Can Soft Regulation Prevent Financial Crises?: The Dutch Central Bank's Supervision of Behavior and Culture

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Financial regulation has traditionally been "hard": national legislatures and regulators (and sometimes international bodies) require certain kinds of behavior and forbid others, on pain of business sanctions, fines, or even criminal penalties. When a financial crisis happens, the usual after-the-fact response is more hard regulation—new laws, stricter regulations, and often entirely new regulatory agencies.[1] That pattern goes back at least to the 1929 market crash that precipitated the Great Depression.[2]

But the fact that financial crises still occur is leading many observers to wonder if more hard regulation is the best way to prevent the next one.[3] However elaborate the regulatory structure, there always seem to be people in the industry willing to take the risk of getting caught to benefit themselves and their institutions. There is a growing body of opinion that what the financial world needs is a way to identify those pathological risk-takers in advance and, perhaps more importantly, to make sure that the financial institutions that employ them discover and control them. Such an approach to financial governance might be characterized as "soft" supervision:[4] rather than relying on prescribing, proscribing, and punishing specific actions, it would focus on education and persuasion (still backed up by the threat of sanctions) to encourage financial institutions to head off excessive risk-taking before it occurs.[5]

In this Article, we report on an in-depth study of the first major effort to put this theory into practice: De Nederlansche Bank's (DNB; the central bank of the Netherlands) novel initiative to promote a healthy corporate culture in the large banks that it supervises. Despite its radical originality, this initiative has been almost entirely unreported in the U.S. legal and business literatures. As with all central banks, DNB's traditional mandate has been to ensure the stability and integrity of the national financial system by promulgating and enforcing regulations and supervising

1. *See, e.g.*, Roberta Romano, *Quack Corporate Governance,* 28 REGULATION 36, 40 (2005) ("[M]ost new major securities regulation in the United States, as well as the United Kingdom, has followed stock market crashes.").

2. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1592. In fact, most of what we think of as "securities law" was a product of the 1929 crash.

3. On this point, compare the regulatory developments discussed in Part I with the sources reviewed in Part V.A.–B.

4. *See* John M. Conley & Cynthia A. Williams, *Global Banks As Global Sustainability Regulators?: The Equator Principles,* 33 L. & POL'Y 542, 569 (2011).

5. *See id.* at 564–65.

individual banks. The financial crisis of 2007–2008 prompted DNB to reassess the adequacy of that model. In response, it has expanded its supervision to include the evaluation of both individual behavior and group-level culture—"Behaviour & Culture" (B&C) —supervision. We have investigated the history and theoretical roots of B&C supervision; interviewed a large number of participants, both regulators and regulated, to understand their practical perspectives; explored the connections between B&C supervision and relevant themes in law and the social sciences; and considered the implications of B&C supervision for banking regulation elsewhere. We conclude that, while the response to B&C supervision has been generally positive, the tangible effect of its supervision remains unproven. Moreover, its relative positive reception may depend on the specific business culture of the Netherlands, which casts doubt on whether it can be exported to larger banking systems.

I. Background

Ten years after the global financial crisis of 2007–2008, we can see patterns in the approaches of Western financial regulators addressing the underlying issues that had created the crisis. Those precipitating issues included technical problems such as excessive risk-taking, often tied to excessive leverage; interconnections between loosely-regulated shadow banking and derivatives and the regulated banking industry; executive compensation systems that rewarded leverage; and the growth of too-big-to-fail financial (TBTF) institutions.[6] Consequently, most of the solutions have also been technical. Those solutions have involved increasing capital requirements; requiring "living wills" from systematically important financial institutions (SIFIs) to demonstrate to regulators that such entities could be wound down without systemic implications, as in the U.S.; or creating "single point of entry" systems for potential insolvency of cross-border financial institutions, as in the EU.[7] These efforts have been combined with a variety of central bank stress tests, restrictions on executive compensation and dividends, and regulatory requirements for convertible bonds when a firm is stressed.[8]

A second category of solutions has emphasized corporate governance reforms, a typical response after systemic corporate problems draw serious

6. The governments in the jurisdictions most responsible for, and affected by, the financial crisis have issued comprehensive reports on the causes of the crisis. For the United Kingdom, see FINANCIAL SERVICES AUTHORITY, THE TURNER REVIEW: A REGULATORY RESPONSE TO THE GLOBAL BANKING CRISIS11–50 (2009). For the United States, see FINANCIAL CRISIS INQUIRY COMMISSION, THE FINANCIAL CRISIS INQUIRY REPORT (2011).

7. *See* Steven L. Schwarcz & Aleaha Jones, *Corporate Governance of SIFI Risk-Taking: An International Research Agenda*, *in* RESEARCH HANDBOOK ON CROSS-BORDER BANK RESOLUTION 5-6, 12, 22 (Matthias Haentjens & Bob Wessels eds., 2018).

