

2016

The Question Concerning Technology in Compliance

Sean J. Griffith

Fordham University School of Law, sgriffith@law.fordham.edu

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the [Law Commons](#)

Recommended Citation

Sean J. Griffith, *The Question Concerning Technology in Compliance*, 11 *Brook. J. Corp. Fin. & Com. L.* 25 (2016)

Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/876

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE QUESTION CONCERNING TECHNOLOGY IN COMPLIANCE

Sean J. Griffith*

ABSTRACT

In this symposium Essay, I apply insights from philosophy and psychology to argue that modes of achieving compliance that focus on technology undermine, and are undermined by, modes of achieving compliance that focus on culture. Insisting on both may mean succeeding at neither. How an organization resolves this apparent contradiction in program design, like the broader question of optimal corporate governance arrangements, is highly idiosyncratic. Firms should therefore be accorded maximum freedom in designing their compliance programs, rather than being forced by enforcement authorities into a set of de facto mandatory compliance structures.

INTRODUCTION

It is a pleasure to address this symposium on the Role of Technology in Compliance in Financial Services.¹ In doing so, I will step back and try to start at the beginning. This means starting at first principles and asking the basic “what is” questions.

Contemporary considerations of technology rarely begin at first principles. Technology is all around us. It frames our interactions with the world—through smartphone screens and computer monitors—to such a degree that we no longer notice it. Although we are always looking for new ways to use technology, we are perhaps too familiar with it to ask what it is or what it might mean for us. What is technology? Is it simply the next “app”? Or is it something deeper and, perhaps, more dangerous?

The most profound thinker on the essence of technology is Martin Heidegger. Heidegger’s philosophical preoccupation was the uncovering of being—that is, the experience of things as they are prior to any attempt to

* T.J. Maloney Chair and Professor of Law, Fordham Law School. Thanks to Ethan Leib for his comments on an earlier draft of this Essay. The viewpoints and any errors contained herein are mine alone.

1. Sean J. Griffith, T.J. Maloney Chair and Professor of Law at Fordham Law School, Speaker at the Brooklyn Law School Symposium: The Role of Technology in Compliance in Financial Services: An Indispensable Tool as well as a Threat? (Mar. 4, 2016).

analyze them.² In the modern era, Heidegger argues, technology has played a central role in the covering up of being.³

A common view of technology is that it is mere instrumentality, a tool that is entirely within our control. But this does not fully capture the essence of technology, which, according to Heidegger, lies in “enframing”⁴—that is, the extraction of use and purpose out of mere being.⁵ Thus, for Heidegger, technology is simultaneously a tool *and* a threat. A tool because it does indeed bring forth a multitude of means,⁶ but a threat because, once being is conceived in this way, it can no longer be experienced as it simply is.⁷

Most of us, of course, do not often think of technology in this way. We take for granted that it is simply a tool to make our lives easier, to facilitate interactions across great distances, and to increase productivity. But this is proof that we are in its thrall. Technology does not merely create convenience; it constructs the world we experience. And it constructs us.⁸

In this Essay, I will draw on these insights to describe the role of technology in compliance. My argument is that by technologizing compliance, we risk losing sight of an organization’s culture. Culture is difficult to operationalize or even define precisely.⁹ Yet culture reveals itself

2. See Mark Blitz, *Understanding Heidegger on Technology*, NEW ATLANTIS, Winter 2014, at 63 (“Heidegger made the bold claim that Western thought from Plato onward had ignored the fundamental question of what it means for something to be—to be present for us prior to any philosophical or scientific analysis.”).

3. See MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY*, reprinted in *BASIC WRITINGS* 311 (David Farrell Krell, ed., 1993) (“Everywhere we remain unfree and chained to technology, whether we passionately affirm or deny it.”).

4. *Id.* at 324–25 (defining the German word “Gestell” to mean “enframing”).

5. See *id.* at 319 (“[W]hat is decisive in *techné* does not lie at all in making and manipulating nor in the using of means, but rather in the aforementioned revealing [of what can ‘turn out now one way and now another.’]”).

6. See *id.* at 322 (“Unlocking, transforming, storing, distributing, and switching about are ways of revealing. But the revealing never simply comes to an end.”).

