingly, the coercive power that police bring to bear on a citizen in the form of commanding, handcuffing, arresting and so on, has a minimal impact on citizen’s compliance decision.”<sup>107</sup> Similarly, at later points in the interaction, McCluskey found that “the higher the level of coercive action displayed by police, the less likely targets are to comply,” and “[f]or every one unit increase [in] the index of coercion[,] citizens are about twice as likely to rebel against the self-control request.”<sup>108</sup> This lead him to conclude that “[t]hough coercion may be a central component of the police role, it appears to serve little to enhance compliance when first asked or when requests are repeated by the police.”<sup>109</sup>

McCluskey did note that when the police mention the possibility of arrest, compliance goes up.<sup>110</sup> However, he views this effect as due not to coercion, but to the greater legitimacy that the police have when their actions are seen as consistent with the law.<sup>111</sup> As a consequence, police scholars generally argue that “[t]he best officers are those who use less, not more force.”<sup>112</sup> This issue is related to police safety because it is efforts to coerce compliance that often lead to defiance and hostility, escalating conflict and injuries to both civilians and officers.

Because of these illusions of competence and character, authorities have lower levels of stress.<sup>113</sup> They are also motivated to govern instrumentally, acting proactively to control others<sup>114</sup> and treating other people as objects whose value is defined by their utility in achieving instrumental goals.<sup>115</sup> First, since they are the

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105. MCCLUSKEY, *supra* note 104, at 76.

106. *Id.*

107. *Id.* at 100.

108. *Id.* at 108.

109. *Id.* at 173.

110. *Id.* at 156.

111. *See id.* at 173.

112. *See* WILLIAM TERRILL, POLICE COERCION 232 (2001); *see also* Kimberly Belvedere et al., *Explaining Suspect Resistance in Police-Citizen Encounters*, 30 CRIM. JUST. REV. 30, 33–35 (2005) (summarizing theories of police resistance).

113. Gary D. Sherman et al., *Leadership is Associated with Lower Levels of Stress*, 109 PROC. NAT’L ACAD. SCI. 17,903, 17,905–06 (2012).

114. *See* Dacher Keltner et al., *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265, 275 (2003).

115. *See* Deborah H. Gruenfeld et al., *Power and the Objectification of Social Targets*, 95 J. PERSONALITY & SOC. PSYCHOL. 111, 123–25 (2008).

most competent, authorities believe that they should control resources. Because they are the most moral, they believe that it is appropriate for them to make decisions for others. Finally, since they are in possession of power, they believe they are secure. There are, therefore, a variety of reasons that authorities fall easily into a utilitarian approach, managing social order by the threat or use of force and deploying community resources to address the problems and concerns that they feel are of importance.

### *B. The Benefits of Utilitarianism*

The benefit of utilitarianism is that it allows quick changes in the deployment of resources.<sup>116</sup> It is easier to change the allocation of instrumental resources than it is to create values such as legitimacy. Creating values is always a long-term project. Hence, instrumental approaches are most likely to be adopted when people do not plan ahead and are managing reactively once problems develop: when people are responding to emergencies, such as terrorism or a crime wave, and when people are operating within a short-term framework. For example, police departments respond to homicides by “hot spot” policing strategies in which they flood an area with police officers.<sup>117</sup> Crime goes down, but departments can seldom maintain the high levels of patrol needed to maintain this effect, so eventually the officers are transferred out as the threat diminishes causing crime rates to again increase.<sup>118</sup>

Similarly, the question of how much attention the federal government can pay to monitoring private businesses is central to deterrence models, as is the question of how much salience private companies will give to creating and maintaining an ethical work culture. When businesses need to achieve short-term quarterly profits or political leaders must produce rapid gains prior to an election, instrumental approaches are attractive. The problem with utilitarianism, however, is that over time it undermines the relationship between authorities and populations and is therefore difficult to sustain in the long run. Utilitarian control is personally satisfying to authorities and may yield short-term successes, but it fails in the long-term.