8. For a more general overview and optimistic evaluation of the regulatory responses in the affected jurisdictions, see Mark Carney, Governor Bank of England and Chair of the Financial Stability Board, Remarks at the Institute of International Finance Washington Policy Summit: What a Difference a Decade Makes (April 20, 2017). More specific regulatory detail is provided in Schwarcz & Jones, *supra* note 7, at 11, 17.

political attention. These reforms have included requirements in both the U.S.[9] and the EU[10] for SIFIs to establish risk-management committees at the board level. In the U.K., as part of its new Senior Management Regime and Conduct Regime, specified financial institutions (banks, building societies, credit unions, and large investment firms) need to establish various board committees and senior executive functions to ensure proper oversight of firm risk-taking.[11] Executive compensation systems that may lead to excessive risk in financial institutions have also been a topic of considerable regulatory interest, with different approaches being developed in the U.S.,[12] U.K., and EU.[13]

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9. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 165, 5365(h), 124 Stat. 1376 (2010) [hereinafter "Dodd-Frank"], discussed in Schwarcz & Jones, *supra* note 7, at 16 n.82.

10. *See* Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, art. 76(3), 2013 O.J. L 176/1 (complex financial institutions required to establish risk management committees composed of non-executive directors).

11. *See Senior Managers and Certification Regime: banking*, FINANCIAL CONDUCT AUTHORITY (Nov. 29, 2018), https://www.fca.org.uk/firms/senior-managers-certification-regime/banking [https://perma.cc/C82W-Q4ZN].

12. The Securities and Exchange Commission (SEC), the Federal Reserve System, the National Credit Union Administration, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Federal Housing Finance Agency were required by Dodd-Frank to jointly prescribe regulations or guidelines for large financial institutions to prohibit incentive-based executive compensation arrangements that encourage inappropriate risks or that could lead to material financial loss. Dodd-Frank, *supra* note 9, §§ 956, 5641. As of May 6, 2016, all required agencies had jointly issued a second proposal to implement section 956, prohibiting "excessive compensation" for financial institutions with consolidated assets over $50 billion, and requiring the mandatory deferral of 50-60% of incentive compensation for 3 to 4 years for a large category of "senior executive officers," and with mandatory deferral of 40-50% of incentive compensation for senior risk takers. *See generally* Incentive-based Compensation Arrangements, 81 Fed. Reg. 37,669 (proposed June 10, 2016). Whether this ever gets implemented is an open question, given indications that Congress is working to amend Dodd-Frank. As of August 24, 2018, there has been no further rule-making indicated on the SEC website taking this executive compensation rule forward.

13. As part of its Capital Requirements Directive IV (CRD IV), the European Union has instituted "sound remuneration policy" requirements for all staff within EU financial institutions, and specific remuneration requirements under Article 92(2) for highly-placed individuals whose activities could have a material effect on the financial institutions' risk profile. These requirements limit bonuses and other variable pay to no more than 100% of an individual's base pay, or 200% with shareholder approval. *See* European Banking Authority, Guidelines on Sound Remuneration Policy under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013, EBA/GL/2015/22, at 7 (2015). The relevant authorities in the U.K., The Prudential Regulatory Authority and the Financial Conduct Authority, have indicated that they construe Article 92(2) to permit different bonus and variable pay arrangements based on the size, market, and complexity of a financial institution, based on the proportionality language of 92(2), and thus that they will follow all of the Guidelines with respect to CRD IV except that of the strict limits on bonuses and other variable pay. *See PRA and FCA Statement on Compliance with the EBA Guidelines on Sound Remuneration Policies*, FINANCIAL CONDUCT AUTHORITY (Feb. 29, 2016), https://www.fca.org.uk/news/statements/pra-and-fca-statement-compliance-eba-guidelines-sound-remuneration-policies [https://perma.cc/EKR5-8KQY].

How effective these technical and governance solutions have been in producing a fundamentally sound global financial system is a matter of debate.[14] Even the most optimistic regulators, such as Mark Carney, Governor of the Bank of England and Chair of the Financial Stability Board (FSB), recognize that there is still work to be done.[15] The nature of that work, as articulated by top banking officials in Europe, the U.K. and U.S., is to ensure ethical "corporate cultures" within SIFIs, because unethical cultures have been recognized as a risk for the global financial system. Financial officials such as Carney; Bill Dudley, President and CEO of the New York Federal Reserve Bank; Christine Lagarde, Managing Director of the International Monetary Fund (IMF); Danièle Nouy, Chair of the Supervisory Board of the European Central Bank (ECB)'s Single Supervisory Mechanism (SSM); and Daniel Turillo, a former Governor of the U.S. Federal Reserve Bank Board, have all stated that globally-significant financial institutions need to change some of their fundamental ethical norms and behaviors.[16] As Carney said in 2014, "[f]undamental change is needed to institutional culture, to compensation arrangements, and to markets."[17] Ten years after the financial crisis, the New York Federal Reserve Bank is among the central players in these discursive efforts, collecting policy

