I. Introduction: “I tear up parking tickets like they’re old receipts.”

While standing in line at Starbucks recently, the author overheard a woman with two companions make the above declaration. Her companions laughed and proceeded to vent their own irritation with recent enforcement of laws which prohibit talking on cell phones while driving. The first women shook her head: “Don’t cops have anything better to do?” The tone was familiar. There can be no doubt that we have all heard or participated in similar conversations - whether relating to paying taxes on tips, filling out certain government forms accurately, speeding, or using marijuana recreationally. These conversations are generally accompanied by eye-rolls and the prevailing sentiment that such laws are silly at best. This particular conversation at Starbucks is indicative of the fact that a large portion of society simply declines to follow laws which they view as superfluous. This article will explore the intersection of such arguably superfluous regulatory laws and restorative justice. Both concepts merit a brief definition before delving into the nuances of the their existence and interaction.

According to the Organisation (sic) for Economic Cooperation and Development, there are at least three types of regulatory laws: economic regulations, social regulations, and
administrative regulations.¹ For purposes of this article, the subtle distinctions between the three are irrelevant. What is relevant is the breadth of every-day behavior upon which regulatory law touches and the fact that violations of these regulations are, in many cases, criminalized. To give an example from each category, insider trading,² exceeding the speed limit while driving,³ and failing to file certain tax forms,⁴ are all behaviors which potentially carry criminal penalties.

Restorative justice is an approach to wrongdoing which is interested in “bringing together the individuals who have been affected by an offense and having them agree how to repair the harm caused by the crime.”⁵ It has been observed that there are at least four steps in a restorative approach.⁶ The first step requires the offender to acknowledge wrongdoing. By making this acknowledgement, the offender “demonstrates that he or she remains part of the law-abiding community and recognizes its norms of acceptable behavior.”⁷ It is only after the offender has willingly recognized the community’s norms as legitimate that the offender can sincerely


² Security Exchange Act of 1934, §78 (ff)(a), 15 U.S.C.A. §2B (2002). The penalty for insider trading is “not more than $1,000,000” or imprisonment for “not more than 10 years”, or both. Id.

³ See, e.g., 625 Ill. Comp. Stat. Ann. 5/11-601.5 (2000). Driving in excess of 40 miles above the speed limit is a Class A misdemeanor. Id.

⁴ See, e.g., 26 U.S.C. A. §7203 (1990). This statute makes it a criminal offense to fail to “make a tax return, keep certain tax records, or supply tax information when required.” Id.


⁶ See Lecture by John O. Haley, Law Professor at Washington University in St. Louis, January 12, 2009 (notes on file with author).

⁷ Declan Roche, Accountability in Restorative Justice 29 (2003).
proceed with the rest of the steps. Closely related, the second step requires the offender to accept accountability. This demands that the offender demonstrate a willingness to make amends for any harm caused by wrongdoing. One might argue that making amends is the “central ambition of restorativism.”

This step of restorative justice is generally marked by “an apologetic stance on the part of the offender, ordinarily conveyed through the undertaking of a reparative task.”

The third step in the restorative justice process requires a willingness on the part of the victim and the community to allow the offender to make amends. One cornerstone of restorative justice is the assumption that the entire community is harmed when an individual commits a crime. Crime is not perpetrated against the police or the government “but against specific victims and the relevant community.” As a result, restoration can only take place when the victims and community are somehow involved in setting the standard for how restoration will be achieved.

Finally, the last stage in the restorative process is re-integration. If the offender successfully meets the restoration standard set by the victim and community, the offender must be accepted back into the community and assisted in becoming a “contributing member of society.” When these prerequisites are achieved, studies have shown that the chances of recidivism are greatly reduced.

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10 Luna, *supra* note 8, at 791.

11 Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 424 (2007). Central to restorative justice is the notion that “direct stakeholders” are in the best position to determine how the offender can best repair the damage which has been inflicted. *See also* Roche, *supra* note 7, at 9. (“Restorative justice turns those traditional observers of the criminal justice system – victims, offenders, and their families and friends – into participants.”)

12 Luna, *supra* note 8, at 795
decreased under the restorative approach as compared with recidivism under an approach that exclusively emphasizes retribution.\textsuperscript{13}

II. Overview of Arguments

Given the increasing promulgation of regulatory laws in our system and the claimed effectiveness of restorative justice, it seems that a restorative approach could be useful in the enforcement of regulatory laws. However, restorative justice cannot be successfully employed when neither the offender nor the relevant community acknowledge wrongdoing in the violation of a particular law. Although restorative justice has been successful in utilizing social perceptions of wrongdoing to bring about a decline in recidivism, there has been little scholarship regarding restorative justice’s capacity to generate a sense of wrongdoing in connection with the violation of a law which society is not inclined to recognize as legitimate.\textsuperscript{14} Therefore, as a precursor to utilizing restorative justice to educate offenders as to the wrongfulness of their conduct, this article focuses on how restorative justice might encourage the community to recognize wrongdoing as inherent in certain regulatory crimes.

This article will first argue that a law is more likely to be perceived as legitimate when it prohibits conduct which causes identifiable harm, leading to a social perception of wrongdoing in connection with the prohibited conduct. Second, this article will argue that the promulgation of excessive regulatory crimes subtly undermines the legitimacy of our legal system by prohibiting conduct with no identifiable connection to harm. Third, this article will suggest that restorative justice is uniquely capable of drawing connections between conduct and harm, elucidating the existence of wrongdoing. Where restorative justice, through education of the

\textsuperscript{13} Luna, \textit{supra} note 8, at 810. “As an empirical matter … it can be said that restorative justice outperforms standard court processes in facilitating the completion of reparations for the current offense and reducing the chance of future crime.” \textit{Id.} at 811.

\textsuperscript{14} The research of such authors as John Darley, Tom Tyler, and Paul Robinson present notable exceptions. As a result, their work is referenced extensively in this article.
community, successfully draws a connection between a regulatory offense and identifiable harm, the law prohibiting this offense is more likely to be viewed as legitimate.

Once society views a particular offense as harmful, a foundation exists upon which the community itself may educate individual regulatory offenders as to the harmfulness of their conduct. However, even assuming that restorative justice does have the capacity to convince society of the wrongfulness of certain actions, it is possible that, in some cases, the necessary means would amount to coercive indoctrination. This article will ultimately conclude that, where education by means of restorative justice fails to persuade society of a law’s legitimacy by means which fall short of coercive indoctrination, harm is perhaps so attenuated from the prohibited conduct as to make the law undesirable. Restorative justice is therefore an apt means by which to imbue regulatory laws with legitimacy and an equally apt means of detecting community resistance to regulatory laws. Where resistance is strongest, the law should perhaps be eliminated in the interest of preserving the legitimacy of the legal system as a whole.

III. Restorative Justice Premised on Legitimacy of the Law

Restorative justice is contingent upon recognition of our legal system’s legitimacy. If the offender does not recognize this legitimacy, there is no reason for the offender to acknowledge wrongdoing or strive to make amends. Perhaps more importantly, if society as a whole does not recognize this legitimacy, there is some question as to whether a violation of the law actually harms anyone at all. Therefore, without the perception of legitimacy, restorative justice becomes nonsensical and, more fundamentally, there is no obvious reason to comply with the law. Though this article will explore proxies for legitimacy, it seems impossible to exaggerate the importance of true legitimacy in securing a law-abiding society. There are at least two ways in which legitimacy can be achieved.
A. Value Congruence

The most powerful legitimacy is achieved when society views a law as congruent with its own norms and beliefs.\textsuperscript{15} To a large extent, this brand of legitimacy requires the law to follow social intuitions. Studies show that shared social intuitions are surprisingly unanimous across cultures and backgrounds,\textsuperscript{16} tending to produce overwhelming consensus that three basic actions are wrong and deserving of punishment: “physical aggression against others, the taking of property, and dishonesty or deception in exchange.”\textsuperscript{17} Codification of these norms, already held by society, is likely to result in the pervasive feeling that “the behaviors prohibited by law are also immoral.”\textsuperscript{18} This legitimacy is effective in ensuring compliance because people “generally see themselves as moral beings who want to do the right thing as they perceive it.”\textsuperscript{19}

When one of the three above-mentioned universally recognized harms is directly implicated in the violation of law, the resulting crimes are termed \textit{malum in se}, literally “wrong in and of themselves.”\textsuperscript{20} An example of a law which prohibits \textit{malum in se} crime is our society’s


\textsuperscript{16} Robinson and Darley, \textit{ supra} note 5, at 3-4.

\textsuperscript{17} Id. at 57.

\textsuperscript{18} Tyler and Darley, \textit{ supra} note 15, at 707.

\textsuperscript{19} Paul H. Robinson and John M. Darley, \textit{The Utility of Desert}, 91 Nw. U. L. Rev. 453, 498-499 (1997). See also Tyler and Blader, \textit{ supra} note 15, at 1154. (observing that “voluntary cooperation flows from stimulating people’s internal motivations, which are linked to the ethical values central to people’s sense of who they are, and what they represent.”)