7. Modern science serves this vision of technology:

Modern science’s way of representing pursues and entraps nature as a calculable coherence of forces Because physics, indeed already as pure theory, sets nature up to exhibit itself as a coherence of forces calculable in advance, it orders its experiments precisely for the purpose of asking whether and how nature reports itself when set up in this way Modern physics is the herald of enframing.

Id. at 326–27. The result of this process is that: “*precisely nowhere does man today any longer encounter himself, i.e., his essence.*” *Id.* at 332.

8. See Blitz, *supra* note 2, at 75 (“Heidegger points out that technology has become the world Technology reigns, and we therefore forget being altogether and our own essential freedom—we no longer even realize the world we have lost.”).

9. Studies of organizational culture tend to be highly descriptive but typically agree that culture is a key factor in the organization’s success. See, e.g., KIM S. CAMERON & ROBERT E. QUINN, *DIAGNOSING AND CHANGING ORGANIZATIONAL CULTURE* (3d ed. 2011) (describing corporate culture according to a four-factor matrix of flexible v. hierarchical and internal-oriented v. external-oriented); ROBERT F. HURLEY, *THE DECISION TO TRUST* (2012) (focusing on how organizations build cultures of trust); EDGAR H. SCHEIN, *THE CORPORATE CULTURE SURVIVAL GUIDE* (rev. ed. 2009) (describing methods of diagnosing corporate culture).

through art, a mode of revealing that for Heidegger was extremely different from technology.¹⁰ And recent work in social psychology has demonstrated the power of culture in changing organizational behavior.¹¹

My central claim in this Essay is that we would be better off conceiving of compliance as an art rather than as a technology and leaving the design of compliance programs to firms rather than enforcement authorities. Because technological compliance inevitably undermines organizational culture and because a culture of compliance may be similarly incompatible with a technological approach, enforcement authorities and organizations invite failure by insisting on both elements in compliance programs. The best compliance program for any one organization will be unique and non-generalizable. The authorities should vigorously enforce the law, but they should stop engaging in program design and instead allow organizations the freedom to design the program best suited to their unique circumstances.

From this introduction, the Essay proceeds as follows. Part I addresses the role of technology in compliance, emphasizing how the deployment of technology tends to transform broader notions of compliance into a narrower concept focused essentially on efficient policing. Part II discusses organizational culture as an alternative means of motivating proper conduct within the organization. Part III points out the contradictions between these two approaches to compliance and emphasizes the role of enforcement authorities in embedding these contradictions in compliance programs. Part IV suggests a way out of the contradiction by allowing firms greater freedom to design and implement compliance as they see fit, free from implicit and explicit enforcement mandates. The Essay then closes with a brief summary and conclusion.

I. TECHNOLOGY IN COMPLIANCE

Compliance is the means by which firms adapt the behavior of their agents to the relevant nexus of legal, regulatory, and social norms.¹² Although it is possible to conceive of many approaches to compliance, U.S. enforcement authorities insist that every “effective” program contains seven common elements. The list, contained in the federal *Sentencing Guidelines for Organizations* (the “Sentencing Guidelines”), includes: (1) the establishment of rules and standards to prevent and detect misconduct; (2) high-level oversight of and engagement with the firm’s compliance program;

10. Like technology, art reveals being, but unlike technology, art does so without measuring and molding being into an infinitely plastic “standing-reserve.” See HEIDEGGER, *supra* note 3, at 322–23 (on the transformation of nature into “standing-reserve”), 339 (on poetry as a mode of revealing). Heidegger made this point by juxtaposing the vision of the Rhine River as it appears in Hölderlin’s poetry and as it appears, dammed, as a source of power at the heart of German industry. *Id.* at 321.