What are the problems created by an instrumental approach? The first problem is that this approach creates an undifferentiated social reality. The key to effective interactions is to distinguish among people by identifying those who can respond to behavior based upon their values and those who must be dealt with instrumentally by making threats or promises.<sup>119</sup> However, when people are approached

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116. See Joe C. Magee & Adam D. Galinsky, *Social Hierarchy: The Self-Reinforcing Nature of Power and Status*, 2 ACAD. MGMT. ANNALS 351, 356–58 (2008).

117. David Weisburd & Anthony A. Braga, *Hot Spots Policing as a Model for Police Innovation*, in POLICE INNOVATION 225, 229–30 (David Weisburd & Anthony A. Braga eds., 2006).

118. Dennis P. Rosenbaum, *The Limits of Hot Spots Policing*, in POLICE INNOVATION, *supra* note 117, at 256.

119. See Kelley & Stahelski, *supra* note 104, at 74–76 (examining misconceptions of others' motivations during game theory interactions).

from an instrumental perspective with threats or promises they respond instrumentally by reacting in terms of costs and benefits. As a result authorities create a situation in which they deal with everyone instrumentally, irrespective of whether those people could potentially respond to them based upon values if their values were appealed to. The authorities, in other words, do not motivate anyone to obey the law because of their view that legal authorities are legitimate and ought to be obeyed, since they threaten all the members of the community with fines, arrest, or imprisonment for noncompliance. This is an inefficient strategy for creating cooperation and sub-optimal for the authorities trying to garner that cooperation.<sup>120</sup>

The pyramid of regulation is one example of the application of this approach.<sup>121</sup> Ayres and Braithwaite argue that everyone should initially be approached through appeals to values.<sup>122</sup> Most will respond. The few who do not can then be treated as subject to punishment. In this manner, resources can be directed toward the small group that needs surveillance and sanctioning while the majority, who respond to values, is addressed in terms of appeals to values.<sup>123</sup>

In addition, surveillance is problematic because it is a self-perpetuating strategy. When managers adopt a strategy of closely monitoring employee performance they create no basis for trusting employees to work when they are not being monitored.<sup>124</sup> As a consequence, managers need to continue to monitor those employees. Similarly, if the police encourage law-abidingness through the threat of punishment, they can never be sure whether people would obey the law if they were not watching. Hence, they need to continue to create a credible threat of punishment in the future.

Finally, and ironically, in the long term continued surveillance turns out to be needed because a focus on instrumental factors "crowds out" the role of other motivations in shaping rule-related behavior.<sup>125</sup> Even if people are initially motivated to comply with the law both because of concerns about being caught and punished, as well as for value-based reasons such as legitimacy, morality, and peer opinion, authorities' focus on deterrence defines the relationship between people and the law as one of risk, and it becomes instrumental. Over time this leads to a decline in the influence of value-based reasons. Eventually people primarily decide whether to comply or to fail to comply based upon their levels of fear of punishment. And, as previously noted, often this calculation leads to rule-breaking behavior.

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120. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 124-41 (1984) (discussing optimal strategies for encouraging cooperation).

121. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992).

122. See *id.* at 3-7.

123. *Id.*

124. Arie W. Kruglanski, *Attributing Trustworthiness in Supervisor-Worker Relations*, 6 J. EXPERIMENTAL SOC. PSYCHOL. 214, 227-31 (1970); Lloyd H. Strickland, *Surveillance and Trust*, 26 J. PERSONALITY 200, 212-15 (1958).

125. See Bruno S. Frey, *How Intrinsic Motivation Is Crowded Out and In*, 6 RATIONALITY & SOC'Y 334, 334 (1994).

As an example, consider the well-known study “A Fine is a Price” by Gneezy and Rustichini.<sup>126</sup> A school had problems with parents picking their children up on time. They first appealed to the parents’ norm of responsibility and later introduced a fine. Parents treated the fine as the price of being late and their sense of responsibility to be on time became less central to picking up their children.<sup>127</sup> In other words, introducing a fine turned what was a value-based obligation into an economic transaction. If parents paid the fine, they did not feel they had failed a social obligation by being late.<sup>128</sup>