\textsuperscript{20} Robinson and Darley, \textit{ supra} note 5, at 58.
prohibition against murder.\textsuperscript{21} We assume that individuals share an intuition that murdering another person as wrong. If someone were to ask why it is wrong to murder, and we were reluctant to enter into a philosophical or religious debate, we might be left stuttering “because … it just is.” The law prohibited murder has no end beyond codification of a morality which assumes that ending a life is harmful. \textsuperscript{22}

When the violation of a law does not directly involve one of the three above-mentioned universally recognized harms, but only the possibility of such harm, the crime is said to be \textit{malum prohibitum}, literally “a crime because it is prohibited.”\textsuperscript{23} These laws are legitimated, not through a belief that the behavior they restrict is wrong in and of itself, but through acknowledgment that the restricted behavior involves an undue risk of harm. Thus, selling heroin is illegal for at least two reasons: heroin as a substance can kill the user and heroin as a commodity often requires weapons, which can kill the seller, buyer, or a bystander. Unlike \textit{malum in se} crimes, if someone were to ask why it is wrong to commit a \textit{malum prohibitum} crime, a lengthy explanation would probably be possible, even necessary, in order to fully identify the harm. The further attenuated the prohibited behavior from this harm (or the less

\textsuperscript{21}“The law’s moral credibility is not needed to tell a person that murder, rape, or robbery is wrong.” Robinson and Darley, \textit{supra} note 19, at 475-476. Because we all arguably share these perceptions, the law encodes these rules, not out of necessity but on principle.

\textsuperscript{22}For purposes of this article, “moral” does not refer to notions of personal morality, but rather to broad social intuitions. After-all, in our society, “only public crimes are criminally punishable, and public crimes are those that endanger the security of society.” Sharon Byrd, \textit{Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in Its Execution}, 8 Law and Philosophy 151, 181 (1989)

\textsuperscript{23}\textit{State v. Hazelwood}, 946 P2d 875 (Alaska 1997). It should be noted that this article does not intend to disproportionately dichotomize \textit{malum in se} and \textit{malum prohibitum} offenses. Many criminal laws have both moral and utilitarian underpinnings, making them part \textit{malum in se} and part \textit{malum prohibitum}. Prostitution, for example, is viewed by many as harmful in and of itself. To others, prostitution is harmful because of the risks of harmful violence and disease. The point is that, if a law lacks both a moral and utilitarian justification, its desirability as a law is questionable.
significant the risk of harm attached to the prohibited behavior), the less likely that society will perceive value congruence with its own intuitions and imbue the law with legitimacy.

As stated by Tom Tyler, “[I]n situations in which behaviors are contrary to official policy but viewed by people as not being immoral … it is more difficult to bring people’s behavior into conformity with the rules.”24 Therefore, where value congruence is lacking, compliance with a particular law may be uneven.

**B. Entitlement of Authority to Compliance**

Legitimacy can also sometimes be achieved when society does not share the particular norms codified by a law, but none-the-less feels that the “legal authorities are entitled to be obeyed.” 25 This leaves some room for the law to guide, as opposed to simply following social intuitions because it implies a certain amount of “reflexive law-abidingness.”26 For example, society is willing to accept that insider trading is wrong without any particular intuition on this matter, simply because “the relevant authorities have thought about it, and assert that it is wrong.”27

However, the perception of authority entitlement perhaps results only when the majority of a system’s laws are perceived to line up with society’s intuitions. The legal system must continually “earn a reputation as an institution whose focus is morally condemnable conduct.”28

It may be helpful to think of society as a bank and the legal system as a borrower. The legal

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24 Tyler and Blader, *supra* note 15, at 1145.

25 Tyler and Darley, *supra* note 15, 707

26 “… reflexive law-abidingness is reinforced when the laws are limited to core objectives that enjoy consensus support.” Robinson and Darley, *supra* note 5, at 28.

27 *Id.* at 30.

28 Robinson and Darley, *supra* note 19, at 477.
system makes a deposit every time a law corresponds with a social intuition of right and wrong. The legal system makes a withdrawal every time a law departs from a social intuition of right and wrong. So long as the legal system still has capital in the bank, society is willing to follow even those laws which depart from its intuitions.\textsuperscript{29} However, if the legal system over-withdraws by passing an excessive number of laws which are incongruent with social intuitions, the legal system risks bankruptcy (or a loss of legitimacy). When the law is continually out of sync with social norms, the legitimacy of the law is severely undermined, ultimately leading to a crisis in compliance with the legal system as a whole.\textsuperscript{30}

Of course, the legal system is not simply passive, but is capable of actively influencing society. A law which initially appears illegitimate may eventually gain the hue of legitimacy. This gradual education of society by the law may avert bankruptcy, at least for a time. However, the reverse is also possible, as seen in the quintessential example of Prohibition in the early 20\textsuperscript{th} century. During Prohibition, the Eighteenth Amendment made it illegal to manufacture, transport, and sell alcohol in the United States.\textsuperscript{31} Because so many individuals viewed Prohibition as incongruent with their own norms, the sale of alcohol did not cease, but rather simply went “underground.”\textsuperscript{32} With so many once law-abiding citizens violating the Eighteenth Amendment, the stigma related to criminal activity was diminished. It is widely recognized that this opened the door to a flourishing black market and pervasive organized crime.\textsuperscript{33} Ultimately,

\textsuperscript{29} See, e.g., Robinson and Darley, \textit{supra} note 5, at 30.

\textsuperscript{30} See Sara Sun Beale, \textit{Is Corporate Criminal Liability Unique?}, 44 Am. Crim. L. Rev. 1503, 1511 (2007) \textit{See also}, OECD, \textit{supra} note 1, at 10 (observing that non-compliance “ultimately break(s) down the credibility of government.”)

\textsuperscript{31} New World Encyclopedia, \textit{Prohibition on Alcohol (United States)}, http://www.newworldencyclopedia.org/entry/Prohibition

\textsuperscript{32} Robinson and Darley, \textit{supra} note 5, at 23.

\textsuperscript{33} New World Encyclopedia, \textit{supra} note 31.
the refusal of society to recognize Prohibition as legitimate caused the Eighteenth Amendment to fail on an overwhelming scale. The law was ultimately repealed.34

C. Proxies for Legitimacy

Proxies for legitimacy ensure compliance with the law where there is a lack of both congruent social intuitions and failure to perceive legal authorities as inherently entitled to obedience. It is important to note that these “proxies” do not simply operate in isolation from legitimacy, but also interact with and supplement legitimacy. These proxies include retributive punishment and fear of social disapproval.35

Punishment in our system is classically synonymous with an “eye-for-an-eye,”36 retribution-focused approach.37 Unlike restorative justice, retribution does not demand that an individual acknowledge wrongdoing or make amends.38 Successful retribution demands only that the offender understand “that the state is nullifying as best it can the claim of superiority” over others and the state which is embodied in every offense.39 In a sense, retribution is a

34 Id.

35 Robinson and Darley, supra note 19, at 468-469.

36 Exodus 21:24. This verse from the Bible is often cited as one of the sources of our cultural predilection towards retribution: “If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.” Id.

37 Retribution tends to emphasize autonomy, assuming that we are all free agents with free will. According to some, “retribution effectuates the ideal of treating human being as responsible moral agents.” Dan Markel, Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate, 54 Vand. L. Rev. 2157, 2165 (2001).

38 Roche, supra note 7, at 29 (observing that, in a retribution-centered system, “an offender can perform community service, pay a fine or attend probation, but is offered few opportunities to convey his or her repentance, and the community largely is denied the chance to demonstrate its acceptance of, or understanding towards, the offender.”)

39 Markel, supra note 36, at 2204.
sanitized, institutionalized version of revenge. It is traditionally much more concerned with addressing the past than affecting the future.

It has been argued that retribution is most effective as an unexecuted threat, convincing individuals *ex-ante* that following the law is preferable to punishment. Retribution therefore relies to some extent upon the effectiveness of deterrence. However, there are several reasons why deterrence is ineffective. First, individuals are often unaware of which laws are applicable in a given situation, assuming they are aware of the existence of the applicable laws at all. Second, individuals frequently fall victim to “optimistic overconfidence,” a psychological phenomenon that causes offenders, even if they actually take the law into consideration, to under-estimate the likelihood that they will get caught. Third, in order for deterrence to work effectively, offenders would have to perform a cost-benefit analysis before deciding whether or not to break the law. However, there is evidence to suggest that offenders generally do not take the criminal law into consideration at all before acting. After interviews with several convicted


42 The legislature seems to give little consideration to educating the public as to the legal code. However, if criminal law is to be successful in promoting deterrence, it must be through knowledge of the costs it imposes. Without this knowledge, new laws and heightened penalties will be useless in providing *ex-ante* incentives and deterrence. Particularly when new laws are contrary to social intuitions, it is imperative that new laws be adequately publicized. After-all, “if people do not know the law and do not understand the penalties, then it is tough to see how increasing the penalties will ever make a difference.” Neal Humar Katyal, *Deterrence’s Difficulty*, 95 Mich. L. Rev. 2385, 2448 (1997).