11. See *infra* Part II.

12. See Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2082 (2016).

(3) due care in hiring; (4) communication and training; (5) monitoring, auditing, and testing; (6) alignment of incentives; and (7) appropriate remediation.¹³ Companies have a strong incentive to adopt compliance programs featuring these seven elements, because doing so promises mitigation of the company's "Culpability Score" at sentencing,¹⁴ or more realistically, gentler treatment at the hands of the authorities in prosecuting and settling the case.¹⁵

Although technology is used in many compliance functions—from automated internal hotlines to computer-based training modules—perhaps the most advanced application of technology to compliance is through the monitoring, auditing, and testing function.¹⁶ Financial firms currently use technology to monitor transactions and block restricted trades.¹⁷ Furthermore, the consensus view, at least among compliance officers at large financial institutions, is that the next step in compliance technology will come from applying "big data" tools to existing surveillance technologies. For example, the Chief Compliance Officer (CCO) of Goldman Sachs recently acknowledged that his office captures more information via voice and data surveillance than it can currently analyze.¹⁸ The challenge, in his view, lies in finding technologies to put the information to use.¹⁹ Likewise, the CCO of Morgan Stanley recently remarked, "we are all in the same boat in this in terms of trying to use big data providers . . . to pull together lots of information from lots of different data sources within the organizations."²⁰ "Big data" technology, the CCO emphasized, is the technology that led to the identification of the Boston Marathon bombers.²¹ It is also the same technology the NSA uses in its mass surveillance programs.²²

13. See U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (U.S. SENTENCING COMM'N 2011).

14. See *id.* § 8C2.5(f).

15. See generally Griffith, *supra* note 12, at 2086–92.

16. See Kenneth Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669, 674 (2010) (describing the large and increasing market for compliance-technology products).

17. For example, programs exist to screen clients against sanctions lists and to erect barriers against other prohibited trades. See, e.g., Bridger Insight XG, *Streamline Regulatory Compliance, Protect Your Business, and Increase Revenue*, LEXISNEXIS RISK SOLUTIONS, <http://www.lexisnexis.com/risk/products/bridger-insight.aspx> (last visited Oct. 4, 2016) (promoting software product as "a fully integrated compliance platform").

18. See Symposium, *The Changing Face of Corporate Compliance and Corporate Governance*, 21 FORDHAM J. CORP. & FIN. L. 1, 55 (2016) (CCO noting that "every month we record, if you played it end to end, ten years' worth of voice").

19. See *id.*

20. *Id.*

21. See *id.* On the use of big data techniques in that investigation, see e.g., Mike Wheatley, *FBI Uses Big Data & Crowdsourcing to Hunt the Boston Bomber*, SILICON ANGLE (Apr. 17, 2013), <http://siliconangle.com/blog/2013/04/17/fbi-uses-big-data-crowdsourcing-to-hunt-the-boston-bomber/>.

22. See James Risen & Eric Lichtblau, *How the U.S. Uses Technology to Mine More Data More Quickly*, N.Y. TIMES (June 8, 2013), <http://www.nytimes.com/2013/06/09/us/revelations-give->

The rush to use big data to improve the policing function of compliance is a movement that generates its own momentum. According to the Sentencing Guidelines, monitoring, auditing, and testing is a minimum requirement of any “effective” compliance program.²³ Any program that lacks this element will not receive a mitigated sentence or prosecutorial deference. Likewise, any firm that has implemented monitoring, auditing, and testing to some degree, but that trails peer firms in the sophistication of this element, is equally unlikely to receive much in the way of mitigation or deference. Where Goldman Sachs and Morgan Stanley lead, other financial firms must follow. Recognizing this trend, an industry has sprouted up around the effort to push firms toward “regtech”—that is, the development and implementation of technologies to address regulatory and compliance problems.²⁴ Plainly, there are clear benefits to implementing an efficient policing function. If a computer program could have instantly alerted JPMorgan’s compliance or risk officers that the size of the positions taken by some of its traders did not match the value of those positions reported to the firm, the London Whale trading fiasco could have been averted.²⁵

But turning compliance into a policing function means turning the business organization into a police state. The downside, captured vividly in art and literature, is that no one wants to live in a police state.²⁶ A recent Financial Times article on workplace monitoring reached the same conclusion: “Even when employers are open and clear about what they monitor and why, they risk giving the impression that they do not trust their own staff. If you act like you cannot trust them, you should not be surprised

look-at-spy-agencys-wider-reach.html?&_r=0; see also Meta S. Brown, *NSA Mass Surveillance: Biggest Big Data Story*, FORBES (Aug. 27, 2015, 10:10 AM), <http://www.forbes.com/sites/meta-brown/2015/08/27/nsa-mass-surveillance-biggest-big-data-story/#2715e4857a0b678b0f439acc>.