14. Two former U.S. Treasury Secretaries, Larry Summers and Timothy Geithner, have expressed some doubt that the global financial system is fundamentally safe (Geithner), or that leverage levels have actually come down significantly for global systemically-important financial institutions (global SIFIs) (Summers). *See* Timothy Geithner, *Are We Safe Yet? How to Manage Financial Crisis*, FOREIGN AFF. (Dec. 12, 2016), https://www.foreignaffairs.com/articles/united-states/2016-12-12/are-we-safe-yet; Natasha Sarin & Lawrence H. Summers, *Have Big Banks Gotten Safer?* 26–30 (Brookings Papers on Economic Activity, 2016). Testing the hypothesis that systemic banks in the U.S. and around the world, and mid-sized banks in the U.S., have increased their capital and are safer, Sarin and Summers assert that "using information on stock price volatility, option-based estimates of future volatility, beta, credit default swaps, earnings-price ratios, and preferred stock yields[, t]o our surprise, we find that financial market information provides little support for the view that major institutions are significantly safer than they were before the crisis and some support for the notion that risks have actually increased." *Id.*

15. *See* Carney, *supra* note 8, at 6–7 (recognizing there is a need to bring about "cultural change," which he defines as an "improved firm culture" where top executives take responsibility for firm ethics and are held accountable when there is misconduct within their financial institution).

16. Christine Lagarde, Managing Director, IMF, Speech Given to the N.Y. Federal Reserve Bank: The Role of Personal Accountability in Reforming Culture and Behavior in the Financial Services Industry (Nov. 5, 2015); Daniel K. Tarullo, Governor, Fed Reserve Sys., Remarks at the Federal Reserve Bank of New York Conference on Reforming Culture and Behavior in the Financial Services Industry: Good Compliance, Not Mere Compliance (Oct. 20, 2014); Daniele Nouy, Chair of the Supervisory Board of the Single Supervisory Mechanism, European Cent. Bank, Remarks at the Goethe Universitat Institute for Law and Finance: Towards a New Age of Responsibility in Banking and Finance: Getting the Culture and the Ethics Right (Nov 23, 2015); *see* Mark Carney, Governor, Bank of Eng., Remarks at 2014 Monetary Authority of Singapore Lecture: The Future of Financial Reform (Nov. 17, 2014); William Dudley, President and Chief Executive Officer, Fed. Reserve Bank of N.Y., Remarks at the Workshop of Reforming Culture and Behavior in the Financial Services Industry: Enhancing Financial Satiability by Improving Culture in the Financial Services Industry (Oct 20, 2014).

17. Carney, *supra* note 16, at 9.

resources on financial firms' culture, and hosting multiple conferences to discuss reforming banks' cultures.[18]

This recognition of the need to change institutional cultures in global financial institutions is part of a regulatory development that Don Langevoort has described as a "cultural turn in compliance."[19] The Delaware Chancery Court indirectly stimulated this turn with its 1996 *Caremark* decision, which raised the specter of personal liability for directors who had failed to put in place effective legal compliance systems.[20] Since then, both civil and criminal law authorities in the United States have employed the concept of culture in settling administrative and criminal claims with corporations. Authorities have agreed to deferred prosecution in some cases, and mitigation of criminal penalties in others, in instances where the defendant company's corporate culture included apparently robust systems for ensuring compliance with the law.[21] But these examinations of culture have all occurred after the fact as part of an assessment of corporate culpability. What is new in reaction to the financial crisis is the intensive and explicit effort by regulators to shape corporate cultures prospectively.

For the most part, those regulators that have addressed culture in their post-crisis policy initiatives have sought to promote particular personal characteristics among individual board members and top executives, and to encourage financial incentives that will align with appropriate corporate behavior. This is typically done in the context of discussing corporate governance and institutional culture, such as in the U.K.'s encouragement of industry self-regulation of culture through the Fair and Effective Markets Review; or in the European Union, where regulators have identified "misconduct risk" as among systemic, macro-prudential objects of financial supervision.[22] Despite the apparent prominence of culture, these regula-

18. The New York Federal Reserve Bank's held its most recent conference on culture on June 18, 2018. *See Reforming Culture and Behavior in the Financial Services Industry: Progress, Challenges, and the Next Generation of Leaders*, FED. RESERVE BANK OF N.Y., https://www.newyorkfed.org/governance-and-culture-reform/culture-and-behavior-in-the-financial-services-industry. Its policy resources are available online (last visited Feb. 18, 2019). *See also Governance and Culture Reform: Resource List*, FED. RESERVE BANK OF N.Y.,https://www.newyorkfed.org/governance-and-culture-reform/archive [https://perma.cc/TBH6-57K4] (last visited Feb. 18, 2019).

19. Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 935 (2017).

20. *Id.* at 941 (discussing In re: Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Ct. Ch. Del. 1996)). Chancellor Allen in *Caremark* held that "only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exits—will establish the lack of good faith that is a necessary condition to liability" when employees within the corporation have been found to have violated the law. *Id.* at 971.

21. *See* Langevoort, *supra* note 19, at 943–44.

22. EUROPEAN SYSTEMIC RISK BOARD, REPORT OF EUROPEAN SYSTEMIC RISK BOARD ON MISCONDUCT RISK IN THE BANKING SECTOR 3–4, 9 (2015). The EU set up the Single Supervisory Mechanism in 2014 in reaction to the financial crisis and associated fiscal crises within certain EU states. It works together with national financial supervisors to evaluate systemically-significant financial institutions. *See* Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules

tory efforts primarily focus on individuals and individual responsibility, through government screenings of the fitness of directors and managers to take on leading roles in global SIFIS, or through efforts to address individual compensation arrangements or responsibilities within firms, such as the Senior Management Regime in the U.K.[23] and the U.K.'s comprehensive compensation regulations.[24] These and other regulations in the U.S.[25] and EU[26] would seem to have the potential to affect firm culture, and certainly suggest a different relationship between regulatory authorities and "the market," at least in regards to executive compensation. Yet they do not evidence a fundamentally new approach to financial supervision of firm culture as such.

