

## The Social Psychology of Evil: Can the Law Prevent Groups From Making Good People Go Bad?

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The year was 2000. The City of Los Angeles had discovered widespread corruption in its police department. About seventy officers were under investigation, and hundreds of convictions were likely to be overturned because of official misconduct.<sup>1</sup> Citizens reading their newspapers must have wondered: “What can we do so that these abuses will never happen again?”

And that question led to a more basic puzzle: *Why* had things turned out so badly at the Los Angeles Police Department (LAPD), in the first place?

“The lines between right and wrong became fuzzy and indistinct,” former officer Rafael Perez explained at his sentencing hearing.<sup>2</sup> “The ‘us against them’ ethos of the overzealous cop began to consume me.”<sup>3</sup> With his voice quavering, Perez added:

To do our job fairly was not enough. My job became an intoxicant that I lusted after. I can only say I succumbed to the seductress of power. Used wrongfully, it is a power that can bend the will of a man to satisfy a lustful moment. It can open locked vaults to facilitate theft. It can even subvert justice to hand down a lifetime behind bars.<sup>4</sup>

But even with all of his candor, Perez’s explanation remained incomplete. His testimony did not shed any light upon the mechanism by which he and his fellow officers were induced to “succumb to the seductress of power.” It did not show how to distinguish dangerous situations, in which bad behavior was likely to develop, from cases in which officers did not abuse their authority. Perez’s testimony also did not tell us how to minimize the likelihood of similar misconduct in the future.

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1. Scott Glover & Matt Lait, *Ex-Officer Gives Tearful Apology at His Sentencing*, HOUS. CHRON., Feb. 26, 2000, at A2.

2. *Id.*

3. *Id.*

4. *Id.*

## I. FROM ABU GHRAIB PRISON TO ENRON CORPORATION

Obviously, the LAPD is not the only organization in which good people sometimes go bad. At Abu Ghraib prison in Iraq, American jailers photographed each other committing acts of abuse against detainees, thereby subjecting themselves to prosecution and losing credibility for the United States.<sup>5</sup> At Enron Corporation, executives tolerated and committed pervasive acts of fraud that lost billions of dollars for shareholders.<sup>6</sup> Observers wondered how individuals in these cases had gone so far wrong. In fact, the questions raised by the Los Angeles experience are raised by countless other events in which ordinary people, who otherwise seem unlikely to become criminals, do in fact engage in criminal activity. More than that: ordinary people, when influenced by groups, sometimes engage in repeated and open crimes and have seemingly lost their moral compass.

This Article attempts to illuminate the social psychology that explains and predicts these occurrences. Specifically, the Article investigates cognitive dissonance, group effects, conformity, authority, persuasion, and entrapment in escalation, in an effort to explain how a person can “succumb to the seductress” in the ways that Rafael Perez and his fellow LAPD officers did in 2000. Social science, it must be said at the beginning, is an inexact science, unlike physics.<sup>7</sup> It provides only examples from experiments—only partial theories—which require so much extrapolation that certainty is often difficult.

This Article does not deal with evil that is propagated by persons with mental disorders, such as those with antisocial personalities,<sup>8</sup> and it does not explain solitary individuals whose conduct is motivated by financial gain or by personal desires, such as burglars or violent predators. Instead, it concentrates on the individual whose place within an organization, or whose relation to a group, is part of

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5. See PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 18 (2007) (containing social psychologist Philip Zimbardo’s analysis of events at Abu Ghraib); see also Seymour M. Hersh, *Torture at Abu Graib*, *NEW YORKER*, May 10, 2004, at 42–47 (containing a literary, quasi-journalistic account).

6. Bethany McLean et al., *Why Enron Went Bust*, *FORTUNE*, Dec. 24, 2001, at 58–68.

7. For a discussion of the limits of the scientific method in psychology, see DAVID CRUMP, *HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY* 351–54 (2001).

8. For a discussion of these issues, see *id.* at 358, 360.

the influence toward crime: in other words, on the situation in which good people are influenced toward evil by their peers and leaders. The Article applies the lessons of social science to the law by analyzing the kinds of prohibitions, prescriptions, or incentives that might be most effective to avoid antisocial behavior in given situations. A final section provides the author's conclusions concerning potential responses to these situations, which include the insight that when we write legal standards that affect individuals within groups, it is important to write them so that they can be enforced not just when evil already is widespread, but continuously and proactively as well.

## II. COGNITIVE DISSONANCE AND RELATED PHENOMENA<sup>9</sup>

### *A. Festinger's Theory of Cognitive Dissonance*

Festinger's Theory of Cognitive Dissonance is one of the more important developments in social psychology. Stated in ordinary language, it explains how people "rationalize" bad behavior.<sup>10</sup> Leon Festinger theorized that there is a mental tension created by contradictory perceptions, which he called "cognitive dissonance."<sup>11</sup> The theory can be summarized by saying that "behavior determines attitudes, as well as the other way around,"<sup>12</sup> because individuals are motivated to reduce the tension (or dissonance) by modifying their attitudes to fit their perceptions of their own behavior. The mind, in other words, rationalizes bad behavior—or justifies it—by changing the actor's cognition (the attitude that conflicts with it), to make bad behavior seem not so bad. But this neutral explanation understates the scary side of Festinger's great insight. To put it more plainly, the theory predicts that people who commit acts that other people would unhesitatingly label as evil will come to view those acts as

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9. Substantial portions of this section, as well as the table in Section III, appeared in DAVID CRUMP, *HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY* (2001), and are reprinted here with permission.

10. See generally LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (setting out the theory in detail); Leon Festinger, *Cognitive Dissonance*, *SCI. AM.*, Oct. 1962, at 93, 93–102 (same).

11. CRUMP, *supra* note 7, at 377–78; see ELLIOT ARONSON ET AL., *SOCIAL PSYCHOLOGY* (2005); ROBERT A. BARON & DONN BYRNE, *SOCIAL PSYCHOLOGY* 144–53 (9th ed. 2000); THOMAS GILOVICH ET AL., *SOCIAL PSYCHOLOGY* 309–11 (2006); see also *supra* note 10.