43 See, e.g., Jay Folberg et. al., *Resolving Disputes: Theory, Practice, and Law* 33 (2005) (…… people are consistently overconfident about their ability to assess uncertain data …”)

44 Robinson and Darley, *supra* note 19, at 461.
inmates, Robert Blecker came to the conclusion that, generally, “people do not consciously weigh costs and benefits” before committing a crime.\textsuperscript{46} Fourth, even assuming that potential offenders are aware of the law, do not fall victim to optimistic overconfidence, and perform a cost benefit-analysis, deterrence would still only be successful if the analysis were to come out in favor of law-abidingness. This is certainly not a given, particularly in situations where breaking the law is more convenient or otherwise supplies greater rewards than compliance. Ultimately, there is no evidence that even the most severe penalties have a significant deterrent effect on crime.\textsuperscript{47} However, where legal deterrence fails, social deterrence often succeeds. As a result, it has been argued that that the second proxy for legitimacy – fear of social disapproval – is actually far more effective than legal punishment in securing compliance with the law.

Fear of social disapproval carries great weight in our culture and can be effectively wielded to enforce the majority perception of appropriate behavior. Even if an individual does not personally perceive a law to be legitimate, the suspicion that society as a whole views the law as legitimate may be sufficient to ensure compliance. A prime example of the effective use of social pressure is the success of laws banning tobacco smoke in restaurants. Although there are

\textsuperscript{45} Christopher Slobogin, \textit{The Civilization of the Criminal Law}, Vanderbilt Law Review, 58 Vand. L. Rev. 121, 141 (2005) (observing that “most criminals are not the rational actors favored by economic models.”).

\textsuperscript{46} Robert Blecker, \textit{Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified}, 42 Stan. L. Rev. 1149, 1175 (1990). Blecker concludes that “general deterrence is unreal and unworkable.” \textit{Id}. Blecker supports this claim by sharing several interviews. In one interview, an inmate reports that, while committing a robbery, punishment “weren’t on (his) mind. Just getting the money and getting away.” \textit{Id}. These sentiments were echoed by several other inmates interviewed by Blecker, causing him to speculate that costs imposed by the law are only effective \textit{ex-ante} to the extent that they “cause a more disciplined hustler to take great precautions.” \textit{Id}.

\textsuperscript{47} John Braithwaite, \textit{Restorative Justice and Responsive Regulation} 439 (2001) (reporting that “Ohio and Indiana, two death penalty states, did not have lower crime rates than Michigan, which does not have the death penalty.”).
citations attached to the violation of these ordinances, such penalties are not the primary means of enforcement.48 Rather, these ordinances are enforced primarily through “public pressure and a ‘realization that business quickly improves after a ban…’”.49 Because this rule is truly a reflection of social intuitions, it is arguably almost unnecessary. Likewise, official enforcement agents are unneeded because those who prefer smoke-free restaurants are apparently in the majority and are likely to take their business elsewhere if a restaurant fails to comply.50 Stringent criminal punishments would be excessive because the stigma attached to smoking is strong enough in and of itself to prevent most violations. Therefore, fear of social disapproval is predominately responsible for compliance with certain types of laws.

IV. Overview of Regulatory Laws and the “Over-criminalization” Trend as a Threat to Legitimacy

Over-criminalization refers to an expansion of regulatory criminal law beyond moral and utilitarian justifications.51 Paul Robinson and John Darley have astutely observed that “current law has extended criminalization beyond even the domain of traditional malum prohibitum


49 Id.

50 A survey conducted by the Los Angeles County Department of Health Services in 1999 reported that “91 percent of non-smokers and 74 percent of smokers believe it is very important or somewhat important to have smoke-free restaurants.” LA Health, Most County Adults Support Tobacco Control Laws, Volume 2, Issue 2, February, 1999 http://publichealth.lacounty.gov/ha/reports/habriefs/v2i2_tobacco/v2i2.pdf.

51 “The over-criminalization phenomenon consists of: untenable offenses, superfluous statutes, doctrines that overextend culpability, grossly disproportionate punishments, and excessive or pre-textual enforcement of petty violations.” Erik Luna, The Over-criminalization Phenomenon, 54 Am. U.L. Rev. 703, 717 (2005). See, also Slobogin, supra note 44, at 121. (“a vast amount of relatively innocuous behavior is now criminalized.”)
offenses, to criminalize conduct that is ‘harmful’ only in the sense that it causes inconvenience to bureaucrats.”52 Recent estimates place the number of current federal crimes at over four thousand.53 Significantly, this number appears to reflect a trend, with a “thirty percent increase in federal offenses carrying criminal penalties between 1980 and 2004.”54

This trend threatens the legitimacy of the law on several fronts. Not only does excessive criminalization subtly undermine the law’s authority, it also transforms the federal criminal code into chaos.55 Without a cohesive criminal code, there is a substantial risk of “marginal deterrence.”56 Marginal deterrence takes place when the state unintentionally incentivizes more serious crimes by “exacting equal penalties for crimes of lesser and greater magnitudes.”57

Ultimately, if incarceration is repeatedly utilized as a penalty for behavior which society views as innocent, incarceration will become useless as a means of deterring crime or imposing condemnation.58 It is worth mentioning that, even as it stands, there is no rational connection

52 Robinson and Darley, supra note 19, at 479. See also, Sara Sun Beale, From Morals and Mattress Tags to Over-federalization, 54 Am. U. L. Rev. 747, 748 (2005) (observing that much of the behavior that is now criminalized “such as removing the tag from a mattress, should really be dealt with by civil provisions, or perhaps left to the good sense of the individual.”).

53 See Luna, supra note 8, at 713. See also Beale, supra note 51, at 753.

54 Id.

55 Beale, supra note 30, at 1507 (describing the federal criminal as “a bloated and disorganized hodgepodge.”).

56 Katyal, supra note 41, at 2389.

57 Id. Katyal illustrates this point by explaining that “since the penalty for one, two or even three more murders is the same, the penalty itself does not work to provide additional deterrence.” Id. at 2395. Katyal goes on to emphasize the importance of placing crimes on a consistent scale: “a government that punishes very harmful activity lightly and less harmful activity strongly will encourage the commission of the harmful activity, thus imposing a net harm on society. Id. at 2423.

58 See Id. at 2416.
between violation of a regulatory law and incarceration. For that matter, there is no obvious connection between the violation of any law and incarceration (“unless the criminal is a kidnapper”).

Further, there is nothing “magical” about the relationship between a particular crime and the number of years an offender is sentenced to serve. This approach is not proportional in any meaningful sense. Despite the fact that the United States claims to value proportionality in sentencing so highly, we have inexplicably deemed incarceration a one size fits all punishment. We currently incarcerate more than two million of our own citizens. This gives the United States the “highest rate of incarceration in the Western world by a factor of five.” At best, these statistics evidence a “failure of imagination” when it comes to sentencing – particularly as it relates to regulatory offenders.

Another distinct problem with criminalizing regulatory violations is the fact that the sheer volume of crimes available to prosecutors makes consistent prosecution an impossibility. As a

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59 Rubin, supra note 39, at 28.

60 Robinson and Darley, supra note 5, at 34.

61 Weems v. United States, 217 US 349 (1910) (arguably establishing a requirement that punishments in the United States be proportional under the Eighth Amendment).


63 Rubin, supra note 39, at 17.

64 Robinson and Darley, supra note 5, at 14.

65 Though arguably the least in need of isolation, an “increasing proportion of the prison population consists of property offenders” and “persons who are serving time for … simple possession.” Rubin, supra note 39, at 58.

66 Though it has been argued that the solution is simply not to prosecute all crimes, one must ask what purpose it serves to have rules on the books if prosecution is undesirable. See Laufer, supra note 9, at 1315, See also Kent Greenawalt, The Natural Duty to Obey the Law, 84 Mich. L. Rev.
result, discriminatory enforcement seems inevitable.\textsuperscript{67} Finally, this penchant for criminalization is particularly problematic when it becomes a vehicle for politicians to placate constituents and win elections.\textsuperscript{68}

As observed by Erik Luna, the only threadbare tie many regulatory laws have to legitimacy is “their ratification by a democratic entity.”\textsuperscript{69} Often, the relationship of these laws to the prevention of any real harm is so attenuated as to leave many individuals unable to identify the harm at all. There appears to be a trend towards criminalizing actions that involve a slighter and slighter risk of harm. Of course, there is no real debate as to the desirability of preventing truly inevitable harm where possible.\textsuperscript{70} However, the accuracy with which the legislature is capable of predicting and judging which risks are acceptable and which are intolerable seems questionable. Although no one is capable of predicting the future, this is essentially what many regulatory laws purport to do.\textsuperscript{71}

Where should the legal system draw the line? We criminalize driving while under the influence of alcohol because it carries a substantial risk of harm, but studies have shown that driving while drowsy carries a similar risk of harm.\textsuperscript{72} At some point, the

\textsuperscript{67} Beale, \textit{supra} note 51, at 758 (“the existence of rarely-used statutes invites (if not demands) selective enforcement and unequal treatment of similarly situated defendants.”)