23. See *supra* notes 13–15 and accompanying text.

24. See Kristen Silverberg et al., *Regtech in Financial Services: Technology Solutions for Compliance and Reporting*, INST. OF INT’L FIN. (Mar. 22, 2016), <https://www.iif.com/publication/research-note/regtech-financial-services-solutions-compliance-and-reporting>.

25. See, e.g., Spencer P. Patton, *Archangel Problems: The SEC and Corporate Liability*, 92 TEX. L. REV. 1717, 1721–26 (2014) (discussing the 2012 London Whale debacle in the context of SEC enforcement policy).

26. See, e.g., GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949). Orwell describes the technological capabilities of the paradigmatic police-state as follows:

Any sound that Winston made, above the level of a very low whisper, would be picked up by [the monitoring device]; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork.

Id. at 4. If anything, the surveillance technology presently available surpasses the tools imagined by Orwell because big data does not require a human watcher to perform the surveillance. Big data merely requires a computer and an algorithm to collect and analyze disparate pieces of information in order to predict patterns and potential violations.

when they act like they cannot be trusted.”²⁷ Pervasive surveillance destroys morale, a critical component of organizational cohesiveness or “culture,” and ironically may lead to further misconduct within the organization.²⁸

II. THE CULTURAL ALTERNATIVE

Organizational culture is the successful coordination of group norms with individual choices—the individual adoption of a larger set of values and beliefs that, once adopted, become ingrained and non-negotiable.²⁹ The values are not imposed; rather they are adopted. This is not an act of policing, but rather a process of persuasion. Ultimately, individuals make their own choices from a shared set of values between the individual and the organization. To thrive thus requires willing participation, a shared belief in the mission of the group and in the means chosen to achieve it.³⁰ Employee morale is an integral element not only of a thriving business organization—dispirited workers tend not to excel at their jobs—it is also an essential element of culture.

Pioneering research into how culture motivates employee conduct in business organizations was carried out in 1994 by Lynne Paine, who argued that a values and integrity approach is more effective than an approach based on internal policing.³¹ The key, Paine argued, was getting employees to adopt the organization’s values because they saw them as consistent with their own.³² She made this argument through examples ranging from aerospace and defense contractors to healthcare providers to electronics manufacturers. Each corporation she examined defined organizational values such as honesty and respect, and used those values as a framework for building corporate culture.

A 1999 survey by Trevino and co-authors into what works in compliance and ethics programs confirmed the Paine hypothesis. The Trevino study surveyed 10,000 employees at six different corporations about their compliance and ethics programs. The results demonstrated that values-based programs had fewer reports of unethical conduct, higher levels of ethical

27. See, e.g., Sarah O’Connor, *Workplace Surveillance is Sparking a Cyber Rebellion*, FIN. TIMES (Jan. 19, 2016, 10:28 AM), <https://www.ft.com/content/8c52aff6-bdda-11e5-9fdb-87b8d15baec2>.

28. See generally Todd Haugh, *SOX on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. REV. 835 (2015); Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015).

29. See SCHEIN, *supra* note 9, at 27 (“Culture is a pattern of shared tacit assumptions that was learned by a group as it solved its problems of external adaptation and internal integration, that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, and feel in relation to those problems.”).

30. See *id.* at 26–27.

31. See generally Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994.

32. See *id.* at 112.

awareness, and greater reporting than compliance-based programs.³³ The study found that culture is more important than program design in inducing compliant behavior.³⁴ The study identified the elements of culture as “leadership, reward systems, perceived fairness, ethics as a topic of conversation in the organization, employee authority structures, and an organizational focus that communicates care for employees and the community.”³⁵

In 2005, Tyler and Bladder compared the effects of “command-and-control” approaches and “self-regulatory” approaches on rule following within organizations.³⁶ Through a two-stage study of employer and supervisor attitudes towards conduct within the organization, the authors found that self-regulatory models seem to be superior to command-and-control models and further that “[e]mployees’ . . . perceived congruence of their personal values with those of the organization, were the primary factors shaping their rule adherence.”³⁷ Likewise, although command-and-control variables correlate with the reporting of misconduct, self-regulatory variables had greater predictive value.³⁸ The authors conclude from this study that group-engagement models, aimed at inculcating self-regulatory norms, may be more successful at changing organizational behavior than command-and-control compliance systems.³⁹