Despite short-term attractions, a utilitarian strategy undermines itself in the long term. Because of the general ineffectiveness of social control, utilitarian strategies underperform relative to expectations. In particular, these approaches end up costing more than anticipated, so the availability of resources limits the degree to which they can be implemented. The massive growth in prison costs is an example.<sup>129</sup> This growth in costs flows from the use of a deterrence approach combined with the resultant pressure for longer sentences.<sup>130</sup> During a period of economic downturn these costs have proved unsustainable.<sup>131</sup>

Such failures cast doubts upon the competence of leaders. However, having framed issues instrumentally it is difficult for authorities to go back and appeal to values. Trying to change strategy presents both psychological and political problems. First, it requires acknowledging failure, and threatens illusions of competence. Second, the position of leader requires success and acknowledging failure is often not an option. As a result, authorities often perceive little choice but to push for more severe punishments, even though research makes clear that it is certainty of punishment, not severity that matters.<sup>132</sup> Similarly, there is ongoing pressure to devote greater resources to surveillance. The police and courts have no mechanism but threat, and no recourse but massive incarceration. And society is stuck with a costly and minimally functional system of law and law enforcement.

An example of recent importance in the United States will be illustrative: coercion and torture. The recent salience of terrorism and torture has brought to the fore a long-running debate in social psychology about the effectiveness of force in eliciting information from those motivated to conceal it. A review of that literature is beyond the scope of this paper,<sup>133</sup> as the concern for purposes of this paper is not

126. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

127. *Id.* at 15–16.

128. *Id.*

129. See VANESSA BARKER, *THE POLITICS OF IMPRISONMENT* 4 (2009).

130. *See id.*

131. *Id.*

132. *See generally* ALFRED BLUMSTEIN ET AL., *DETERRENCE AND INCAPACITATION* (1978).

133. *See* Steven M. Kleinman, *Barriers to Success: Critical Challenges in Developing a New Educating Information Paradigm*, in *EDUCING INFORMATION* 235, 264–65 (Nat’l Def. Intelligence Coll. ed., 2006) (providing historical analysis). *See generally* JANE MAYER, *THE DARK SIDE* (2008) (providing a review of recent debates on the use of torture in the context of terrorism).

with the use of coercion as a social control strategy (i.e., torturing some people to frighten and thereby deter others), but rather, with the fairly widespread belief that physical force is an effective mechanism for gaining information from reluctant people. That issue parallels our prior discussion concerning physical force and conforming behavior, with an important difference: physical force can sometimes be effective in gaining immediate compliance when an authority is present and is viewed as able to deploy immediate sanctions. Nonetheless, while torture may appear to lead to the desired confessions of secret information, it is unclear whether such confessions are actually reliable, and thus unclear if torture achieves its stated short-term goal.<sup>134</sup>

However, consistent with the evidence summarized above, the data suggest the instrumentalism that underlies torture does not work.<sup>135</sup> One core problem with the use of coercion to elicit information is that interrogators are unable to detect when someone is lying.<sup>136</sup> While a wide variety of mechanical techniques for detecting lying exist, a review of such physiological or neurological methods, ranging from lie detectors to brain scans, indicates that “none of these mechanical devices has been scientifically shown to be capable of accurately and reliably detecting deception.”<sup>137</sup> For interrogations to be effective, those being interrogated thus need to be motivated to tell the truth, not simply forced to divulge information in response to physical coercion, since the veracity of such coerced statements is dubious.

A review of interrogation research suggests that techniques involving “hostility and the employment of force[,] be it physical or psychological[,]” are counterproductive.<sup>138</sup> So when does interrogation work? Kleinman argues that successful interrogations are typically linked to the development of a human connection between the interrogator and the person being interrogated.<sup>139</sup> In other words, the two players must build a social bond. Kleinman, therefore, suggests that interrogators focus on creating a cooperative relationship with their subjects, based on sensitivity to the person’s needs and concerns. Toward that goal, “coercive approaches are rightfully rejected.”<sup>140</sup>

While discussions of interrogations of terrorists do not focus on engaging legitimacy or moral values, studies of criminal confessions show that the most

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134. Steven M. Kleinman, *KUBARK Counterintelligence Interrogation Review: Observations of an Interrogator*, in EDUCING INFORMATION, *supra* note 133, at 95, 130 (acknowledging that “the scientific community has never established that coercive interrogation methods are an effective means of obtaining reliable intelligence information”).