In contrast, DNB's explicit supervision of behavior and culture at a group level is unprecedented. Although the EU has required DNB and other European central banks to subject individuals nominated for high positions to "Fit and Proper" testing for some time,[27] DNB's effort to supervise the group phenomenon of culture is wholly innovative. To initiate this

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and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010, 2014 O.J. L 225/1.

23. The Financial Services Bill of 2012 ("the Bill") in the U.K. created a new regulatory framework, which is formed by the Financial Policy Committee (FPC), within the Bank of England, responsible for monitoring and reducing systemic risk; and the new Prudential Regulation Authority (PRA), a subsidiary of the Bank of England, is responsible for regulating 1,500 banks, building societies, credit unions, insurers, and major investment firms. The PRA focuses on ensuring those institutions have sufficient capital and proper risk controls. In addition, the bill created the Financial Conduct Authority (FCA), an independent regulator of business conduct, responsible for ensuring that the relevant markets function well. It focuses on market integrity, consumer protection, and effective competition as well as issuing prudential regulation applicable to firms not prudentially regulated by the PRA. *See* Financial Services Bill of 2012, Explanatory Notes ¶ 6 (Eng.), available at: https://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0278/en/2012278en.pdf [https://perma.cc/FYC2-XM7H].

24. The FCA and PRA Remuneration Code for deposit-takers and designated investment firms is an extensive regulatory system that covers all aspects of remuneration that could have a bearing on effective risk management, including salaries, bonuses, long-term incentive plans, options, hiring bonuses, severance packages, and pension arrangements. *See generally* FCA Handbook 2017, SYSC 19D (Eng.), https://www.handbook.fca.org.uk/handbook/SYSC/19D [https://perma.cc/PQ5J-HS2Y] and http://www.prarulebook.co.uk/rulebook/Content/Part/292166/13-06-2017 [https://perma.cc/V92V-KQYD].

25. See, for example, the U.S., EU, and U.K. regulations proposed to limit executive compensation, *supra* note 13.

26. *See* Directive 2013/36/EU, *supra* note 10.

27. Fit and Proper Testing is a new procedure since the financial crisis in Europe and the U.K., where persons to be nominated for the board of directors (supervisory board or management board, in the European context), or who are to be appointed to high executive positions such as CEO, CFO, General Counsel, Chair of Supervisory Board, or Audit Committee, are evaluated by government officials for integrity and competence for the specified position. *See* De Nederlandsche Bank, You're going to be assessed: What should you expect? (2017), available at https://www.dnb.nl/en/binaries/Flyer_Youre%20going%20to%20be%20assessed_web_tcm47-340126.pdf?2018062613 [https://perma.cc/KZT8-U85V] (DNB's explanation of its procedures for Fit and Proper testing). The purpose of Fit and Proper testing is to ensure "sound and ethical leadership for financial institutions." *Id.*

program, DNB hired organizational psychologists, who then engaged in months of rigorous study of organizational behavior literature. Guided by that study, DNB then developed the underlying principles for its program. Having gained permission to launch the initiative from its own board, DNB embarked on its program to supplement traditional financial supervision with supervision of behavior and culture. We undertook to study DNB's program because of its unique approach to evaluating culture not as a mere component of legal compliance but as an independent phenomenon with the capacity to cause inappropriate risk-taking by financial institutions. Given its intellectual and practical novelty, the DNB's initiative may prove highly relevant to the ongoing discussions of bank reform in the rest of the EU as well as the U.K. and U.S.

This Article initially details the elements of the DNB program. It then reports the results of a qualitative study of the program that has involved interviews with DNB regulators; with personnel at the highest levels in the regulated entities, including banks, insurance companies, pension funds and trusts; and with attorneys and management consultants who have worked with clients experiencing this new type of supervision. The purpose of our qualitative analysis is not to pass judgment on the efficacy of this program, which is still in its early stages. Rather, we seek to present the perspectives of those involved, describing and analyzing the issues that those who have experienced the program chose to discuss with us. Against this background, we will seek to connect the program to broader issues of regulatory and organizational psychology theory.

Specifically, this Article proceeds as follows. Section II describes the DNB initiative in more detail, based on DNB's own published accounts. Section III sets out our research methods. Section IV presents our findings, developing a number of themes that emerged from our interviews. Section V discusses these themes in light of some theories in both law and psychology that underlie the regulatory effort to affect organizational behavior at a group level. Section VI offers some concluding thoughts.