\textsuperscript{68} It appears that a great deal of recent criminalization has been the result of “crime de jour – legislation drafted in response to whatever crime is the focal point in the media – even if that offense is already defined and punished harshly and effectively under state law.” Beale, \textit{supra} note 51, at 755. \textit{See also} Luna, \textit{supra} note 8, at 720 (“Appearing tough on crime wins elections regardless of the underlying justification.”)

\textsuperscript{69} \textit{Id.} at 723

\textsuperscript{70} Slobogin, \textit{supra} note 44, at 122 (arguing that “individual prevention should become the predominate goal of the criminal justice system.”)

\textsuperscript{71} \textit{Id.}
level of culpability – as opposed to the supposed risk of harm - involved in a given action must enter into the criminalization equation.

With no readily ascertainable moral or utilitarian justification, individuals feel no congruence with the normative assumptions upon which many of these regulatory laws rely. Edward Rubin illustrates the absurdity of attaching condemnation to many actions which regulatory laws forbid by asking the following question: “We have strong intuitions about the government prohibition against murder, but do we have similar intuitions about the government prohibition against driving a taxicab without filing Form C8705.4?”73 A concrete, if extreme, example of such absurdity can be found in Hedgepath v. Washington Metropolitan Area Transit Authority. 74 This case revolved around a teenager who was arrested for eating a single french fry on the metro in D.C. Though the law which enabled this arrest has since been voluntarily modified, the law was upheld on appeal, painting a vivid picture of regulatory law run amuck. 75 Less radical examples involve criminal penalties for speeding,76 talking on a cell phone while

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72 In Highway Safety, Survey: Officers Agree Drowsy Driving is an Overlooked Traffic Safety Issue, A Publication of the Governors Highway Safety Association, Vol. 7, No. 3. (February 2005) http://www.ghsa.org/html/publications/directions/pdf/2005/022005_directions.pdf (reporting that “almost nine of ten officers” have “stopped a motorist they thought was intoxicated, but who was actually drowsy,” while “89 percent of police officer agree that drowsy driving is as dangerous as drunk driving,” and, objectively, “71,000 persons are injured in drowsy driving crashes” annually.).

73 Rubin, supra note 39, at 32. (“People lose confidence in regulators and governments if they are required to comply with technical rules that do not appear to relate to any substantive purpose.”)


75 The D.C. Court of Appeals suggested that the law allowing this arrest was perhaps foolish, but not impermissible under the Constitution. Hedgepath, 586 F3d at 1148.

driving\textsuperscript{77}, refusing to wear seatbelt while driving,\textsuperscript{78} neglecting to ensure that children who are passengers in the car are wearing seatbelts,\textsuperscript{79} purchasing marijuana,\textsuperscript{80} and the “unauthorized use of the image of ‘Smokey Bear’”.\textsuperscript{81}

In the absence of any real legitimacy, the legal system might rely upon fear of social disapproval and punishment to ensure compliance. However, when it comes to regulatory law, this reliance is ill-placed. There is little social pressure to enforce these laws since much of the activity criminalized under regulatory law is not recognized as harmful.\textsuperscript{82} Further, punishment is rarely severe enough to truly encourage compliance.\textsuperscript{83} Although there are few empirical studies currently relating to compliance with regulatory laws, “a growing body of anecdotes and studies… suggest that many rules ‘on the books’ fail to elicit sufficient compliance to achieve


\textsuperscript{78} See, e.g., Tex. Trans. Code Ann. §7, Subtitle C, Chapter 454.413, making it a misdemeanor to drive without a safety belt.

\textsuperscript{79} See, e.g., Id. at §7, Subtitle C, Chapter 545.412 (making it a misdemeanor to fail to secure a child in a seat belt).


\textsuperscript{81} 36 CFR Part § 271.1 (2009); See also Beale, supra note 51, at 761.

\textsuperscript{82} See Greenawalt, supra note 65, at 58. (“The claim is that, if one is otherwise morally permitted to exercise a moral right, the improper intervention of that law cannot cancel the moral permissibility of that exercise.”)

\textsuperscript{83} There appears to be a disconnect between the legislature’s willingness to enact regulatory laws and its willingness to create sanctions that will ensure the effectiveness of these statutes. Although this article has already established the overall ineffectiveness of criminal punishment when it comes to achieving deterrence, ambivalence on the part of law-makers leaves regulatory criminal law in a “deterrence trap.” Christine Parker, The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement, 40 Law Soc’y Rev. 591, at 591 (2006). This means that “penalties for noncompliance will either not be big enough to deter rational misconduct or they will be so large that they exceed the capacity” of the individual to pay or the willingness of society to inflict the punishment. Id. at 591-592.
their objectives.”\textsuperscript{84} With some regulatory laws, it is perhaps the sheer complexity of requirements that undermines compliance. For example, in the pursuit of quality care for the elderly, the United States has over 500, detail-oriented federal nursing home standards, making full compliance a practical impossibility.\textsuperscript{85} With many regulatory laws, however, conscious refusal to comply may be the true obstacle to compliance. For example, it has been observed that prohibitions against using cell phones while driving are largely ignored by motorists.\textsuperscript{86} Similarly, there have been studies to suggest that the majority of drivers ignore speed limits.\textsuperscript{87} These studies have prompted the observation that “motorists drive at speeds that they feel are appropriate, apparently independent of the posted speed.”\textsuperscript{88} When it comes to the use of illegal drugs, it has been estimated that approximately five percent of individuals who comply with

\textsuperscript{84} OECD, \textit{supra} note 1, at 10.

\textsuperscript{85} \textit{Id.} at 18. Compare to Australia, which has only 31 comparable standards, all “broad” and “results-oriented.” \textit{Id.} Interestingly, inspectors have found that care for the elderly is consistently more reliable in Australia than in the US. The simple explanation seems to be that “the pursuit of reliability in US regulations produced so much complexity and detail that they reduced the performance as a whole.” \textit{Id.}


\textsuperscript{87} One study in Michigan showed that 62\% of drivers exceeded the speed limit in urban areas, while 89\% of drivers exceeded the 55 mile per hour speed limit on the fringes of rural or urban areas. Transafery Incorporated, \textit{supra} note 85.

\textsuperscript{88} \textit{Id.} (citing Michael Thornton and Richard W. Lyles, \textit{Traffic and highway Safety: Occupant Restraints, Safety, Management and Emergency and Commercial Vehicles}, Transportation Research Record No. 1560, (1996)).
current laws do so, not out of belief that the laws are legitimate, but out of fear of being caught and punished. 89 As explored earlier in this article, legal deterrence is an unreliable enforcement mechanism. 90 Given the many reasons deterrence fails, it seems inevitable that many in this five percent, with no value congruence and thus no perception of legitimacy relating to drug laws, will at some point, break these laws and experiment with illegal drugs.

To some extent, that law itself carries a legitimizing force and is capable of gradually transforming the shared intuitions of society. 91 This is in tension with the notion that passing a law does not, in and of itself, create a social norm. It is not this article’s intention to spiral into an unanswerable chicken-egg debate (which came first, the intuitions or the law?). However, it is worth considering that perhaps the answer is neither. It seems possible that social intuitions and the law are continually influencing one another, so that each must keep pace with the other in order to maintain maximum legitimacy. Regulatory laws of the ilk previously discussed seem likely to disturb this delicate balance. To return to the earlier analogy of a bank, too many such regulatory laws passed too quickly could be a recipe for a bankruptcy of legitimacy. 92 As succinctly put by Paul H. Robinson and John M. Darley, “society is weakened every time a law

89 Tyler and Darley, supra note 15, at 713.

90 See, supra note 45 and accompanying text.

91 See, supra note 31 and accompanying text. See also Katyal, supra note 41, at 2388. (“… criminal law exerts a strong, and sometimes unconscious, force on people’s preferences.) See also Robinson and Darley, supra note 19, at 471, claiming that “the criminal law influences the powerful social forces of normative behavior through its central role in the creation of shared norms.” Id.