135. See *supra* notes 119–25 and accompanying text.

136. ALBERT VRIJ, DETECTING LIES AND DECEIT 67–69 (2000); Gary Hazlett, *Research on Detection of Deception*, in EDUCING INFORMATION, *supra* note 133, at 45.

137. Kristin E. Heckman & Mark D. Happel, *Mechanical Detection of Deception: A Short Review*, in EDUCING INFORMATION, *supra* note 133, at 63, 83.

138. Kleinman, *supra* note 134, at 95.

139. *Id.* at 123.

140. *Id.*

effective interrogation technique for eliciting confessions is to appeal to the suspect's conscience: that is, his or her moral values.<sup>141</sup> Strategies designed to build rapport and encourage suspects to voluntarily confess information include "treat[ing] the suspect with decency and respect," "not handcuff[ing] or shackl[ing] the suspect," and "recogniz[ing] that in everyone there is some good, however slight it might be."<sup>142</sup> A recurring theme in the interrogation literature is that people are more likely to involve themselves in a positive relationship and to engage their values and voluntarily cooperate when they anticipate respect and decent treatment from their captors. Interrogation is thus similar to policing in general: the most effective method for achieving the desired behavior is ensuring that the individual is voluntarily motivated to comply. In short, just as the police need willing cooperation, so do interrogators.

As we have noted, the basic approach of coercion does not elicit the desired truthful information from reluctant and hostile prisoners. However, once authorities have embarked upon this course of interrogation, they typically are pushed to even greater levels of extreme violence and coercion by the very failure of this approach to elicit information. Mayer documents discussions in recent years about how to respond to the failure of violent interrogation techniques.<sup>143</sup> She notes that there is a constant pressure to achieve results by escalating to more extreme methods of coercion when milder forms have proved ineffective, as interrogators typically do.

With both deterrence and coercion, the core problem is similar: by embarking on a force-based strategy, authorities undermine their rapport with the people involved, who come to mistrust and even hate the authorities, to develop oppositional consciousness, and to resist and undermine those authorities. Any hope for cooperation or collaboration is undermined by feelings of distrust and anger and by motives of concealment and misdirection. Further, once the ineffectiveness of a force-based strategy becomes apparent, going back is difficult. Any later efforts to appeal to people's values or build rapport are tainted and unlikely to be successful, even when they would have been the superior strategy if pursued from the outset.<sup>144</sup> Lacking alternative courses of action and late in the game, the authorities implement the only strategy they see as possible: an even more severe force-based approach. As a result, the opportunity for a value-based strategy is diminished and eventually destroyed.

Mass incarceration is a further example. To make deterrence work there needs to

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141. Ariel Neuman & Daniel Salinas-Serrano, *Custodial Interrogations, What We Know, What We Do, and What We Can Learn from Law Enforcement Experiences*, in *EDUCING INFORMATION*, *supra* note 133, at 141, 172 (drawing on evidence from Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996)).

142. *Id.* at 186.

143. MAYER, *supra* note 133, at 134–36, 144, 164–74.

144. See, e.g., Gneezy & Rustichini, *supra* note 126, at 8 (noting that removal of a fine as punishment did not return individuals to their pre-fine, value-based behavior).

be punishment. Because incarceration increases the risk of recidivism,<sup>145</sup> the punitive system is creating a group of long-term criminals with resulting repeat incarcerations. Moreover, there is political pressure for even more severe punishments, based upon the failure of less severe punishments to work.