12. CRUMP, *supra* note 7, at 377.

good, or at least as not so evil. And they will do so because this attitudinal change makes their minds feel more comfortable or less dissonant.

The implications of Festinger's theory are wide-ranging, and observed effects from varied settings support it. "For example, a subject who has been made to harm another person with electric shocks during an experiment tends to begin disparaging the victim."<sup>13</sup> This attitude reduces the dissonance. Prisoners who initially despise "snitches" tend to see crime prevention as noble after they have begun to collaborate with prison authorities.<sup>14</sup> As another example, game theorists have noted that subjects induced to bid in auctions tend to value the prize more if they have invested heavily in it.<sup>15</sup> Even such mundane experiences as a long wait at a bus stop can be analyzed in dissonance terms. The theory predicts, ironically, that the longer one has waited, the more one is motivated to justify the delay, or even to wait longer, to reduce the tension between a perception that one has invested in waiting and the attitude that the investment is not worthwhile. Then, there is the recognized fact that during voir dire in lawsuits, examining jurors about their attitudes is difficult. "Does anyone in this jury panel have any 'prejudices'? Any 'preconceived notions' about the issues in this case?" Every member of a jury panel has preconceived notions, and arguably, everyone has prejudices. Cognitive dissonance, however, prevents most people from admitting them, because it prevents them from recognizing their prejudices.<sup>16</sup>

*B. Zimbardo's Prison Simulation: Role-Playing and the Dissonance Phenomenon*

Psychologist Phillip Zimbardo designed an experiment related to dissonance theory that produced disturbing results. He designated randomly chosen students as "guards," provided them with paraphernalia such as uniforms and badges, and gave them a set of

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13. *Id.* at 378; see also ARONSON ET AL., *supra* note 11, at 416–18 (explaining the blaming-the-victim phenomenon).

14. CRUMP, *supra* note 7, at 378.

15. See *infra* notes 24–33 and accompanying text (evaluating the entrapment-in-escalation phenomenon).

16. KENNY F. HEGLAND, TRIAL AND CLINICAL SKILLS: IN A NUTSHELL 194 (4th ed. 2005) ("You cannot inquire directly, as very few believe themselves prejudiced.").

“rules” to enforce. He assigned other students to play the parts of “prisoners,” restricted to cell-like spaces and wearing jail clothing.<sup>17</sup>

After an initial tentativeness, both groups began to behave as if the simulation were real. “Guards” imposed increasingly degrading punishments upon “prisoners,” who rebelled or passively endured.<sup>18</sup> Zimbardo actually found it necessary to terminate the experiment prematurely.<sup>19</sup> Role-playing, it appears, tends to induce attitudes that conform to the role. The “guards” tended to evaluate the importance of the “rules” and to disparage reactions of prisoners when the guards administered punishment for perceived infractions.

Dissonance theory may explain the reason. The guards changed their attitudes to fit the role they had assumed, and they revised their thinking about student “prisoners” to justify their oppressive behavior.<sup>20</sup> Zimbardo’s experiment illustrates the dark side of Festinger’s predictions. And since the “guards” and “prisoners” had originated as ordinary students randomly selected for the role, the experiment also shows the power of the dissonance phenomenon. Ordinary people, having no particular inclination toward evil, will engage in evil behavior if the alignment of their behavior and their self-perceptions induces them. By implication, prevention of evil conduct requires affirmative intervention, rather than assumptions about the good that there is in people. Enforcement needs to be proactive.

*C. Small Steps: How Cognitive Dissonance Works to Induce Behavior Gradually*

In a way, the picture is even gloomier than this description of Zimbardo’s experiment suggests. Observation confirms that it is easier to induce individuals to shift attitudes if they already have taken steps in the desired direction. Jonathan Freedman and Scott Fraser conducted an experiment that involved asking a control group of homeowners to post large, ugly signs saying “Drive Carefully.”<sup>21</sup>

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17. See generally ZIMBARDO, *supra* note 5.

18. *Id.* at 73, 106, 119–20, 122, 172, 175; see also ARONSON ET AL., *supra* note 11, at 285–87 (discussing Zimbardo’s experiment and its meaning); GILOVICH ET AL., *supra* note 11, at 4–14 (same).

19. ZIMBARDO, *supra* note 5, at 174–94.

20. *Id.* at 219–20.

21. Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195, 195–202 (1966).

Fewer than twenty percent consented. At the same time, a second group of homeowners were asked to display a tiny, three-inch card, and many agreed. A few days later, the second group of homeowners who had accepted the tiny sign were asked to accept the big, ugly sign. This time, nearly eighty percent agreed. “Small steps”—the second group’s earlier acceptance of the tiny cards—had changed their attitudes toward the big signs. The experimenters described the phenomenon as “the foot-in-the-door” technique.<sup>22</sup>

As another example, political regimes that use torture would be able to recruit torturers by small steps: first, by having newcomers stand guard, then by having them observe, and then by inducing minor participation.<sup>23</sup> Perhaps cognitive dissonance, in part, explains why this “small steps” technique works. Having accepted and become a part of the behavior, the subject adjusts cognition (attitudes) to justify the behavior, even when it consists as yet only of small steps.

*D. Entrapment in Escalation: From the Dollar Auction to the  
Concorde Fallacy*

The phenomenon known as “entrapment in escalation” is illustrated by experiments based upon the “dollar auction.” In the dollar auction, an auctioneer announces that he will exchange a one dollar bill for a payment from the highest bidder. The catch is that the next-highest bidder also must pay his or her bid.<sup>24</sup> Therefore, as the bidding closes in on a dollar, players scramble to avoid becoming the next-highest bidder, a phenomenon that often sends the bids up to amounts exceeding one dollar. Thus, there are three crucial junctures in the dollar auction: the second bid (which means that there now is going to be a loser), the first bid over fifty cents (which means that the auctioneer will profit from the players), and of course, the “magic moment” (the first bid that exceeds one dollar).<sup>25</sup>

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22. *Id.*; see also BARON & BYRNE, *supra* note 11, at 389; GILOVICH ET AL., *supra* note 11, at 244–45.