92 See Robinson and Darley, supra note 5, at 23. (observing that, “in communities in which the liability and punishment rules regularly deviate from the consensus of the community member, those criminal law rules are diminished in their moral credibility.”) See also Adam L. Alter and John M. Darley, Transgression Wrongfulness Outweighs Its Harmfulness as a Determinant of Sentence Severity, 21 Law & Hum. Behav. 319, at 332 (2007) (“legal codes that ignore the principles of wrongfulness tend to undermine the moral force of the criminal law.”)
is passed that large numbers of reasonable, responsible citizens think is stupid.”^{93} The same article goes on to elaborate on the process that might easily lead to bankruptcy of the legal system:

Initially the reactions may be limited to conclusions about the idiocy of the specific legal rule that offends the community’s morality, but as …police and the courts, are mobilized to enforce the senseless laws… there develops a generalized contempt for the system in all its aspects and a generalized suspicion of all its rules.”^{94}

As a result, it seems vital that the force of the criminal law be brought to bear only when actions are “so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict.”^{95} Though many regulatory laws are no doubt intended to improve life for individuals within society, there has often been a distinct failure to ground these laws in social intuitions.^{96} The resulting inability of the law to utilize the community in enforcement of regulatory laws is perhaps at least partly responsible for a lack of compliance.

V. How Restorative Justice Might Interact with Regulatory Laws

Restorative justice is more likely to secure compliance with regulatory laws than the current retribution-focused system, which has failed to generate legitimacy and relies on a dilapidated deterrence model as a precursor to the cookie-cutter punishments of incarceration or monetary fines. If restorative justice at first seems ill-suited to regulatory law, it is perhaps the result of a fundamental lack of recognized legitimacy as connected to many regulatory laws. Because the content of a restorative approach is primarily dictated by offender, victim and

\[^{93}\text{Robinson and Darley, supra note 5, at 28.}\]
\[^{94}\text{Robinson and Darley, supra note 5, at 24.}\]
\[^{95}\text{Luna, supra note 8, at 714. See also, Alter and Darley, supra note 91, at 328 (“…if a perception of injustice actually exacerbates wrongdoing, then a punishment system that fails to reflect people’s conception of justice may be worse than an ineffective system.”).}\]
community, it may accurately be said to reflect the intuitions of society. Restorative justice then, has the capacity to detect the presence or absence of legitimacy. At the same time, there may also be room for a restorative approach to influence perceptions of legitimacy through education of social intuitions. It seems possible that restorative justice could be uniquely effective in a regulatory setting, restoring both “the capacity and willingness to comply” after a violation has been committed. 97 By giving the community a voice in the form and content of punishment, restorative justice simultaneously assures full comprehension of the harm an offender has caused and secures future accountability.

A. Hurdles to application of restorative justice in a regulatory setting

As already established, the first step in a restorative approach requires the offender to acknowledge wrongdoing. When it comes to regulatory crimes, this acknowledgement is problematic for several reasons. First, it is difficult to imagine a genuine acknowledgement of wrongdoing in the absence of a genuine recognition of harm caused by one’s actions. Many regulatory infractions do not actually result in identifiable harm. In fact, regulatory crimes are generally “victimless” in the sense that directly wronged individuals do not often present themselves. 98 When no individual person can accurately be called the victim of a regulatory crime, harm seems amorphous at best. Regulatory laws are often passed with an eye towards preventing harm to an identifiable victim, but this prevention scheme is separated from any actual individual by dozens of contingencies.

Still, there are at least two potential “victims” of every regulatory crime. The first is the community as a whole. Assuming that every law is endowed with some community support

97 OECD, supra note 1, at 41.

98 Cf Gabbay, supra note 11, at 427 (describing the crimes we normally associate with restorative justice and making amends as crimes where, “there is an identifiable person who is the offender, another identifiable person who is the victim, and a victimizing act which infringes the latter rights.”)
simply by virtue of having been passed in our democracy, violation of any law is an affront to society and “the victim is collective.”\(^9\) The second potential victim of regulatory crime is the state. If the law is a manifestation of the power of our government, then breaking the law is essentially a challenge to this power. As a result, there is a sense in which “every crime is fundamentally an act of political rebellion.”\(^10\) The harm therefore – if we are willing to acknowledge it as such - is not so amorphous as we might initially imagine:

> Just because the victim might be, in some cases, the collectivity or the popular sovereign does not mean that the suffering endured or the insult to the legitimacy of the political decision-making regime is not real.\(^11\)

The concrete harm involves undermining the state and, by extension, the society which sanctions the state.

Though harm may genuinely have been suffered by the community and the state, this does not mean that the offender (or the community, for that matter) will automatically recognize this harm. Some form of education may be necessary in order to convince the both the offender and the community that this harm exists. Even assuming that harm is acknowledged by a regulatory offender, it is one thing to acknowledge the state and community as victims and another to assume a remorseful attitude toward the victimization of these entities.\(^12\) However, this penitent attitude is integral to the success of restorative justice. In fact, it has been suggested

\(^9\) Markel, *supra* note 36, at 2199. This is an especially convincing argument when the regulatory offense involves tax fraud. If the violation specifically prevented money from being distributed to schools, roads, and welfare departments, it is easy to paint the community as a victim. This is more difficult when the offense involves speeding, for example.

\(^10\) *Id.* at 2200.

\(^11\) *Id.* at 2200-2201.

\(^12\) To use an illustration, it is one thing to realize that the power of the state has been subtly undermined by driving 70 mile per hour in a 55 mile per hour zone, but it is quite another to muster contrition as to this act.
that restoration is only possible “on the condition that there has been some relevant change of heart or character in the wrongdoer.”

Restorative justice may have the capacity, not only to illuminate harm, but to convince regulatory offenders that they should feel badly, thereby generating remorse. Restorative justice has been proven capable of such education, with victim-offender mediation regularly employed to “educate the accused about the wrongfulness of his conduct.” However, the question remains whether utilizing restorative justice in this manner is feasible and desirable in a regulatory context.

A. Restorative Justice as Education

Given its past success in “promoting respect for the law,” restorative justice could be successful in fostering respect for regulatory laws. Specifically, restorative justice could be used to educate society as to the wrongfulness of regulatory laws by associating the consequences of violation with risk of harm normally associated with traditional malum prohibitum crimes or even the harm associated with malum in se crimes. If this education could convince society that harm is inherent in the commission of certain activities prohibited by regulatory laws, value congruence resulting in a perception of legitimacy may follow. Ideally, this would ultimately encourage individual compliance. Despite this possibility, there are lingering questions regarding the use of restorative justice in order to achieve education.

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103 Laufer, supra note 9, at 1316. Laufer goes on to explain that forgiveness should not be offered when no change is evidence in the offender. To offer restoration without remorse on the offender’s part would be to “show a failure of self-respect by saying that the wrong one suffered in the first place was not significant after all.” Id. This is particularly dangerous when the victim is the state and the consequence of a failure to punish crimes is potentially anarchy.

104 Meredith J. Duncan, Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex, 42 Wake Forst L. Rev. 1087, 1133 (2007).

105 Luna, supra note 8, at 797.
1. Is Utilization of Restorative Justice for Education Desirable?

There is perhaps a thin line between education and indoctrination. Education carries the connotation of sharing all of the facts so that the target can make an informed decision. Indoctrination implies inundation with a particular point of view until it is accepted by the target. Theoretically, our society is relatively comfortable with the former and vehemently opposed to the latter. In the United States, education is not the traditional realm of the legal system. We are historically uneasy with the idea of a legal system setting an agenda for society to follow, preferring to think that “it (is) the people who are supposed to instruct the government” and not vice versa. Furthermore, it is a hallmark of our legal system that laws are concerned only with securing outward compliance and not with forcing individuals to profess inward agreement with any law. Still, one might argue that education campaigns enter the realm of indoctrination more often than we realize.

The Drug Abuse Resistance Education (D.A.R.E.) anti-drug campaign is a prime example. Prior to our current drug laws, there was not necessarily any social intuition against the use of drugs. In fact, in the early 20th century, there were on the open market “all manner of potions, elixirs, and other products, including perhaps most famous, Coca-Cola, which openly contained opiates or cocaine and often in quite large doses.” As demonstrated by the failure of Prohibition, it was almost certainly not simply the passage of anti-drug laws that

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106 Rubin, supra note 39, at 43.

107 See Byrd, supra note 22, at 180. (arguing that the law is “intended to guarantee actual compliance and not to persuade the actor that he ought to (follow the law) because it is the right thing to do.”)