Authorities are constantly found in a situation of declining effectiveness, but it is hard to convert a utilitarian strategy to a legitimacy strategy. Further, because value reliance has been "crowded out," lifting surveillance often results in problems caused by non-compliance.<sup>146</sup> The end of an autocratic regime is often associated with increases in crime, even if the new regime is democratic. Populations used to obeying out of fear do not associate law abidingness with values, and suddenly find the risk of punishment to be lower. For example, crime rates have increased in South Africa during its democratic transition.<sup>147</sup>

And, of course a final coercive strategy is currently being used to combat corruption in for-profit organizations. In 2002, Sarbanes-Oxley was passed in response to the large corporate frauds of Enron, WorldCom, and others.<sup>148</sup> Sarbanes-Oxley encourages organizations to take a more command and control approach to compliance. Similarly, the government's response to wrongdoing has emphasized the responsibility to identify and sanction wrongdoing. What is central to both is not that deterrence might be needed but that the general approach taken is framed in terms of creating credible threats of sanctioning and emphasizing mechanisms for surveillance and punishment. The centrality of sanctioning to government approaches to stopping corporate wrongdoing should not be overstated, as the Federal Sentencing Guidelines also emphasize creating an ethical culture.<sup>149</sup>

This discussion makes clear the importance of examining the limits of force-based approaches in advance of policy formation and implementation. The time to capitalize on people's commitment to values and their prior belief that authorities are legitimate and their values moral is prior to any use of force. Time is needed to create or strengthen values and to engage existing values through participatory and deliberative procedures, through which people come to trust their leaders and view them as legitimate.

#### IV. STRATEGIES FOR PROMOTING SOCIAL ORDER THROUGH LEGITIMACY

The key message of this article is that while command and control strategies have value, they are overused in current efforts to regulate. This is true both in

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145. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 300-01 (2007).

146. FREY, *supra* note 38, at 24-33.

147. Antoinette Louw, *Surviving the Transition: Trends and Perceptions of Crime in South Africa*, 41 SOC. INDICATORS RES. 137, 149 (1997).

148. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

149. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2012).



the internal dynamics of companies and in the efforts of legal authorities to engage in external regulation through laws. A strategy more consistent with existing social science evidence about the factors shaping compliance with regulations should place greater emphasis upon creating and maintaining legitimacy. Creating this legitimacy requires both for-profit organizations and the government to use procedures that the public will experience as fair in developing and implementing rules governing rule-following as well as other aspects of work organizations, such as discipline, pay, promotion, and grievance management. It is by creating a climate of procedural justice that organizations can most effectively motivate voluntary rule following.<sup>150</sup>

The second theme of this article is that the overextension of command and control models based upon a faulty understanding of available evidence is connected to the biases of people in positions of power. There are psychological satisfactions associated with holding and exercising power that lead people to seek such arrangements and resist their examination and change. Those psychological processes have been outlined. The implication of their existence, however, is to emphasize the need for independent review and empirical benchmarks. Given that those exercising power are likely to justify, rather than reflect upon, their actions, their use of discretionary authority needs to be subject to verification.

The implication of the literature on biases is consistent with the scientific concept of blind studies. The literature recognizes that those doing an investigation of evidence have subtle and unconscious biases that lead them to look at the evidence through the lens of their own prior views. This includes researchers and others in positions of authority.<sup>151</sup> Reviews need to be conducted by neutral and uninvolved panels of experts of independent researchers to evaluate policies and practices. This policy is already in place in the form of National Academy of Science ("NAS") panels and efforts such as the Campbell collaborative, which promote meta-analyses of the empirical literature on law. An example of an NAS effort is the review of policing literature.<sup>152</sup> Similarly, a Campbell collaborative effort recently explored the influence of procedural justice in policing upon attitudes and behaviors related to the law.<sup>153</sup> The hallmark of both efforts is an attempt to develop empirically based policies and practices through a neutral and independent review of what works. An analysis of the effectiveness of different efforts to regulate white collar crime would be similarly benefited from such a neutral and independent review.

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150. TYLER & BLADER, COOPERATION IN GROUPS, *supra* note 27, at 192–94; Tyler & Blader, *Can Businesses Effectively Regulate Employee Conduct?*, *supra* note 27, at 1153–54.

151. See Findley & Scott, *supra* note 89, at 292.

152. See generally NATIONAL RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING (Wesley Skogan & Kathleen Frydl eds., 2004).

153. See Lorraine Mazerolle et al., *Procedural Justice and Police Legitimacy: A Systematic Review of the Research Evidence*, 9 J. EXPERIMENTAL CRIMINOLOGY 245 (2013).