In subsequent work, Tyler and co-authors emphasize procedural fairness and dignity values in producing compliant behavior, arguing that “employees will comply and act ethically if they view management as legitimate and see managerial policies as congruent with their own moral values,” and, relatedly, that “employees are most likely to believe that management is legitimate and management policy moral when they believe that organizational procedures are fair.”⁴⁰ Ultimately, the authors contend, successful organizational cultures are more likely to prevent rogue actors than command-and-control systems for three reasons:

33. Linda K. Trevino et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 136–37 tbl.2 (1999); accord Gary R. Weaver & Linda K. Trevino, *Compliance and Values Oriented Ethics Programs: Influences on Employees’ Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 333 (1999) (finding association between organizational values and employee willingness to report misconduct).

34. Trevino et al., *supra* note 33, at 144.

35. *Id.* at 141.

36. See Tom R. Tyler & Steven L. Blader, *Can Business Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1153 (2005).

37. *Id.* at 1148.

38. See *id.* at 1153.

39. See *id.* at 1154; accord TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (Princeton Univ. Press 2006).

40. Tom R. Tyler, John W. Dienhart & Terry Thomas, *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 33 (2008); accord Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims of Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 212 (2012).

First, in a culture where transparent procedures are voluntarily embraced, the self-policing mechanisms that will thrive in the organization will be more likely to expose wrongdoing in its infancy. Second, a culture where rule following is the expected norm, and cynicism is low, will be a far less comfortable environment for those who would prefer to break the rules. Finally, in a culture where rule following is the accepted norm, scoundrels and cheats will be far less likely to ascend to the positions of power in which they can do significant damage.⁴¹

Successful compliance thus depends on the flourishing of shared cultural norms between the organization and its individual workers.⁴²

The bottom line of all of this research is that the success of compliance may depend more on inculcating organizational norms (e.g., good faith adherence to organizational norms and lack of cynicism, among others) than innovations in the technology of policing. This does not mean an emphasis on organizational culture is always more successful than command-and-control structures. But sometimes it is. An investment in culture is thus an alternative to an investment in policing structures as a means of influencing employee behavior.

Enforcement authorities have begun to take notice. The 2004 revision to the Sentencing Guidelines takes organizational culture into account by emphasizing, in addition to steps taken to detect and prevent misconduct, corporate actions that “otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”⁴³ The government thus acknowledges the importance of corporate culture in compliance as a component of “effective” compliance programs. However, the Sentencing Guidelines go on to suggest that “organizational culture” can be demonstrated by the basic seven minimal requirements discussed above, some if not all of which undermine corporate culture.⁴⁴

More recently, the Federal Reserve Bank of New York (FRBNY) has been emphasizing the importance of “culture” in financial-institution compliance. The FRBNY recently convened a workshop around the issue, at which its President delivered remarks emphasizing the deep-seated cultural and ethical failures of financial institutions and arguing that “improving culture in the finance industry is also an imperative [for ensuring financial stability].”⁴⁵ Bank CEOs joined the chorus during panel sessions organized

41. Tyler, et al., *supra* note 40, at 43.

42. *See id.* at 1153 (describing how to promote shared cultural values through discussions at the organizational and the individual work-group level).

43. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (U.S. SENTENCING COMM’N 2011).

44. *Id.*; *see also* Paine, *supra* note 31, at 109 (expressly criticizing the *Sentencing Guidelines* as “emphasiz[ing] the prevention of unlawful conduct, primarily by increasing surveillance and control.”).

45. William C. Dudley, President & Chief Exec. Officer, Fed. Reserve Bank of N.Y., Remarks at the Workshop on Reforming Culture and Behavior in the Financial Services Industry (Oct. 20, 2014).

around the theme.⁴⁶ The General Counsel of the FRBNY, Thomas Baxter, has also spoken regularly on the issue. At a recent event at Fordham Law School, he emphasized the merger of culture and compliance. In his words:

One of the very exciting areas in compliance today relates to how a company's strong ethical culture can impact corporate behavior. One aspect of this behavioral change relates to the greater tendency of corporate constituents to follow the applicable rules when the culture is right. Looking to the future, I envision we will see much more empirical research that shows the benefits of merging ethics with compliance, and placing both in the hands of a trusted corporate officer with a catchy new name – the chief ethics and compliance officer. As we move to the next level, ethics and compliance will increasingly become a part of a single program.⁴⁷

As a result, the financial industry is being pushed by its principal regulators to demonstrate a culture of compliance.