23. CRUMP, *supra* note 7, at 382. It should be added that the small steps phenomenon can be used to induce good behavior as well as bad behavior. See ZIMBARDO, *supra* note 5, at 450.

24. Martin Shubik, *The Dollar Auction Game: A Paradox in Noncooperative Behavior and Escalation*, 15 J. CONFLICT RESOL. 109, 109–11 (1971).

25. CRUMP, *supra* note 7, at 477–78.

The dollar auction models a number of real-world events. One example, the “Concorde Fallacy,” as it is called, takes its name from the supersonic airliner produced by a British-French consortium, for which costs escalated.<sup>26</sup> Even after it was apparent to an objective observer that the economically sound strategy was to cut and run, both governments increased their levels of commitment because they had “too much invested to quit.”<sup>27</sup> The Concorde Fallacy mirrors the dollar auction because a similar psychological trap has been observed in dollar auction experiments, with astonishing results. Experimenters typically give subjects sums ranging from \$2.50 to \$20 to bid, and often the escalation continues until players have exhausted all of their funds. In some experiments, the subjects have become distraught to the point of crying, even as they continue to bid and run out their money. This “entrapment” phenomenon occurs in high percentages of experiments.<sup>28</sup>

Why does it happen? One group of experiments surveyed subjects during dollar-auction play and concluded that a change in motivation develops.<sup>29</sup> The initial economic motivation, which is to have a good time by trying to obtain something for less than its value, gives way to a competitive urge that obscures the player’s initial goals. Another group of experimenters tied the motive to face-saving.<sup>30</sup>

In addition to the dollar auction and the Concorde Fallacy, there are many examples of entrapment in escalation. Consider the uneconomical, yet unresolvable lawsuit or dispute. It sometimes occurs that parties to a lawsuit spend more in pretrial preparation than the amount at issue and still find themselves unable to settle their dispute short of a trial that will more than double the expenditures of each. Likewise, it sometimes happens that lawyers representing labor and management are unable to end a strike that has produced losses far exceeding any possible gains. The arms race

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26. See Hal. R. Arkes & Peter Ayton, *The Sunk Cost and Concorde Effects: Are Humans Less Rational Than Lower Animals?*, 125 PSYCHOL. BULL. 591, 591 (1999).

27. ALLAN I. TEGER, TOO MUCH INVESTED TO QUIT 1 (1980) (explaining the phenomenon in these terms).

28. CRUMP, *supra* note 7, at 478 (explaining the entrapment).

29. TEGER, *supra* note 27, at 15–17, 91.

30. CRUMP, *supra* note 7, at 479. They also produced evidence tending to demonstrate that men are more susceptible to entrapment in escalation than women. But neither gender should claim superiority, because experiments with other games show men acting less aggressively and more cooperatively than women. *Id.*

between the United States and the former Soviet Union has often been similarly analyzed by game theorists.<sup>31</sup>

It is not difficult to relate the entrapment-in-escalation phenomenon to the outgrowth of widespread police corruption in Los Angeles. As Officer Raphael Perez testified, “The ‘us against them’ ethos of the overzealous cop began to consume me.”<sup>32</sup> After beginning with small steps, Officer Perez may have found himself trapped in an escalating pattern of repeated crimes.<sup>33</sup>

*E. Implications of Dissonance-Related Phenomena for the Law*

Unfortunately, theories and experiments do not always hold clear implications for behavior modification, and in this area we encounter a need for speculation. Psychology is not an exact science, like some areas in physics, and the conclusions that follow are imperfect. Human beings are complicated. They differ markedly from individual to individual and group to group. Nevertheless, some conclusions can be stated with confidence, even if others cannot.

Observations related to cognitive dissonance confirm that it is a dangerous phenomenon. As the Romans put it, “*facilis descensus Avernum*”—roughly translated, “the descent to Hell is easy”—and the truth of this saying is experimentally verifiable in the examples discussed above.<sup>34</sup> The question that people naturally asked about the crimes within the LAPD, or at Abu Ghraib prison in Iraq, should be stood on its head. The sensible question is not, “How could these things happen?” Instead, it is: “It’s *going* to happen!” Given cognitive dissonance phenomena, Zimbardo’s experiment, and the small steps observation, shouldn’t we, rather, *expect* these kinds of bad behavior to occur, in the absence of strong measures to prevent them?<sup>35</sup>

Social psychology tells us that small steps are important here: social psychology tells us to expect them.<sup>36</sup> A police officer in the

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31. *Id.* at 479.

32. Glover & Lait, *supra* note 1, at A2.

33. *See supra* notes 1–4 and accompanying text.

34. Such as Zimbardo’s prison experiment. *See supra* notes 17–20 and accompanying text.

35. In fact, Zimbardo and others have applied his experimental findings to the analysis of the Abu Ghraib misconduct. *See ZIMBARDO, supra* note 5, at 324–79; GILOVICH ET AL., *supra* note 11, at 3–5.

36. *See supra* notes 21–23 and accompanying text.