108 See Rubin, supra note 39, at 58.


110 See, supra note 31 and accompany text.
created broad, social opposition to drug-use. Rather, concerted education campaigns accomplished this task. The D.A.R.E. Program,\textsuperscript{111} bearing a “just say no” to drugs message, targeted children, utilizing popular celebrities\textsuperscript{112} and catchy slogans.\textsuperscript{113} Far from offering children an even-handed presentation of the pros and cons of drug use, these campaigns were designed specifically to “label drug use as morally wrong.”\textsuperscript{114} These campaigns consciously facilitated a perception that drug laws were congruent with social intuitions, linking drug use with basic “physical aggression against others”\textsuperscript{115} and oneself. It seems likely that this perception, rather than the mere existence of anti-drug laws, is responsible for a great deal of compliance with anti-drug laws.\textsuperscript{116}

Based on the above description, it does not seem outrageous to suggest that the “Just Say No” campaign is an amalgamation of education and indoctrination. Never-the-less, there was a time when the D.A.R.E. Program could be found in 80% of the schools in the United States.\textsuperscript{117}

\begin{thebibliography}{99}
\item An anti-drug music video entitled “Stop the Madness” was sponsored by the Reagan administration in the 1980’s and features Nancy Reagan Casey Kassem, David Hasselhof, Arnold Schwartzenegger, Whitney Houston among other celebrities. The video can currently be viewed at: http://www.youtube.com/watch?v=Z5zJvX3pIY4. (accessed May 1, 2009)
\item See Drug Alcohol Rehab, Slogans Against Drugs, (2005). http://www.drugalcohol-rehab.com/slogans-against-drugs.htm Particularly recognizable slogans includes, “Drug Free is the way to be,” “I’m above the influence,” and “This is your brain … this is your brain on drugs. Any questions?” Id.
\item Tyler and Darley, supra note 15, at 728.
\item Robinson and Darley, supra note 5, at 57
\item The effectiveness of D.A.R.E. in particular has been widely questioned in recent years. See Drug Reform Coordination Network, A Different Look at DARE, Does DARE work? http://www.drcnet.org/DARE/section5.html
\item Grindeland, supra note 110.
\end{thebibliography}
This begs consideration of whether our society does, in fact, find indoctrination acceptable under some circumstances. Particularly when the subjects are adults, capable of freely accepting or rejecting the substance of this indoctrination, the use of minor coercion is not necessarily shocking to our sensibilities. As observed by Stephen A. Gardbaum, some level of coercion is inherent within our legal system: “[I]f the mere lack of consensus triggers the necessity of coercion, then coercion is involved every time anyone disagrees with the state over any matter.” 118 Attempting to convince this person of the legitimacy of a particular law is not inherently objectionable. Perhaps such an attempt only becomes objectionable when it refuses to accept failure as an option, continuing its onslaught until it obtains conformity.

The most effective indoctrination can be categorized as pure coercive indoctrination, involving “isolation, destruction of the preexisting self, and construction of a new, indoctrinated self.” 119 Without these steps, indoctrination may ultimately fail. However, “as a moral and political matter,” our “modern liberal democracy” is relatively comfortable with this failure. Many have argued that the D.A.R.E. program was such a failure, falling short of its goal to secure consistent compliance with anti-drug laws. However, this lack of consistent compliance does not necessarily mean that D.A.R.E. and similar efforts were futile. D.A.R.E. was ultimately successful in providing a longstanding justification for anti-drug laws, allowing many to recognize congruence between these laws and their own intuitions. Therefore, while statistics may challenge the overall effectiveness of D.A.R.E. in preventing drug use, this program at least managed to instill a sense of legitimacy in anti-drug laws where little legitimacy existed before.

The level of coercion which would be required for restorative justice to instill this


119 Robinson and Darley, supra note 5, at 54.
same sense of legitimacy in regulatory laws certainly need not rise to the level of pure coercive indoctrination. After-all, some level of coercion is necessary in order for restorative justice to function. The reality is that “very few criminal offenders who participate in restorative justice processes would be sitting in the room absent a certainly amount of coercion.”\textsuperscript{120} Still, it is desirable for restorative justice to actively guard against crossing the line into pure coercive indoctrination.

2. \textbf{Is it Possible to Utilize Restorative Justice in Educating Society?}

Given the centrality of community involvement to restorative justice and the importance of socially recognized legitimacy, the first efforts at education must target society in general. Indeed, recognizing the importance of social consensus when it comes to punishment, our retributive approach to justice already seeks to utilize the law in “shap(ing) societal tastes through stigma, lore and a host of other methods.”\textsuperscript{121} Unified societal tastes are perhaps even more important in a restorative approach. If members of society do not see themselves as the collective victim of certain regulatory crimes, restorative justice for those crimes cannot proceed, regardless of any acknowledgment of wrongdoing by individual offenders. There would be no purpose to the restorative process if the need for restoration were unrecognized by society. Where the law on its own fails to secure this recognition regarding regulatory crimes, restorative justice appears well situated to draw the community itself into the process, transforming social intuitions from within. The voluntary efforts of individual members of society are much more likely to spur change than the raw power of the state as enforcer. Persuading influential members

\begin{footnotesize}
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\item[120] Braithwaite, \textit{supra} note 46, at 434.
\item[121] Katyal, \textit{supra} note 41, at 2443. In this way, the legal system seeks to establish normative expectations for appropriate punishment in given circumstances, avoiding potential turmoil. \textit{See} Tyler and Darley, \textit{supra} note 15, at 732 (“A conflict between the victim and the community and the state occurs when the victim and/or community feel that the sentence given for the crime is not morally correct”).
\end{enumerate}
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of the community is more likely to draw consensus than simply incarcerating delinquent members of the community. Instruction from the community almost undoubtedly carries greater influence than instruction from the anonymous legal system:

The moral authority of our most cherished institutions comes from their voluntary nature: the value of advice from a priest, a teacher, or a loved one depends in large part on the fact that we are free to ignore it. Therefore, education of society should be prioritized. It is only the success of this effort which will make restorative justice possible in a regulatory setting.

Even in a society without reservations regarding the use of indoctrination, the success of such educative efforts would not be a foregone conclusion. With our unwillingness to resort to pure coercive indoctrination, the chances of success are perhaps even more dubious. Still, even small efforts to educate society as to the content and purpose of regulatory laws could assist in securing value congruence with the legal system, making restorative justice possible. It is widely recognized that compliance is much more likely when “laws are accompanied by information campaigns to ensure that they are brought to the notice of and made comprehensible to the target group.” Such information campaigns highlight the harm allegedly caused by

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122 Such community members and institutions include (but are not limited to), “conscientious parents … proud teachers … neighbors, pastors, coaches, scout leaders, and camp counselors.” Roche, supra note 7, at 343.

123 Hoffman, supra note 108 at 1478.

124 Robinson and Darley, supra note 5, at 56. “Even using a method as extreme as coercive indoctrination, one can fail to permanently separate a person from his preexisting beliefs and values.” Id.

125 Robinson and Darley, supra note 19, at 476. (“To be maximally effective, the legal system must publicize why these kinds of conduct lead to outcomes that are sufficiently damaging to be criminalized.”)

126 OECD, supra not 1, at 7. See also Tyler and Darley, supra note 15, at 728:
regulatory crimes and, as previously discussed, the perception of value congruence is enhanced when individuals can be persuaded that the prohibited action will inevitably lead to some detrimental harm. Two exemplary information campaigns merit at least cursory exploration.

First, “Click it or Ticket” campaigns encourage society to recognize driving without a seatbelt as harmful. State regulatory laws requiring passengers to “buckle up” were once widely viewed an unnecessary restraint on liberty, with a 1977 Gallup poll stating that 78% of respondents actively opposed such laws. However, by 2004, a Harris Opinion Poll reported that 80% of respondents supported the enforcement of seat-belt laws. With increased support has come increased compliance. The National Highway Traffic Safety Administration reports that, when data was first collected, in 1994, seatbelt use was below 60%, while the most recent data, from 2007, places seat-belt use at 82%. There is reason to think that this shift in support and compliance is as least partly the result of “Click it or Ticket” campaigns, which attempt to connect lack of seatbelt use with increased fatality in motor vehicle accidents. Through “television, radio, print media, and billboard advertisements,” the “Click it or Ticket”

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The point of each is that the public may actually view the operations of legal authorities as much more consistent with public morality than it believes. If so, it is not necessary to change the law, it is only necessary to educate the public about what the law actually is. This will bring the law into harmony with public views about what is right, without any actual changes in the law. Id.


130 Glassbrenner, *supra* note 127.
campaign seems to have experienced success in drawing this connection and thereby convincing Americans of the existence and seriousness of potential harm associated with non-compliance. The National Highway Transformation Safety Administration reports that one particular “Click it or Ticket” campaign, conducted in eight southeastern states, was single-handedly responsible for increasing seatbelt use in those states by 9 percent. With this campaign paving the way, it is easy to imagine the violator of a seatbelt law acknowledging wrongdoing – particularly if the violation were to involve failing to ensure that children in the car were wearing seatbelts. This acknowledgment would make a restorative approach to such violations possible.

Second, Mothers Against Drunk Driving (MADD) has been extraordinarily effective in encouraging society to recognize drinking and driving as harmful. In the first half of the twentieth century, public concern over drinking and driving was virtually non-existent. Founded in 1980, MADD has “generally been given credit for changing American attitudes towards drinking and driving” by linking the intoxicated operation of a motor vehicle with


133 See Insurance Institute for Highway Safety, Child Restraint Laws, March 2009 http://www.iihs.org/laws/ChildRestraint.aspx. This webpage depicts a chart, explaining the seatbelt laws in every state relating to children and demonstrating that it is illegal in every state for children to ride in cars without safety belt. Id.