III. THE CONTRADICTION UNDERMINING COMPLIANCE PROGRAMS

The contradiction at the core of contemporary compliance programs is that the inculcation of cultural norms is antithetical to pervasive policing. Compliance programs built on culture ultimately depend on individual autonomy—individual employees freely choosing the course of action that is consistent with organizational values. Compliance programs built around technological surveillance and other forms of policing ultimately depend on authority—a hierarchical structure designed to ensure that everyone does what they are supposed to do. Authority and autonomy, of course, are antithetical.⁴⁸ Designing compliance around either cultural norms or technological surveillance thus presents a choice. Either may work, but attempting to design a program around both means embedding an internal contradiction.

Less abstractly, policing undermines culture by rupturing trust in the organization and discouraging willing participation in its norms.⁴⁹ Policing treats its subjects as prospective criminals, but not all employees are

46. See FED. RESERVE BANK OF N.Y., SUMMARY OF OCTOBER 20, 2014 WORKSHOP ON REFORMING CULTURE AND BEHAVIOR IN THE FINANCIAL SERVICES INDUSTRY 2–5 (2014), <https://www.newyorkfed.org/medialibrary/media/newsevents/events/banking/2014/Summary-Culture-Workshop.pdf> (summarizing workshop contributions).

47. Thomas C. Baxter, Exec. Vice President & Gen. Counsel, Fed. Reserve Bank of N.Y., Remarks at the Fordham Journal of Corporate Counsel & Financial Law Symposium (Feb. 9, 2015).

48. See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 103 (2004) (“The difficulty is that authority and accountability are ultimately antithetical: one cannot have more of one without also having less of the other.”).

49. In addition to pervasive monitoring, policing may offend cultural norms built on individual autonomy by use of deceit. Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal?*, 77 U. CIN. L. REV. 523, 554–55 (2008) (distinguishing between, “policing” and “governance” by emphasizing the role of deceit).

prospective criminals. Having thus been treated unfairly, employees are more willing to disregard organizational norms. This may lead to the rationalization of transgressive behavior, as described by Todd Haugh:

[C]riminalized compliance imports many of the criminal law's delegitimizing features into the corporation—from vague and overlapping rules, to aggressive and onerous monitoring, to inconsistent enforcement and adjudication. Employees recognize this illegitimacy and incorporate it into their own thought processes, thus creating an environment ripe for rationalizations. Once rationalizations take hold, there is little stopping an employee from committing an unethical or illegal act, regardless of the compliance program in place.⁵⁰

Undermining individual autonomy means reducing the willingness of individuals to freely choose to adopt the norms of the organization, increasing the likelihood of transgression, and therefore, the need to monitor their behavior.

A compliance approach that focuses on surveillance and policing employees will destroy employees' faith in management.⁵¹ The 1999 study by Trevino and co-authors came to the conclusion that “unquestioning obedience to authority” and a management focus on “self-interest rather than concern for employees” led to a breakdown of trust between employees and management.⁵² Employees will be more likely to follow the rules if they believe management's authority to be legitimate.⁵³ If management's authority is delegitimized by a policing approach to compliance, employees will be more likely to commit ethical breaches.⁵⁴ Employees will be more likely to rationalize their wrongdoings and create excuses and justifications for their behavior, if the social culture around them permits it.⁵⁵

In contrast, if employees perceive their organization to be procedurally just, they will be more likely to conform to those social norms that promote rule following.⁵⁶ If employees feel like management values their input, they will view their relationship with management as a “social exchange” rather than just an “economic exchange.”⁵⁷ They will be more likely to “go beyond their normal role requirements and report ethical problems to

50. Todd Haugh, *The Criminalization of Compliance* 5 (Kelley Sch. of Bus., Research Paper No. 16-28, 2016), <http://ssrn.com/abstract=2752621>.