Ramparts Division of LAPD may have started the process by observing and tolerating a cover-up in a minor aspect of a police report, and then by writing false reports himself. An accountant at Enron may have approved a trader's claimed hedge strategy that posed a small risk of being self-funded, and then may have graduated to bigger prevarications. A National Guardsman at Abu Ghraib may have begun the descent toward major abuses by participating in a slight humiliation of a prisoner. The theory of cognitive dissonance predicts the effect of these actions.<sup>37</sup> Attitudes change. The police officer sees the false report as a necessary law enforcement tool, the Enron accountant perceives his manipulations as the proper response to a novel situation in which normal rules (for example, Generally Accepted Accounting Principles) do not apply to the cutting-edge transactions of a spectacularly innovative company, and the guardsman at Abu Ghraib imagines himself to be performing an essential part in prisoner interrogation, rather than committing a war crime. Finally, the entrapment-in-escalation phenomenon and Zimbardo's prison experiment show that once the police officer, accountant, or soldier takes on his or her respective role, the role tends to take on a life of its own—and to make a good person's commitment to bad behaviors more pervasive.<sup>38</sup>

These conclusions suggest that lawmakers must adopt special measures if they are to counteract bad behavior induced by dissonance-related phenomena. Lawmakers must call for proactive enforcement. Rules designed to “nip abuses in the bud” may be especially effective. At Abu Ghraib, the sudden placement of soldiers into a hastily organized prison, headed by officers with no relevant experience, was a predictable disaster.<sup>39</sup> Instead of inducing professional behavior through good-hearted people, the Government established an environment that fostered mistreatment. If lawmakers are to prevent this kind of behavior, they must establish clear norms, ensure that they are enforceable, and immediately condemn even small variations from them. The Government should hold superior officers responsible for this policy, as the Army in fact finally did with

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37. *See supra* notes 10–16 and accompanying text.

38. *See supra* notes 17–20, 24–33 and accompanying text.

39. *See generally supra* note 35 and authority therein cited.

respect to Abu Ghraib—although too late for prevention, at least this time.<sup>40</sup>

Along the same lines, Congress reacted to major corporate financial scandals by passing the Sarbanes-Oxley Act of 2002,<sup>41</sup> which holds high-level executives liable for the enforcement of accounting policies through certification requirements.<sup>42</sup> Critics have suggested that Sarbanes-Oxley imposes enormous financial costs, which may be far out of proportion to its contribution to market integrity.<sup>43</sup> That may be so, particularly with respect to some provisions. An evaluation of the financial costs imposed by Sarbanes-Oxley is beyond the scope of this Article, but undoubtedly the burden on particular executives, individual companies, and the economy as a whole is staggering. However, cognitive dissonance theory suggests that some of the measures contained in Sarbanes-Oxley are appropriately targeted. Likewise, perhaps the “broken windows” theory advanced by James Q. Wilson (and used apparently to such positive effect in New York City while Rudolph Giuliani was mayor) can be justified by these considerations. The broken windows theory asserts that intolerance of small crimes, such as aggressive panhandling, minor drug dealing, and vandalism, also prevents major crimes, such as rapes, robberies, or murders.<sup>44</sup> Again, it is a matter of preventing small steps!

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40. Brigadier General Janis Karpinsky was relieved of command of the 800th Military Police Brigade and demoted to colonel. Also, Colonel Thomas Pappas was relieved of command of the 205th Military Intelligence Brigade and reprimanded. Robert Burns, *Colonel Loses Command in Abuse Scandal*, ST. LOUIS POST-DISPATCH, May 13, 2005, at A4.

41. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in various sections of Title 15 of the United States Code).

42. *Id.*

43. See, e.g., Gary M. Brown, *Approaching Securities Laws*, in PRACTICING LAW INSTITUTE, UNDERSTANDING THE SECURITIES LAWS 17, 17-18 (2007) (describing the Act as “dominat[ing]” corporate practice and as “sweeping”).

44. The thesis appears to have originated in James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, Mar. 1982, at 29. For discussion, see Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1171, 1182 (1996) (explaining the thesis). But see Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 314-16 (2006) (concluding that there is no empirical evidence that proves that police action against minor crime reduces major crime).

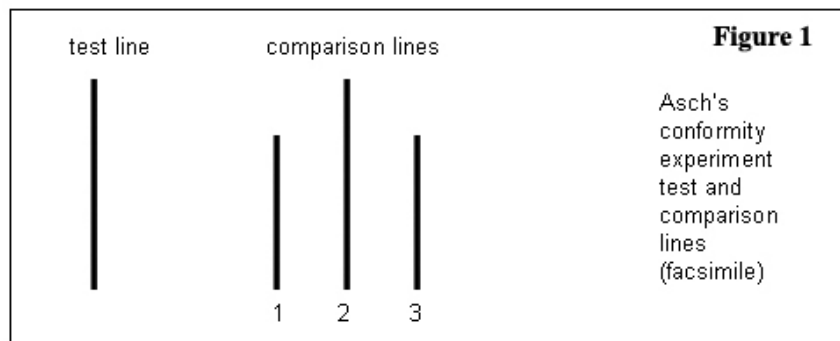
For a discussion of how the broken windows theory fits the reduction of environmental pollution, see ARONSON ET AL., *supra* note 11, at 519-21 (suggesting that people are more likely to litter if the environment is already full of litter).

### III. PERSUASION TOWARD WRONGDOING

In addition to cognitive dissonance effects, persuasion and authority within group settings can motivate people to adopt behaviors they would not otherwise consider. “Persuasion” includes a wide variety of mechanisms that supply human motivation. Persuasion need not be either overt or direct. In fact, it can be extraordinarily indirect. To put the issue another way, if a LAPD veteran had attempted to persuade Officer Perez to engage in his crimes by saying, “The objective is to perjure yourself,” this method of persuasion would likely be ineffective to a new recruit. But there are other mechanisms of persuasion.

#### *A. Conformity and Group Influences: Asch’s Experiments*

Solomon Asch’s conformity studies are classic in the social psychology of persuasion. They have disheartening implications for our hopes about independent thinking or for resistance to group lawbreaking. Asch used a diagram with a test line and three comparison lines of differing lengths. He showed them to a group of stooges and to an experimental subject. See Figure 1.