II. An Overview of DNB's Methods

In its book *Supervision of Behavior and Culture*, DNB articulates the first premise undergirding its program as a view that "an increase in rules and regulations alone is not enough to prevent a financial crisis."[28] DNB recognizes that because the technical rules previously applied to financial institutions, such as capital adequacy and liquidity requirements, did not prevent excessive risk-taking before the crisis, there is little reason to think such rules can prevent excessive risk-taking in the future.[29] To address problems of excessive risk-taking, financial institutions must develop

28. De Nederlandsche Bank, Supervision of Behaviour and Culture: Foundations, Practice & Future Developments 29 (2015). Its other two premises are that there is a strong relationship between perceptions of financial institutions' behavior and culture and "the public trust in the financial sector," and that behavior and culture are part of "sound business operations." *Id.* at 30.

29. *Id.* at 29.

"effective processes to identify and manage behavior and culture risks," and DNB "must be able to address [those] risks explicitly and professionally as part of the supervisory program."[30] The focus is thus proactive, seeking to prevent problems, and includes a "more qualitative assessment of the institution, focusing on integrity, suitability, behavior and culture of board members."[31] The new approach is meant to supplement, not supplant, traditional financial supervision.

Recognizing that this new type of supervision would require different skills among its supervisors, starting in 2010, DNB recruited four organizational psychologists, two management experts specializing in change management, and two lawyers with experience in banking to join its newly created Expert Centre in Culture, Organization and Integrity. The head of the Expert Centre, Wijnand H.J.M. Nuijts, is a lawyer who has worked for DNB since 2003 and has been the head of supervision of Behavior and Culture (B&C) since its inception in 2009. Indeed, it was under his leadership that two members of the Integrity Unit he then led (which had focused on issues such as money laundering and fraud) were given seven months to delve into the organizational psychology, leadership, decision-making, and corporate culture literatures to provide a scientific basis for DNB's planned supervision of behavior and culture.

DNB describes its supervision process as having four stages: (1) context analysis; (2) risk identification; (3) risk assessment; and (4) risk mitigation.[32] Context analysis seeks to understand the environment in which the institution functions and to establish a focus for the inspection. It begins with desk research done in consultation with the institution's financial supervisors, looking at such areas as the bank's strategic priorities, operational issues, and governance arrangements. The chosen focus could involve decision-making, leadership, communication, or group dynamics.[33] The B&C supervisors then determine a key strategic decision-making process at the supervisory or management board to evaluate, such as a decision to acquire another firm or introduce a new product.[34] This initial phase culminates in a kick-off meeting with top management "to establish a baseline of trust and openness."[35]

During the risk identification phase of the supervision, B&C supervisors use multiple methods to gather information: further desk research, self-assessments by board members, surveys, semi-structured interviews, and board observations.[36] Quantitative and qualitative data is collected to understand board members' perceptions of the board's decision-making process regarding the decision being studied, the group dynamics among the board members, the behaviors of those in leadership positions, how

30. *Id.* at 31.
31. *Id.* at 35.
32. *Id.* at 73.
33. *Id.* at 74–76.
34. *Id.* at 76.
35. *Id.* at 76.
36. *Id.* at 77–83.

open the communication was among members, and how well contrary opinions were expressed.[37] B&C supervisors collect this information using self-assessment surveys of the board members, followed by individual interviews, which DNB considers "at the core of [their] methodology."[38] One key moment follows: board observation to "actually see and sense the group dynamics on the board."[39] DNB realizes observation of one board meeting does not give it a basis for drawing conclusions, but it uses the board observation to substantiate preliminary conclusions it had developed using surveys of the board and individual interviews.[40] DNB then uses broader surveys of employees at all levels to evaluate perceptions within the firm of the key issues of decision-making, leadership, and communication, using both open-ended questions and statements that ask employees to respond to; such as, "'[l]eaders and managers behave according to the core values of the organization.'"[41]

The goal of the third phase of B&C supervision is to study the data and develop preliminary conclusions about behavioral patterns that are either positive or negative concerning decision-making, leadership, communication, and group dynamics.[42] These conclusions are then challenged in organized fora by peers within DNB who are not participating in the inspection, as well as by supervisors from the Authority for the Financial Markets (AFM), which supervises the entire financial market sector.[43] The peers and supervisors organize these peer challenges with interdisciplinary teams in an effort to manage the degree of inevitable subjectivity and come to conclusions that are as objective as possible.[44] At this point, they finalize the assessment, and the organize another peer challenge session.[45]

The final assessment of the behavior and culture in a supervised firm then feeds into the "risk mitigation" phase of the process. As stated by DNB, "[a]fter all, we aim to influence behavior and culture; the ultimate goal is not the diagnosis."[46] The primary mechanism for influencing behavior and culture is a "challenging dialogue" with the board and relevant members of management,[47] with ongoing evaluation and monitoring as necessary. In this dialogue, risks and behavioral issues are discussed in specific—and as we have heard in our interviews—sometimes painful detail. These dialogues are considered a central part of the process, since trained psychologists are asking challenging questions and modeling the

37. *Id.* at 79.
38. *Id.* at 80.
39. *Id.*
40. *See id.* at 83.
41. *Id.* at 82.
42. *Id.* at 85.
43. *Id.*
44. *Id.*
45. *Id.* at 86.
46. *Id.*
47. *Id.* at 88.

qualities of introspection and reflection that boards and managers are being encouraged to adopt.