51. See Paine, *supra* note 31, at 109.

52. Trevino et al., *supra* note 33, at 144.

53. See Tyler & Blader, *supra* note 36, at 1154.

54. See Trevino et al., *supra* note 33, at 142.

55. See Joseph Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, 83 J. BUS. ETHICS 595, 604 (2008) (discussing how social context and culture make excuses and rationalization more appealing to wrongdoers).

56. See Linda Klebe Trevino & Gary R. Weaver, *Organizational Justice and Ethics Program “Follow-Through”: Influences on Employees' Harmful and Helpful Behavior*, 11 BUS. ETHICS Q. 651, 652 (2001).

57. *Id.* at 653.

management.”⁵⁸ Thus, compliance programs that focus on policing are antithetical to promoting an organizational culture of procedural fairness and rule following.

That policing undermines culture does not necessarily imply that it is an inferior means of motivating employees. There may be some organizations—particularly far-flung global corporations with relatively little organizational cohesiveness—in which an investment in policing produces greater returns than the same investment in culture. It does imply, however, that investments in policing undermine investments in culture and vice versa. Investing in both is thus internally contradictory—each investment has a tendency to cancel the other out—yet that is precisely what enforcement authorities have pressed organizations to do.

Monitoring and surveillance have been a basic element of every “effective” compliance program since the first draft of the Sentencing Guidelines,⁵⁹ and now so is culture. Yet, by insisting on both culture and policing, enforcement authorities are embedding a contradiction in compliance. If technologized surveillance in particular and command-and-control approaches more generally are inconsistent with the successful cultivation of corporate culture, then programs that strive for both will likely get neither. Worse, by insisting that all compliance programs be built around this inherent contradiction, enforcement authorities are dooming compliance programs to failure.

IV. HOW TO FIX THE PROBLEM

Enforcement authorities are the driving force behind the current structure of compliance.⁶⁰ As I have argued at length elsewhere, compliance is a de facto mandate, through which the enforcement authority not only demands that firms comply with the law, but also specifies how they must do it.⁶¹ Enforcers impose their vision of compliance through the strong incentives created by the Sentencing Guidelines and the imposition, at settlement, of specific compliance reforms.⁶² The enforcement authority is the architect of

58. *Id.*

59. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (U.S. SENTENCING COMM’N 2011).

60. See Griffith, *supra* note 12, at 2083–84.

61. See *id.* at 2078 (“Compliance is a de facto government mandate imposed upon firms by means of ex ante incentives, ex post enforcement tactics, and formal signaling efforts.”); see also Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 961 (2009) (“[R]egulation of compliance [is] firmly in the hands of the DOJ.”).

62. On the governance reforms in settlement agreements, see BRANDON GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 65 (2014) (reporting on 255 deferred and nonprosecution agreements (DPAs/NPAs) from 2001 to 2012); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements* 194 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 16-13, 2016) (concluding that the use of DPAs/NPAs are inconsistent with the rule of law); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution* 1–3 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series,

compliance and, as we have seen, the enforcement authority has built the edifice on shaky ground.

Rather than seek to correct this error by decreasing the emphasis on policing and increasing the emphasis on culture, a simpler solution is to leave the problem to the organizations themselves. Let the enforcement authorities enforce the law, but without creating special privileges and exemptions for preconceived notions of “effective” compliance. Let them tell companies that they must comply with the law, but not how they must do it. Companies, in turn, would be free to design their own compliance programs according to the idiosyncratic needs of each uniquely situated firm.

Rectifying the situation has two basic steps.⁶³ First, the Sentencing Guidelines would need to be amended to remove the promise of mitigated penalties for companies with “effective” compliance programs.⁶⁴ Companies would still have a strong incentive to comply in order to avoid the penalty associated with misconduct, but the compliance programs they would design would be more organic, structured in a way that responds to the organization’s specific situation, its unique culture, and other characteristics. Second, prosecutors and enforcement authorities would need to stop conditioning settlement on specific compliance reforms.⁶⁵ Enforcement authorities could continue to recognize a compliance program as well designed, offering some discount or credit on the sanction in recognition of this fact, but they should not start with a preconceived definition of what an effective compliance program must be.⁶⁶

That it is technically simple to separate the influence of enforcement authorities from program design, however, does not mean that doing so would be easy politically. Enforcement authorities may now be too invested in evaluating compliance and recommending specific reforms simply to give it up.⁶⁷ Companies, for their part, have come to rely on the system of

Working Paper No. 16-04, 2016) (reporting on PDA agreements from 2008 through 2014 and policing agency costs); Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 BUS. LAW. 61 (2014) (reporting on publicly available DPAs/ NPAs from 1993 through 2013).