Thus, he was able to test suggestibility toward conformity from group influence.<sup>45</sup>

After the stooges each identified one of the comparison lines, which obviously did not fit, as matching the test line, Asch invited the experimental subject’s response. In other words, two or three

45. See SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 451–95 (1987); Solomon E. Asch, *Opinions and Social Pressure*, SCI. AM., Nov. 1955, at 31–33.

stooges first would identify line 1 (or line 3) as matching the test line in Figure 1, even though the mismatch is obvious. Then, the experimenter would ask the unsuspecting subject which line was the best fit. While subjects in the control groups erred less than one percent of the time,<sup>46</sup> Asch noted that “[s]eventy five percent of experimental subjects agree[d] with the majority in varying degrees.”<sup>47</sup> Subjects often reacted to the stooges’ choices with astonished looks and puzzled squinting. Asch’s conclusion was that “the tendency to conformity in our society [is] so strong that reasonably intelligent and well-meaning young people are willing to call white black.”<sup>48</sup>

In groups, “norms” arise, and they give rise to what is called the “normative group influence,” a pressure toward conformity, as opposed to the “informational group influence,” by which a group can take advantage of the notion that “many heads are better than one.”<sup>49</sup> A norm is an accepted rule for proper social behavior. The normative influence of a group is its suggestion of conformity (which may be good, as in the case of positive examples such as group courtesies, or bad, as Asch’s experiment shows). The informational group influence, on the other hand, reflects the greater experience or knowledge of several people rather than one.

Imagine, for example, that a group is asked, “What foreign country do you first enter if you start at the center of Detroit and travel due south?” When one member of the group persuades the others that the answer is Canada because the waterway separating that country from the United States makes a reverse S shape immediately below Detroit, the informational influence is at work. But if a member of the group who knew the correct answer (Canada) were to adopt an erroneous answer (Mexico) because all other group members chose that response, the normative group influence would have won out.<sup>50</sup>

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46. Asch, *supra* note 45, at 33.

47. *Id.*

48. *Id.* at 34; *see also* ARONSON ET AL., *supra* note 11, at 256–57 (discussing how the one person who does not go along with the majority may face consequences); BARON & BYRNE, *supra* note 11, at 358–86 (discussing Asch’s work); GILOVICH ET AL., *supra* note 11, at 220–31 (same).

49. *See* CRUMP, *supra* note 7, at 384–85.

50. *Id.* at 385.

There are factors that increase conformity to suggestion, as well as factors that decrease it.<sup>51</sup> Subsequent experiments have shown that conformity to group suggestion is stronger if a sense of inferiority or insecurity is induced in the subject. The absence of prior commitment against the suggestion, as well as membership in a culture that values conformity, also are strengthening factors. Unanimity of the group makes for more powerful suggestion than if the subject has an agreeing companion, and so does a high-status group, or a group with expertise. Group size also matters, but the effect seems to level off at a size ranging from three to seven, depending on the experiment. And, of course, ambiguity of the correct response increases conformity.<sup>52</sup>

In the Ramparts Division of the LAPD, the normative group influence and the conformity phenomenon seem likely to have been factors in persuading officers to engage in lawbreaking. A new officer probably has a sense of inferiority or insecurity, perhaps even physical insecurity. He or she becomes a member of a culture that values conformity, and the veteran officers presumably are a high-status group, as well as a group with expertise. The new officer finds himself or herself in conditions in which by-the-book methods often do not produce results and often are not the accepted practice, so that the new officer finds ambiguity in making correct decisions.<sup>53</sup> Of course, there also are factors to the contrary. Most recruits presumably come in with a prior commitment to follow the law and avoid perjury. Also, it seems probable that there is a lack of unanimity among the group of lawbreakers (because surely some officers at times act with propriety, and thus they provide a counterexample). But Asch's experiment shows that the influence toward conformity is powerful. Similarly, the guardsman-turned-jailer at Abu Ghraib prison seems vulnerable to group influences,<sup>54</sup> and so does the neophyte accountant surrounded by lawbreaking at a place like Enron.

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51. *Id.* at 386.

52. *Id.*

53. *Cf.* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 516 (2004) (analyzing how formal training is "quickly undermined" by contradictory messages in the field).

54. *Cf.* ZIMBARDO, *supra* note 5, at 263–65 (discussing Asch's work in the context of Zimbardo's prison experiment).

Asch's conformity experiments may explain why states that allow juries to return non-unanimous jury verdicts in civil cases do not limit them to eleven-to-one votes. More commonly, verdicts of ten to two, nine to three, or even eight to four, can support a judgment.<sup>55</sup> When the votes are eleven to one, the conformity influence is at its most powerful, and social science predicts that a unanimous verdict is likely anyway. A law allowing eleven-to-one verdicts would not affect many cases. But if there are two or three holdouts, each serves to provide a role model to the other that undermines the unanimity of the group suggestion, and a hung jury is much more likely. If the jurisdiction really wants to minimize hung juries, it needs to allow nine-to-three or ten-to-two verdicts, and not just eleven-to-one verdicts.

### *B. Authority as a Factor in Persuasion*

Conformity is not the only mechanism of group suggestion. Authority is another. And, while the findings about conformity discussed above are cause for concern, the results of experiments with authority are even more so. They are downright scary.

Stanley Milgram's authority experiments are a landmark example.<sup>56</sup> Milgram set up a phony "experimenter" in an official-looking white lab coat, who actually was a stooge, and who instructed subjects to administer electrical "shocks" to a strapped-down "learner" whenever the learner made errors.<sup>57</sup> The scale for the "shocks" began at "15 volts ('Slight' Shock)," and went through "150 volts ('Strong' Shock)," all the way to 450 volts.<sup>58</sup> But in reality there were no shocks, and the learner also was a stooge who both erred intentionally and grunted or gasped in pain at the lower

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55. See Shari Seidman Diamond et al., *Revising the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 203 (2006) ("[O]nly eighteen states require unanimity and another three accept a non-unanimous verdict after six hours of deliberation. The remaining states permit super-majorities of between two-thirds and five-sixths in civil cases." (internal citation omitted)).