DNB is clear that responsibility for responding to its findings and changing problematic behavior rests with the board and senior management, but it also becomes involved in applying pressure to promote change when the most serious risks have been identified. Thus, when its conclusions suggest serious risks that have materialized into major financial problems or "unsound" behavior that the board does not recognize, DNB will shift to "intrusive supervision" and become directive about actions it expects the board to take in short order.[48] In less serious situations, but where risks are identified that the board needs to address, DNB will engage in a challenging dialogue that "involves questioning fundamental assumptions on the institution's behavioral and cultural (or social) norms, raising awareness of blind spots and risks and being explicit about expectations concerning effective, sustainable mitigation."[49] Finally, in some institutions the B&C evaluation provides no serious cause for concern, so the mitigation phase focuses on communicating DNB's findings through "an open and reflective dialogue" with the institution.[50]

The B&C supervisors at DNB recognize that the kind of supervision they have developed is difficult, both for the supervisors and for the supervised, and that it requires persistence and discipline by both parties. Accordingly, the last phase of the supervision is to monitor the effects over time, to see the efforts the financial institution is making and evaluate the "tangible effects of the interventions implemented."[51]

At the time of its most recent comprehensive report on the results of its program, published in 2015, DNB had conducted 54 examinations of behavior and culture since the program's inception in 2010: 20 of banks; 17 of insurance companies; 11 of pension funds; and 6 of trust offices.[52] These examinations included thematic reviews of "decision-making (2011); board effectiveness (2011–2012); behavior and culture (2012–2013); capacity for change (2014); root-cause analysis [of serious problems] (2015); and risk culture (2015)."[53] The majority of these assessments were addressed at the senior management level, that is, the management board in the Dutch system, and in some cases the supervisory board.[54] DNB concluded in 2015 that:

48. *Id.* at 91.
49. *Id.* at 92.
50. *Id.* at 91.
51. *Id.* at 96.
52. *Id.* at 17. By early 2017 this number had risen to "around 70." *Behaviour and Culture in Financial Supervision: Why, What and How?*, Solvency II Wire (April 4, 2017), http://www.solvencyiiwire.com/behaviour-and-culture-in-financial-supervision-why-what-and-how/1587357 (relaying an interview with Wijnan Nuijts, Head of Dept., Expert Ctr. Governance, Behaviour and Culture, DNB).
53. DNB, Supervision of Behaviour and Culture, *supra* note 28, at 17.
54. *Id.* at 19. Dutch firms typically have a two-tier board structure. The Management Board consists of the top management team, so "inside" or "executive" directors in systems with a unitary board; and the Supervisory Board are non-executive directors. DNB's supervision concentrates on the management board. *Id.* at 18 n.3.

> in general, members of the [management] boards of financial organizations lack attention to and awareness of their own behaviour and the group dynamics that influence their results. Other risks that these board-level assessments have revealed include:
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> (a) dominant CEO leadership and docility of board members, or senior management blocking the voicing of constructive dissenting opinions,
>
> (b) unsatisfactory adherence to strategic or other objectives, leading to risky decisions that result in financial loss, and
>
> (c) informal decision-making that renders the formal organization "obsolete."[55]

We turn now to describing our process of study and what we have heard from those we have interviewed.

III. Our Methods

The findings we report here are based on a series of interviews we have been conducting in the Netherlands. To date we have completed interviews of 25 people: DNB staff members involved in B&C supervision, executives at financial institutions supervised by DNB, and members of the "consultant community," including lawyers and other professionals, service providers, and advisors who work with the banking community. The interviews have been conducted in English and have averaged about one hour in length, although a number were much longer, and two people have been interviewed multiple times. All of the interviews have been recorded and transcribed for analysis. The process is ongoing.

The 25 subjects to date can be described as an opportunity sample: we have cast a very broad net in issuing invitations and have interviewed everyone who has accepted the invitation. Thus, our sample is not random, nor can we claim that it is representative of some larger population. Nonetheless, it is qualitatively significant. We believe that we have interviewed all DNB staff members who have been involved in planning or implementing the B&C program through early 2017. The response has been more erratic among those in the private sector, and we cannot identify systematic differences between those who accepted and those who declined. Nonetheless, we can say that everyone we have interviewed is a highly-placed individual with a strong basis for commenting on the B&C initiative. Generally speaking, outside of DNB we have interviewed top management people at large banks, smaller banks, insurance companies, trusts, and outside advising organizations such as law firms and specialist headhunters.

Our approach to the interviews emulates those Conley has used in a series of projects involving law and business,[56] and those used in our ear-

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55. *Id.* at 19.