63. This might be technically easy, but perhaps would be politically unfeasible. A full account of the politics of this choice is outside the scope of this Essay.

64. See ORWELL, *supra* note 26; O’Connor, *supra* note 27.

65. On this point, see also Arlen, *supra* note 62; Arlen & Kahan, *supra* note 62.

66. Interestingly, the U.S. Attorney’s Manual (the “Manual”) treats compliance in precisely this way, refusing to provide a list of necessary characteristics of “effective” compliance programs in connection with the charging decision. See UNITED STATES ATTORNEYS’ MANUAL § 9-28.800(B) (U.S. DEP’T OF JUST. 2008) (“The Department has no formulaic requirements regarding corporate compliance programs.”). If anything, the Manual increases prosecutorial discretion by adding “good faith” to the list of things prosecutors may consider in assessing a program’s effectiveness. *Id.*

67. Consider, on this point, that the Department of Justice has hired a full-time “Compliance Expert.” See Laura Jacobus, *DOJ’s Andrew Weissmann and Hui Chen Talk Corporate Compliance in Exclusive Interview*, ETHICS & COMPLIANCE INITIATIVE (Feb. 1, 2016, 9:58), <https://www.ethics.org/blogs/laura-jacobus/2016/02/01/doj-interview> (describing the role of the DOJ’s compliance expert).

discounts and safe harbors that they receive from modeling their behavior on the expectations of the enforcement authorities.⁶⁸ Nevertheless, it is in the long-term interests of both regulatory authorities and business for companies to adopt programs that actually produce compliant behavior. Although it may seem counterintuitive or even paradoxical, the best way to get such programs may be for enforcement authorities to stop imposing their vision of program design.

CONCLUSION

An ancient story illustrates the dangers of technology. A traveler, meeting a gardener irrigating his crop one vessel of water at a time, stops to explain how the gardener could build a draw-well to irrigate many ditches at once. But the gardener reacts angrily, answering:

I have heard my teacher say that whoever uses machines does all his work like a machine. He who does his work like a machine grows a heart like a machine, and he who carries the heart of a machine in his breast loses his simplicity. He who has lost his simplicity becomes unsure in the strivings of his soul. Uncertainty in the strivings of the soul is something which does not agree with honest sense. It is not that I do not know of such things; I am ashamed to use them.⁶⁹

It is no longer possible, if ever it was, to reject technology. But it is possible to be awakened to the dangers posed by technology and, once awakened, to remain on guard against them.⁷⁰ The goal is to prevent technology from constructing our worldview and blinding us to other manifestations of being. The goal is to remain wary.

In the context of compliance, this wariness entails a degree of humility about perfecting the compliance machine. Technology might improve compliance in some ways, but it might impair or destroy it in others. The way forward, for some organizations at least, might be wholly non-technological.

Firms cannot make this choice, however, as long as enforcement authorities insist upon a rigid predetermined structure of compliance. The way forward, therefore, requires allowing firms to determine their own compliance structures. Once they are choosing for themselves, they can be expected to choose the method that most effectively produces compliance. This may involve a further investment in technology. Or, alternatively, it may focus on building corporate culture by investing in rule legitimacy, willing participation, and a set of shared beliefs within the firm. Or, again, it may involve a combination of the two that fits the firm's specific structure,

68. See generally Griffith, *supra* note 12, at 2085 (describing industry lobbying for compliance as a mitigating factor at the enactment of the Sentencing Guidelines).

69. WERNER HEISENBERG, *THE PHYSICIST'S CONCEPTION OF NATURE* 21 (Arnold J. Pomerans trans., Hutchinson & Co. 1958).

70. See Blitz, *supra* note 2, at 75.

history, and needs. In any event, it would not involve a program designed around a set of specifications imposed upon the firm by the enforcement authorities.