134 See James C. Fell and Robert B. Boas, Mothers Against Drunk Driving (MADD): The First 25 Years, Taylor and Francis Group, Pacific Institute for Research and Evaluation, 196 (2006). http://www.madd.ca/english/research/madd_canada_first_25_years.pdf. This lack of public concern is far from surprisingly considering the fact that the United States was a society in which drinking was a favorite pastime and in which alternative public transportation was generally lacking.” Id.
drastically increased likelihood of accident and fatality. Perhaps most effectively, through television and print campaigns, MADD has managed to cast the victims of these fatalities as children.\textsuperscript{136} In the year MADD was founded, there were approximately 30,000 alcohol-related traffic deaths\textsuperscript{137}, by 2007 this number had decreased to 12,998.\textsuperscript{138} The clear implication is that compliance with laws prohibiting drunk driving has increased in these years. At least partly as a result of MADD’s efforts to paint drunk driving as harmful to innocent individuals, there is evidence that offenders often acknowledge wrongdoing when caught violating drunk driving laws – even when no accident has actually taken place.\textsuperscript{139} This makes restorative justice possible for such regulatory violations. In fact, there currently exists at least one such program, which utilizes “drunk driving conferences” to assist the offender in making amends.\textsuperscript{140}

As both “Click it or Ticket” and MADD demonstrate, it is possible to educate society’s intuitions regarding the existence of harm associated with particular actions. It could be argued that the resources necessary for such widespread persuasion are prohibitive, making such sweeping campaigns unfeasible for most regulatory laws.\textsuperscript{141} However, in our age of information technology, this argument is unconvincing. The government could easily publish straightforward justifications for laws at no cost on a centralized, virtual blog. Similarly, there would

\begin{itemize}
\item \textsuperscript{135} Id. at 195
\item \textsuperscript{136} Id. at 200
\item \textsuperscript{137} Id. at 195
\item \textsuperscript{138} Mothers Against Drunk Driving (MADD) Website, http://www.madd.org/Drunk-Driving/Drunk-Driver/Statistics.aspx
\item \textsuperscript{139} See Braithwaite, supra note 46, at 111
\item \textsuperscript{140} Id.
\item \textsuperscript{141} See Robinson and Darley, supra note 19, at 476. (“Realistically, the legal system cannot constantly generate public understanding of why each specific prohibited act is wrong.”)
\end{itemize}
little expense associated with internet publication of videos, perhaps illustrating the effects of non-compliance with specific regulatory laws. Greater cooperation between the government and news media could also make the justifications behind these laws easier for society to grasp. Moreover, increased coordination with non-profit organizations such as the Ad Council could produce public service announcements geared directly towards impending regulatory laws.\textsuperscript{142} Such efforts would hardly require the dedication of prohibitive resources, but would still reach a wide audience.

Of course, exclusive use of these education campaigns assumes the involvement of society in the legal system only after the law has been passed.\textsuperscript{143} It may be preferable to involve the community during the drafting process, thereby minimizing the work that will need to be performed by these campaigns. Granted, our republican system allows society to choose the individuals who are directly involved in drafting these laws. However, it may be productive for these same constituents to take a more active role in the drafting process itself. At the very least, it may be more effective for “code drafting (to be) done in public with an eye to educating and involving the community.”\textsuperscript{144} The Organisation (sic) for Economic Cooperation and Development suggests that it might be desirable for code drafting to “consist mainly of interactive working methods between the regulators and the regulated.”\textsuperscript{145}

\textsuperscript{142} Ad Council Website, \url{http://www.adcouncil.org/}. See also, “The More You Know” website, \url{http://www.themoreyouknow.com}

\textsuperscript{143} It should be noted that MADD has been at least partly responsible for the passage of many drunk driving laws. Though the organization is being used in this article to illustrate a campaign which successfully affected public perception of regulatory laws, it could just as easily be used as an illustration of a grassroots organization which has been successfully involved in the drafting of legislation. See MADD, \textit{supra} note 138.

\textsuperscript{144} Robinson and Darley, \textit{supra} note 19, at 489.

\textsuperscript{145} OECD, \textit{supra} note 1, at 59.
3. Is it Possible to Utilize Restorative Justice in Educating Individual Offenders?

Neither constituent involvement in code drafting nor information campaigns will succeed in convincing every individual of the legitimacy of a given regulatory law. However, as previously demonstrated, fear of social disapproval is an extremely effective proxy for legitimacy. This is why social education is a pre-requisite to successful restorative justice. If educative efforts could succeed in convincing a significant segment of society that a given regulatory law is legitimate, individual compliance would theoretically increase simply by virtue of social pressure. Moreover, where compliance fails, the existence of a social norm in congruence with the law would offer some foundation for the introduction of restorative justice, whereby efforts to educate the individual offender could commence.

A. Guilt v. Shame

The use of guilt and shame are both ways in which the existence of wrongdoing has historically been impressed upon an offender. The distinction between the two, though crucial, may not be immediately apparent. Shaming is public, “exposing the offender to public view and heap(ing) ignominy upon him in a way that other alternative sanctions to imprisonment, like fines and community service, do not.”\(^{146}\) As an example, a shaming punishment might require an offender to wear a sign broadcasting his crime. Guilt, on the other hand, is private, “distinguish(ing) between the wrongdoer and the wrong.”\(^{147}\) An example of a guilt-inducing punishment would be requiring an offender to listen to stories of individuals who have been harmed by similar crimes.

Because shaming punishments were initially “designed to reconstitute the injured

\(^{146}\) Markel, supra note 36, at 2171.  

\(^{147}\) Id. at 2178. Markel distinguishes the two further, explaining that “guilt is local” while “shame is global” Id. Guilt has also been described as more “personal” than shame. Laufer, supra note 9, at 1309.
sovereignty of the Crown and to restore that sovereignty by making it spectacular,” it might initially appear that shame-inducing methods would be most effective for regulatory crimes.\footnote{Katyal, \emph{supra} note 41, at 2451.} Certainly, utilizing shame would be the most effective means to validate the power of the state following a regulatory infraction. However, there are at least two reasons why this article will argue that shaming punishments are actually less attractive than guilt-inducing punishments. First, shaming punishments tend to be purposefully demeaning.\footnote{Richard S. Frase, \emph{Book Review: Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States…} 36 Geo. Wash. Int’l L. Rev. 227, 231 (2004).} With our modern sensitivity to humanitarian concerns, there is something inherently troubling about the idea of punishment “aimed at humiliating the offender by degrading the offender’s status.”\footnote{Markel, \emph{supra} note 36, at 2162.} Yet, this degradation is exactly what shaming punishments seek to accomplish. There are uncomfortable parallels between such degradation and the “destruction of the preexisting self” sought to be accomplished by extreme forms of indoctrination akin to coercive indoctrination.\footnote{Robinson and Darley, \emph{supra} note 5, at 54.} Having already established that such methods are beyond the self-imposed limits of our society, it seems preferable that we avoid the most extreme (and thus most effective) shaming mechanisms.

The second reason why guilt-inducing methods may be preferable to shaming is simply that shaming is potentially counter-productive. Rather than ushering the regulatory offender into the restorative process, shaming may push the offender away from the community and towards additional crimes. The degradation associated with shaming punishments is less likely to result in acknowledgment of wrongdoing than it is to impose long-lasting stigma upon the offender. It stands to reason that this offender “may capitalize on her sunk costs and increase her criminal activity.”\footnote{Because it is common for “normal people (to) avoid those who are stigmatized,”}
such methods may isolate the offender from society, mitigating the force of social pressure in securing future compliance with the law.\textsuperscript{153}

The use of guilt to spur education of the regulatory offender may be more successful in promoting the goals of restorative justice. Specifically, the utilization of guilt may push an offender toward the community, ultimately facilitating re-integration. Guilt has been described as channeling “ideals of reciprocity, decency, (and) solidarity.”\textsuperscript{154} The imposition of guilt on another person implies the existence of past and future expectations. Though an offender may have temporarily failed to meet these expectations, the very use of guilt implies hopes for future compliance, conveying that the offender is still part of the “team.”\textsuperscript{155}

Guilt-inducing methods are most easily imposed upon offenders with the force of broad, social consensus as to the blameworthiness of an offense. However, guilt- unlike shame - does not necessarily require unanimity of public opinion in order to work effectively. Shaming cannot truly occur without the complicity of the relevant community: “Thus, if being sent to the principal’s office is a badge of honor in a boy’s peer culture, no shaming will occur in that situation.”\textsuperscript{156} On the other hand, this same boy could easily experience guilt without the assistance, or even the knowledge, of his peer group. Of course, guilt might be more likely

\textsuperscript{152} Katyal, \textit{supra} note 41, at 2399. Katyal elaborates on this claim by painting a vivid picture:

… the youth who is caught for selling one vial of crack emerges from confinement as a social pariah. He internalizes that belief and avoids contact with the law-abiding world. His isolation from the lawful world leads him to keep company with other pariahs. The sub-norms of this group spreads the criminal activity that the law-abiding world punishes, and devalues the lawful alternatives that the law-abiding world celebrates.” \textit{Id.} at 2460.