56. Milgram was Asch's student and was familiar with Asch's conformity experiments. He got the idea for his own studies by considering Asch's work but shifted his thinking to a focus on experimental control rather than group control. See ZIMBARDO, *supra* note 5, at 266. For Zimbardo's discussion of Milgram's work, see *id.* at 266–272. See also ARONSON ET AL., *supra* note 11, at 519–21 (discussing Milgram's work); BARON & BYRNE, *supra* note 11, at 272–79; GILOVICH ET AL., *supra* note 11, at 10–11.

57. See ZIMBARDO, *supra* note 5, at 268–69.

58. See *id.* at 269.

settings.<sup>59</sup> At 120 volts, the stooge playing the part of the learner protested that the shocks were painful; at 150 the stooge (through a voice recorder) shouted that he wanted “to be released from the experiment, complaining of a heart disturbance.”<sup>60</sup>

If the subject faltered, the experimenter responded firmly that “the experiment requires that you go on.”<sup>61</sup> At “180 volts,” the learner shouted that he “couldn’t stand” the pain;<sup>62</sup> at 300, responses stopped, and the experimenter told the subject to treat a non-response as a wrong answer.<sup>63</sup> Most subjects who “prematurely” terminated this charade were highly agitated, and so were those who continued, protesting all the way, to 450 volts.<sup>64</sup> The white-jacketed “experimenter” used the same simple technique every time a subject hesitated, telling the subject that “the experiment requires you to continue” or words to that effect.<sup>65</sup>

Astonishingly, more than sixty percent of the subjects continued to the end of the scale while hearing agonized cries from the stooge.<sup>66</sup> Milgram’s conclusion was that “ordinary people” were sufficiently obedient to purported authority that they could readily be engaged in a “terribly destructive process.”<sup>67</sup> It does not take much extrapolation to infer that some people can similarly be influenced to violate the law, even when harmful results are clear.

What kinds of circumstances strengthen or reduce the effect of authority? Later experiments showed that a high-status authority tended to increase obedience. If the phony “experimenter” was introduced as a professor from a prestigious university, for example, subjects obeyed more readily than if the “experimenter” claimed affiliation with a lesser university. The presence of a disobeying role model reduced obedience. Physical factors, such as close proximity of the authority giving instructions or distance of the person harmed

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59. *Id.* at 270.

60. Stanley Milgram, *Group Pressure and Action Against a Person*, 69 J. ABNORMAL & SOC. PSYCHOL. 137, 139 (1964) [hereinafter Milgram, *Group Pressure*]; see also Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963) [hereinafter Milgram, *Obedience*].

61. Milgram, *Obedience*, *supra* note 60, at 374.

62. Milgram, *Group Pressure*, *supra* note 60, at 139.

63. ZIMBARDO, *supra* note 5, at 268–69.

64. See *id.*

65. Milgram, *Obedience*, *supra* note 60, at 374; see also authorities cited *supra* note 56.

66. ZIMBARDO, *supra* note 5, at 271.

67. See authorities cited *supra* note 56.

(for example, by walling the “learner” off in another room), reinforced obedience. More recent experiments have shown that depersonalization of the experimental subject, such as the wearing of a mask, makes the subject more obedient to either group conformity or to authority suggestions that might otherwise be resisted.<sup>68</sup>

These experimental results suggest a reason why the so-called Nuremberg Defense,<sup>69</sup> offered by an actor whose crime is alleged to have occurred during the execution of a military order, is properly viewed by courts with suspicion. Specifically, the experiments indicate that resistance to authority should be encouraged when the objective is transparently illegal because authority is a more powerful motivator toward harmful action than one might have supposed. Thus, although the Model Penal Code provides an affirmative defense for a military actor who “execute[s] an order,” the defense applies only if the actor “does not know [the order] to be unlawful.”<sup>70</sup> The inapplicability of the defense to orders known to be illegal may seem a minimal concession at first glance, but it actually is strong medicine. It requires soldiers to disobey rules about the chain of command that have been drilled forcefully into them, even though they may face severe consequences from their rectitude. Milgram’s experiments show the necessity for such a limit upon the defense.

#### IV. THE NECESSITY OF ENFORCEMENT

Social psychology leads to a wide variety of conclusions, most of which must be regarded as tentative. The clearest conclusion, probably, is that enforceability of legal norms, as well as actual enforcement, is important. Inclinations toward bad behavior within groups are surprisingly strong. The dissonance phenomenon, particularly when actors take on roles, induces overreaction. The small-steps phenomenon, authority response, and conformity influence show that minor and occasional violation easily can expand

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68. See CRUMP, *supra* note 7, at 386.

69. So called because lower-ranking officials offered it at war crimes trials held in Nuremberg, Germany after World War II. This defense is the claim that a soldier was following orders, and thus cannot be held culpable for the violation of any laws those actions may have violated. See Henry T. King, Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT’L L. 335, 340 (2002).

70. MODEL PENAL CODE § 2.10 (Proposed Official Draft 1962).

to become pervasive. Continuous correction of this tendency is needed.

*A. Bottom-Up Enforcement and Top-Down Enforcement*

All of these considerations suggest that visible, responsive, and constant enforcement of pre-set norms is more important than one might think to prevent bad behavior from growing within a group. Without enforcement, conduct that reasonable people recognize as not just unacceptable, but as obviously and seriously unacceptable, should nevertheless be expected to emerge because the social psychology amply shows how human beings will redefine bad conduct so that it becomes acceptable—and will propagate it through their peers and underlings.<sup>71</sup> Bottom-up enforcement of group norms can take the form of conformity to group suggestion that counteracts potentially immoral orders from the top.<sup>72</sup> Top-down enforcement also plays an important role because it takes advantage of the authority phenomenon and counteracts the emergence of antisocial authority (rogue managers) as well as peers who influence others toward misconduct.<sup>73</sup> Several kinds of conclusions about enforcement can be drawn from these statements.