56. *See, e.g.*, John M. Conley, William M. O'Barr, & Robin Conley Riner, Just Words: Law, Language, and Power (3d ed. forthcoming 2019); William M. O'Barr & John M. Conley, Fortune and Folly: The Wealth and Power of Institutional Investing (1992).

lier work on the corporate social responsibility movement.[57] In each interview, we have raised three general topics: we have sought a description of the person's experiences with B&C supervision, an evaluation of how effective the person believes B&C supervision to be, and the person's suggestions, if any, for future improvements. In covering these topics, we have encouraged our subjects to go in whatever particular directions they choose and to elaborate at whatever level of detail they think appropriate. At the beginning of each interview we have emphasized the confidentiality of the process, promised that we would not use people's names when quoting them and that we would quote with care so that by identifying the position of anyone we were quoting we would not violate our confidentiality assurances. Beyond covering these three major topics, we have encouraged our subjects to set the specific agenda, raising other topics as they see fit, giving various topics such emphasis as they may choose, and commenting freely on outlooks and practices. Consequently, the content of each interview is the product of collaboration between interviewers and subjects.

We have analyzed the interviews qualitatively, studying the transcripts individually and then discussing them in detail among three of the four of us (Conley, Smeehuijzen and Williams). We have focused on the major themes raised by the subjects in response to the topics we raise as well as in response to the topics they broach on their own. In addition to the content of the subjects' remarks, we have paid close attention to the details of discourse, examining closely the ways in which people choose to express themselves. As we will discuss, for example, our subjects have repeatedly used certain metaphors and figures of speech in describing particular aspects of B&C supervision. The first draft of this Article was discussed in a roundtable with DNB personnel, organizational psychologists, and other legal experts and academics, followed by in-depth review by our organizational psychologist colleague (Rupp) and further revisions and discussion.

We are sometimes asked—usually by those of a quantitative bent—whether interview responses amount to anything more than "anecdotes" or "mere stories." We reject the anecdote label unequivocally. We accept the proposition that we are hearing stories but believe that they are far more substantial than "mere."

Linguists, anthropologists, and discourse analysts of various persuasions have long believed that stories (or, more formally, "narratives") are worthy of close attention, for a number of reasons.[58] Narrative is ubiquitous and socially significant; stories are the primary vehicle for communicating our understandings of social situations to others, and for attempting to shape our audience's response. We believe, therefore, that narratives are

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57. *See* John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement,* 31 J. Corp. L. 1, 6–8 (2005); John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles*, 33 L. & Pol'y 542, 553–57 (2011).

58. For an in-depth discussion of these ideas, see John M. Conley & William M. O'Barr, Just Words: Law, Language, and Power (2d ed. 2005).

a source of bottom-up, "native" hypotheses for future testing. Researchers regularly test hypotheses driven by the theory of their respective disciplines; this is the history of empirical work in law and economics, for example. But it may be equally (if differently) illuminating to seek testable hypotheses among the people to be studied—what an anthropologist might call "folk theories."

Applying this logic to our interviews suggests some strengths and limitations. Because our sample is nonrandom and relatively small, it would be inappropriate to quantify our results and make statistical claims about the prevalence or distribution of particular themes, views, or beliefs. What we can do, however—and what is especially appropriate at the initial stage of an investigation such as ours—is to use the interviews to *identify* issues for continuing investigation and, perhaps, ultimate quantification. Because we have done nothing more than suggest broad and obvious topics to our subjects (what have you experienced, what is your impression about how effective the B&C supervision is, how can it be improved),[59] we can say that every major issue that we report on here was framed by multiple people who are actually participating in B&C supervision, either as supervisors or supervised. Thus, our analyses will enable future research by ourselves and others to pursue issues that are of actual importance to the people who are directly involved, rather than issues that are assumed to be important.

A final methodological point involves the use of English in our interviews. The obvious reason for doing this is that the three North American members of our team do not speak Dutch. Conversely, everyone we have interviewed in the Netherlands (indeed, everyone we know in the Netherlands) speaks English with a fluency that is, to us native speakers, awe-inspiring. Nonetheless, all of these people are speaking in a second, third, or even fourth language. Given their fluency, we have no hesitation about analyzing the content of their remarks and interpreting the meaning of that content. We have, however, refrained from the fine-grained analysis of specific phrasings that we have performed in other projects involving native speakers.[60]

IV. Findings

In this section we introduce the major themes, views, and concerns that have emerged during our interviews. It is worth repeating that in conducting each interview we raised only three broad topics: the subject's experience with B&C supervision, the subject's views on its effectiveness, and the subject's suggestions for improvement. Consequently, all of the

59. It may be that by asking "how can B&C supervision be improved" we've suggested that there is a need for improvement, and so shaped the respondents' comments. Recognizing this potential, we will review the transcripts again to evaluate the language we used to ask those questions.

60. *See generally* Conley et al., Just Words, *supra* note 56; Robin H. Conley & John M. Conley, *Stories from the Jury Room: How Jurors Use Narrative to Process Evidence*, 49 Stud. L. Pol. & Soc'y 25 (2009).

specific issues we review below were raised and developed by the subjects themselves.