\textsuperscript{153} \textit{Id.} at 2458.

\textsuperscript{154} Markel, \textit{supra} note 36, at 2179.

\textsuperscript{155} \textit{Id.}

\textsuperscript{156} \textit{Id.} at 2175.
and perhaps more pronounced if the peer group made their disapproval of the boy’s actions known.

Guilt may therefore be uniquely suited to inspiring an offender to acknowledge his own wrongdoing in a regulatory setting because, though guilt thrives on social consensus, it is not utterly dependent upon this consensus. Theoretically, guilt could be utilized sooner than shaming since shaming would require a complete shift in social intuitions prior to implementation. Guilt, on the other hand, could be implemented in the midst of an education campaign so long as the foundation for social disapproval had been adequately laid.

B. Utilizing Guilt in a Regulatory Setting

If regulatory offenders are to sincerely acknowledge wrongdoing, guilt-inducement must be offense-specific. The most effective methods will be the most carefully tailored. Examples of efforts which have successfully caused offenders to experience guilt and subsequently acknowledge wrongdoing are as varied as “sitting through a lecture, house arrest in one’s below-code apartment, watching movies” or documentaries.\(^{157}\) Although a clearly identifiable, individual victim is lacking for many regulatory crimes, this article has already established that the community and state are consistent victims of such offenses. Efforts at inducing guilt could focus on harm to the collective. Alternatively, these efforts could focus on the risk of harm to an individual victim. For example, “foreign nations have utilized conferencing for the ‘victimless’ crime of drunk driving, with the offender confronted by the potential consequences of his actions – most importantly injuring or killing another motorist or pedestrian.”\(^{158}\) Although utilization of an essentially fictitious victim could backfire,\(^{159}\) the

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\(^{157}\) Markel, *supra* note 36, at 2176. Markel elaborates with an example of a rapist, “punished, not only with a period of incarceration, but also with exposure to documentaries depicting how victims of rape or child molestation have been traumatized by such actions.” *Id.* at 2230.

\(^{158}\) Luna, *supra* note 8, at 814.
success of MADD in painting the potential victims of drunk driving as beloved sons and daughters illustrates the possible effectiveness of this strategy.\textsuperscript{160} In this same spirit, personal conversations with members of the community who have experienced harm as the result of similar regulatory offenses could be utilized. For example, an offender who was caught driving without fastening a child passenger’s seatbelt could meet with an individual whose child was injured as a result of this same offense. Interventions by individuals within the victim’s immediate community might be effective, regardless if whether these individuals have had direct experience with harm related to the regulatory offense. Such “family, school, and peer-based intentions” have proven very effective with juvenile offenders, with as high as a 75% reduction in recidivism.\textsuperscript{161} Simply knowing that individuals whom the offender respects are opposed to the behavior may elicit guilt and the desire to comply with the law in the future.

Once wrongdoing has been acknowledged by the regulatory offender, there remains the task of making amends. Again, this task should be offense-specific in order to best facilitate restoration. As already observed, making amends may present complications in the absence of a

\textsuperscript{159} When faced with potential harm, the previously described phenomenon of optimistic overconfidence makes it easy for the offender to assume such harm will never actually take place. \textit{See supra} note 42 and accompanying text. There is also danger associated with exaggerating the potential consequences of conduct. If the individual has simply failed to file a particular tax form, it would be an overstatement to claim that this single offense might cause the downfall of our welfare system. The claimed consequences of these offenses must be plausible if they are to be effective. It is therefore imperative that the harm to potential victims not be too greatly embellished. It would diminish the credibility of restorative justice to treat the theoretical or potential victims of regulatory crimes (such as the person you could have struck with your car while speeding) as on par with actual victims of other crimes (such as the individual who was robbed on the street).

\textsuperscript{160} \textit{See supra} note 138 and accompanying text.

\textsuperscript{161} Slobogin, \textit{supra} note 44, at 151. (This is when such restorative justice participants are “compared to matched control groups that receive no treatment or traditional treatment in prison.”)
definable victim. However, these complications are not insurmountable. Although assigning a white collar regulatory offender to pick up trash by the side of the road may prove successful in deterring future offenses, this assignment lacks any meaningful connection to the offense and fails to make use of the offender’s abilities. It may be more productive – for both the offender and society - if the community service involved teaching a course on corporate ethics for a predetermined number of weeks, months, or years. Conferences are another model of making amends which have functioned successfully in a regulatory setting. John Braithwaite describes conferences which have taken place in Australia and could potentially be utilized for offenders who have yet not yet actually harmed an individual victim:

… loved ones, drinking mates, and friends from work express support for the offender and her commitment to responsible citizenship. They also become key players in suggesting ideas for a restorative plan of action … Drinking mates may sign a designated driver agreement. Bar staff at the drinker’s pub may undertake to call a taxi when the offender has had too much... This instills within the community with a sense of responsibility and within the offender with a sense of accountability. With this shared burden, re-integration can successfully take place.

This is not to suggest that there is no place for traditional ideas of punishment in the context of regulatory law. Even if restorative justice were to become the primary enforcement mechanism for regulatory law, incarceration and criminal fines would still arguably be necessary as a secondary enforcement mechanism. It is perhaps only when backed by a credible retributive threat that restorative justice can function successfully. If declarations of guilt and wrongdoing were the only option, such declarations would soon ring empty. Removing the option to

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162 See Luna, supra note 8, at 814. (observing that “restorative programs may still have application to offenses without discernible victims.”)

163 Gabbay, supra note 11, at 422. (telling the story of white collar offenders who were sentenced to two years of “giving lessons on business ethics.”)

164 Braithwaite, supra note 46, at 111.
sentence the offender retributively would force the system to continually induce guilt until the offender acknowledged wrongdoing. Such methods would not only achieve disingenuous acknowledgments but would run the risk of resembling pure coercive indoctrination. However, with restorative justice and retribution functioning simultaneously, an offender could volunteer for subjection to guilt-inducement as an alternative to punitive punishment. If these methods failed or the sincerity of the offender was obviously questionable, the offender could simply revert to the retributive system. If, on the other hand, restorative methods succeeded, their voluntary nature would make sincerity and long-lasting re-integration more likely. Therefore, a robust retributive system could actually insure the success of restorative justice in a regulatory context.

VI. Conclusion

Returning to Starbucks, it seems evident that the women conversing in line failed to perceive any legitimacy associated with recent laws to prevent talking on cell phones while driving. Because the prohibited conduct carried no harm which was easily cognizable to them, they perceived no value congruence with the law. Their lack of previous conformity with the law illustrates that these women did not perceive the authority of the legal system as entitled to blind compliance. Rather, the law led them to question the very competence and value of enforcement officers. As far as these women are concerned, legitimacy has already failed on some small scale. Given their vocal re-enforcement of one another’s views and their public conversation, it seems clear that social disapproval has also failed as proxy to legitimacy. Though one woman voiced her concern over increased enforcement, the first woman’s dismissal of these efforts undoubtedly undermined the deterrent effect of such punishment, thereby effectively eliminating both common proxies to legitimacy. There is, therefore, no compelling reason for these women to abide by laws prohibiting them to talk on their cell phones while driving. If one of these women were caught violating the law, it is likely that she would treat the penalty as nothing more
than an inconvenience without ever acknowledging any true wrongdoing. Though this scenario is common-place in our current system, it is undesirable. Having laws on the books that can be dismissed so completely does nothing but undermine the legitimacy of otherwise valid laws.

To the extent that wrongdoing exists when a regulatory law is violated, this wrongdoing should be recognized. As this article has attempted to illustrated, restorative justice offers a device uniquely capable of bringing this wrongdoing to the consciousness of the community and the offender. Of course, there are certain regulatory crimes for which it becomes difficult to picture acknowledgement of wrongdoing and making amends with a straight face. The idea of an education campaign aimed at preventing the consumption of food on public transportation and movies designed to induce guilt for this offense are fodder for Saturday Night Live. In this way, restorative justice - relying to such a large degree upon community support - may serve as a barometer for the legitimacy of regulatory laws. Where the idea of restorative justice becomes laughable, this indicates that the particular law is so incongruent with current social intuitions as to make legitimacy impossible. In these cases, perhaps criminal penalties are inappropriate.

If guilt over a particular regulatory crime is impossible to imagine, then categorizing this action with murder and robbery can only “dilute the condemnatory effect of criminal liability.”

It seems preferable to retain the moral force of the legal system by eliminating the law. When penalties must exist for these actions at all, the penalties should be civil in nature. Even where guilt is conceivable, the legal system should be sensitive to the prolonged resistance of society. Legitimacy can only be created – and restorative justice can only succeed - to the extent that society allows itself to be educated. If regulatory crimes have no clearly ascertainable relationship to harm in the eyes of the community, even after education has been attempted, perhaps these crimes are nothing more than a product of over-criminalization and should be

165 Robinson and Darley, supra note 5, at 50.
repealed.