For example, large organizations that are well managed for compliance usually devise built-in enforcement methods when they contemplate their responses to new regulatory standards.<sup>74</sup> Consider a chemical facility that must comply with clean air standards. The standards themselves often do not express any enforcement mechanism, and for that matter, they usually do not contain any algorithm for compliance.<sup>75</sup> A team of compliance specialists,

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71. The similarity between events at Abu Ghraib and Zimbardo's prison experiment is a striking example. *See supra* notes 17–20, 34 and accompanying text. Milgram's results are even more striking. *See supra* notes 56–68 and accompanying text.

72. Originally, the "human relations" movement, and later, "organizational theory," emphasized the importance of the difference between rules and informal norms in management. *See CRUMP, supra* note 7, at 178.

73. Top-down management, often referred to as "administrative management," is a part of classical theory that emphasized the integrity of the chain of command. *See CRUMP, supra* note 7, at 176–77 (discussing the "Fourteen Principles" of Management set out by Henry Fayol).

74. Interview with John J. Crump, former compliance engineer, Shell Chem. Corp., in Houston, Tx. (Nov. 14, 2007).

75. *See, e.g.*, Rules and Regulations of the EPA, 40 C.F.R. § 63 (2007) (setting national standards for certain air pollutants; in 72 FR 38864-01).

separate from the employees who will actually carry out compliance duties, will be charged with responsibility for designing a checklist for the completion of those duties.<sup>76</sup> The checklist will detail each individual step specified. Perhaps most importantly, it will include a mechanism by which enforcement is automatic. The chemically reactive column that the compliance employee is charged with maintaining will not function unless a particular switch is thrown, and the switch is installed so that it cannot be thrown unless the employee has performed all of the required steps.<sup>77</sup>

This kind of mechanical solution is not always possible, but if not, the organization can promulgate rules that come close. The relatively simple solution of having a written checklist that must be signed by a supervisor, before the employee can consider the job complete, is an example. These kinds of processes are not fail-safe. Employees learn how to fool the compliance switch, and supervisors become lax about ensuring that the checklist that they sign has indeed been completed. The presence of enforcement mechanisms, however, would do some good in overcoming influences toward bad behavior, and it makes the detection of widespread abuses more likely.

There are some kinds of policies that should be implemented from the top down. The company's sexual harassment policy is an example. Human relations advice indicates that this policy should be authoritative, clear, and secure.<sup>78</sup> Furthermore, checklist and fail-safe-switch approaches are inapplicable to a problem that can assume an infinite variety of forms and for which communication and example are essential. Thus, the harassment policy should call for ready communication with managers—one's immediate manager first, but with the option of climbing the entire chain if communication is unworkable with the immediate superior. Here, top-down enforcement means that the positive influence of authority, the factor that proved so powerfully negative in Milgram's experiments,<sup>79</sup> will provide a check against the influence of cognitive dissonance,

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76. Interview with John J. Crump, *supra* note 74.

77. *Id.*

78. See Linda Ottinger Headley & Katherine E. Flanagan, *Harassment, Sexual and Otherwise*, in UNIVERSITY OF HOUSTON LAW FOUNDATION, ADVANCED EMPLOYMENT LAW FOR EMPLOYERS AND EMPLOYMENT LAWYERS 50–53 (2006).

79. See *supra* notes 56–68 and accompanying text.

small steps, conformity, and other factors that can create bottom-up harassment.<sup>80</sup>

*B. Designing Avenues for Automatic Enforcement at the Time Regulations Are Promulgated*

In order to be effective, measures aimed at preventing the spread of bad behavior must be enforceable. It is perfectly possible to design legislation that is impossible to enforce. For example, consider the city that wrote its prohibition of farm and exotic animals so that it defined a misdemeanor that did not apply to anyone “in the business of keeping animals.”<sup>81</sup> The local district attorney found it necessary to decline enforcement of this provision.<sup>82</sup> Even if an individual maintained a herd of goats beside his or her patio home, no prosecutor could prove that the individual was not “in the business of keeping animals.”<sup>83</sup> Since the prohibition was unenforceable, residents who wanted to keep pigs or goats would probably do so. They might begin with small steps—one pig or goat—and begin to see themselves as freedom fighters against the totalitarian city. Then, the conformity urge probably would ensure that others imitated the behavior.

The city could have produced a result closer to the one it desired by thinking of enforceability. One simple way to solve its problem would have been to provide that the “business of keeping animals” was not an element of the offense that the prosecution needed to negate, but rather an affirmative defense upon which the goat herd would have both the burden of producing evidence and the burden of persuasion.<sup>84</sup> This approach might not furnish the best solution, but it would have enabled the district attorney in the situation described above to initiate misdemeanor cases rather than declining prosecution. A better solution, perhaps, would have been to set up a

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80. Social psychological experiments show that this kind of accountability and responsibility is effective. *See* ARONSON ET AL., *supra* note 11, at 255–56 (discussing the experiments).

81. *See* DAVID CRUMP ET AL., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES 117–18 (2005) (paraphrasing such a statute).

82. *Id.*

83. *Id.* at 118 (explaining why such a case is not prosecutable, in spite of students’ frequent enthusiasm for creative evidence gathering).

84. *Cf.* MODEL PENAL CODE § 1.12(2) (creating affirmative defenses; providing for proof by defendant in some cases).

permit or registration system and to define the misdemeanor as keeping one or more of the non-urban animals without a permit or registration.<sup>85</sup> This approach would have made enforcement much easier, although it would not have avoided the need for some court actions. If even a couple of ersatz freedom fighters ever formed the impression that enforcement of the law against non-permitted goat herds was lacking, social psychology suggests that violations would have crept in and grown.

Sometimes government enforcement is not the only way for a law to work against cognitively dissonant, small-stepped, conforming violators. For example, a withholding system makes income taxes much more readily collectable.<sup>86</sup> The employer is virtually required to function as the analogue of a fail-safe switch by the knowledge that failure to withhold creates liability.<sup>87</sup> The result is widespread (if not perfect) payment of income taxes by salaried employees. This factor is built into the Internal Revenue Code for precisely this reason. A less planned outcome, but a serendipitous one, occurs when the mortgage banking industry sets up escrows that collect and pay local property taxes.<sup>88</sup> A lender is motivated to enforce compliance because it can lose its security if a tax-related foreclosure takes the property from the borrower.

But even if these means of private enforcement are not available, and a government system is necessary, social psychology strongly suggests that regulators should build enforcement into their regulations from the beginning. They should understand the kinds of algorithms that firms in the regulated industry will need to promulgate for compliance. In other words, regulators should not simply create standards and wait for compliance officers in each firm to invent methods for meeting them; instead, they should have

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85. Cf. UNIFORM CONTROLLED SUBSTANCES ACT §§ 301–309 (1994) (setting up registration system).

86. See *Begier v. IRS*, 496 U.S. 53, 60–61 (1990) (explaining the withholding system enacted by Congress).

87. 36 U.S.C. § 3402(d) (2000) (stating that the employee is responsible for the taxes “but this subsection shall in no case relieve the employer from liability for any penalties” for failing to withhold the taxes).

88. For cases illustrating such a requirement, see *In re Ma*, 375 B.R. 387, 391 (Bankr. N.D. Ohio 2007); *Fournigault v. Independence One Mortgage Corp.*, 242 F.R.D. 486 (N.D. Ill. 2007). See also DAVID CRUMP ET AL., PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES 263, 265–66 (2003) (explaining the requirement; reproducing a mortgage instrument containing such a requirement).

concrete awareness that plans for step-by-step, fail-safe enforcement, or methods that overcome inducements toward noncompliance can be created. They should adjust the wording of each standard so that it can be made the subject of an effective algorithm for reliable, enforceable compliance.

This is not to say that government should mandate any particular enforcement algorithm that it considers in promulgating its standard. Often, that approach is inefficient if what is sought is compliance with a standard. The market may produce better compliance mechanisms, or it may be best served by different mechanisms in different situations. The point is only that government should consider the availability of enforcement algorithms when it designs its standards. To put the matter another way, if one type of standard seems attractive in terms of the results it promises but is difficult to enforce, a standard that produces slightly lesser results but is reliably enforceable may actually be preferable.

*C. Implications of These Conclusions for the Examples That Began This Article*

What would social psychology mean for, say, rules governing jailers at Abu Ghraib prison—the site of those novice guards’ astounding abuse of inmates, which subjected some of them to later prosecution and impaired the international reputation of the United States? Social psychology speaks clearly in at least one respect: the likelihood of occurrence of this kind of abuse. The probability that dissonance, role, small steps, and conformity will induce bad behavior is high, as Zimbardo’s prison experiment shows. The question is not, “How could such behavior have happened?” but rather “Shouldn’t we expect it to happen?” And so, the first step in regulating this kind of bad behavior is to assume that it will happen, that it will be imitated, and that it will be widespread—unless managers take serious steps against it. The second step is to set up regulations that have a meaningful chance of preventing it. And the third consideration is to think of enforceability—by automatic means to the extent possible, and by intervention of authority to the extent needed—and to provide for it.

Enforceability in this case is the hardest issue, as it often is in many cases. In a situation such as that at Abu Ghraib, one idea that might make sense is to make sure that the individual acting as warden has personal responsibility for taking active steps against

prisoner abuse. The social psychological literature shows without question that imposing appropriately calibrated responsibility upon the chief executive invokes the power of authority to bring about sound results,<sup>89</sup> and the chief executive can use more subtle, varied, and effective methods than the law can.<sup>90</sup>

The effects of communication, instruction, and example can be powerful in achieving compliance, as social science shows.<sup>91</sup> This concept seems obvious but is not. The United States Army took steps to hold the responsible general accountable for Abu Ghraib after the fact, but by then it was too late for either prevention or serious enforcement.<sup>92</sup> At lower levels, a serious policy regulating bad behavior by guards would require a report from any individual having non-routine contact with a prisoner. It would invest middle managers, from colonels down to sergeants, with personal responsibility for ensuring that reports of the kind are made—and for condemning nonconforming conduct. Further, it would contain policies for dealing with common troublesome incidents, such as the need to invade a cell to remove a recalcitrant prisoner. This policy would be based upon awareness of a practical procedure, an algorithm, so that a team with clear responsibilities could remove the prisoner with least risk to themselves and with minimal harm to the prisoner. Similar considerations apply to a police department, such as the one in Los Angeles that experienced widespread official misconduct.

These same principles probably apply to the Enron situation. The Sarbanes-Oxley Act, for all of the criticism that has been leveled at it, seemed to create the kinds of legal standards that will address Enron-type abuses by making those in authority personally responsible for financial statements. Such a standard is enforceable. It avoids the negation of the standard by divided responsibility among executives, accountants, and lawyers, a division that means none is accountable because all have deniability of the crucial knowledge. On the other hand, the criticisms of Sarbanes-Oxley may also have merit. Its sponsors probably should have considered compliance algorithms as

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89. See ARONSON ET AL., *supra* note 11, at 255–57.

90. See ZIMBARDO, *supra* note 5, at 451–56 (offering “a ten-step program to resist unwanted influences”).

91. *Id.* at 456.

92. See *supra* note 40 and accompanying text.

part of their definition of the standard. That approach might have maximized enforceability while reducing costs. In the end, it may prove true that Sarbanes-Oxley costs much more than any benefits that it could ever provide. That is a question for another article.

#### V. CONCLUSION

In all of these cases, the solutions are similar. The first consideration is to expect abuses whenever dissonance phenomena, roles, small steps, and conformity indicate that they are likely. As a corollary, prevention requires setting aside blind faith that every individual's inherent goodness will minimize bad behavior. The second consideration is to set up regulations that target the expected behavior. Third, the regulations should be designed with enforcement in mind. Finally, the necessary level and kind of enforcement that may be needed should be projected and provided.