A. What is DNB Looking For?

Throughout our interviews, this has proven to be a vexing question for both DNB supervisors and the bankers they supervise. The question initially came to our attention when it was raised repeatedly and explicitly by bankers, often in the form of, *Does DNB have an idea of what they're looking for?* or *What's DNB's idea of a good culture or a bad culture?* When we then combed our DNB staff interviews for discussions of the issue, we found that similar questions were at least implicit in their comments. As we shall describe in detail below, DNB has not provided specific answers to the questions the bankers were posing, since

> it has no intention of qualifying cultures as 'good' or 'bad'. What DNB will do is target its supervision at identifying and eliminating risks relating to conduct and culture. As part of this process, DNB will continually ask the question of how much the culture of the enterprise and/or the conduct of management and employees could adversely impact on the financial position or integrity of the enterprise in the short or longer term. . . . The supervision is also aimed at effectively influencing behavior. Engaging in dialogue and holding up a mirror (which can be somewhat confrontational) are the most appropriate instruments for this. Evidently, undesirable behavior is not accepted, and where this occurs action will be taken, using the resources provided by the Dutch Financial Supervision Act (Wft).[61]

But many people in the banks, insurance companies, and pension funds being supervised by the B&C team seem reluctant to believe that DNB really does not evaluate cultures as being "good" or "bad." As a result, a modicum of distrust has developed in this supervisory relationship, as will become evident in some of the quotes from regulated personnel below.

1. *The Concept of Culture and B&C Supervision*

DNB not having a template for what is "good" and "bad" culture is consistent with the modern view of culture among anthropologists. In order to put the challenge that DNB faces in perspective, it may useful to sketch the antecedents of the concept of culture in its home discipline, anthropology, and then discuss the similarities with and contrasts to notions of culture in the management and organizational psychology literatures.

The earliest roots of *culture* in its contemporary sense are found in late-nineteenth and early-twentieth-century anthropology. As we discuss below, the concept has more recently become prominent in organizational psychology and allied disciplines. The lack of definitional clarity reflected in many of our interviews is not at all surprising, since for more than a hundred years anthropologists have contested the meaning of culture—and

61. *See* Wijnand Nuijts & Jakob de Haan, *DNB Supervision of Conduct and Culture*, *in* FINANCIAL SUPERVISION IN THE 21ST CENTURY 151, 163 (A. Joanne Kellerman, J. de Haan & F. de Vries eds., 2013).

continue to do so. Anthropologists have long agreed on a core meaning of culture as a set of generally shared beliefs, values, symbols, objects, technologies, and practices that characterize a particular group of people and help to define their way of life, to themselves as well as outsiders.[62] As it is often put, the elements of culture are the things that are taken for granted by the members of a group. Many early anthropologists emphasized the constraining, deterministic aspects of culture, especially among so-called "primitive" people, who were often described as "slaves to custom."[63] Thus, in early anthropology one can read statements like "the Trobriand Islanders think . . ." whereas it was assumed that members of "advanced" Western societies could take or leave their cultural norms on a case-by-case basis.[64]

In addition to focusing their research increasingly on complex modern societies, contemporary anthropologists have revisited the classic ethnographies of traditional societies in which the concept of culture was developed.[65] Most anthropologists now view culture less as a set of constraining rules and more as a bundle of shared resources that members of a group draw on to organize and make sense of reality and to guide them in their daily lives.[66] Contemporary anthropologists reject the notion of "slaves to custom." They now view resistance to cultural norms not as pathology but as an important part of culture and a significant force in the never-ending process of cultural change.[67] Just as surely as culture helps to shape individual behavior, that behavior influences the abstraction we call culture. In addition, they find culture to have meaning in groups other than the ethnic or geographic communities in which it was originally observed. In recent years, anthropologists have examined, for example, the culture of corporations, financial institutions, professions, and government bureaucracies.[68]

Nonetheless, many issues remain unsettled, and some appear inherently intractable. A number of these issues fall under the general heading of the relationship between culture and the individual. Specific questions include: Is culture an independent reality, or is it simply a description imposed on many observed instances of individual behavior? How does the developing individual acquire culture (beyond the vague and unhelpful answer, "through teaching and learning")? How does the individual come

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62. *See* Paul A. Erickson & Liam D. Murphy, A History of Anthropological Theory 29 (4th ed. 2013); O'Barr & Conley, Fortune and Folly, *supra* note 56, at 55.

63. *See* Erickson & Murphy, *supra* note 62, at 118; Bronislaw Malinowski, Crime and Custom in Savage Society 2–4 (Helix Books 1985 [orig. 1926]).

64. *See* Erickson & Murphy, *supra* note 62, at 88–89, 127.

65. *See* John M. Conley & William M. O'Barr, *Back to the Trobriands: The Enduring Influence of Malinowksi's* Crime and Custom in Savage Society, 27 L. & Soc. Inquiry 847, 847–48 (2002).

66. *See* O'Barr & Conley, Fortune and Folly, *supra* note 56, at 5.

67. *See* Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice 228 (2006); *see generally* James C. Scott, Domination and the Arts of Resistance (1990).

68. *See* Karen Ho, Liquidated: An Ethnography of Wall Street 39–72 (2009); O'Barr & Conley, Fortune and Folly, *supra* note 56, at 4–8.

to accept certain aspects of culture and reject or resist others? How much does culture truly constrain the individual? Conversely, how does the individual help to shape the abstraction we call culture? How, in concrete terms, does culture change?

A mid-twentieth school of anthropology called "culture and personality" addressed many of these questions, as have a number of anthropological approaches grouped under the broad heading of psychological anthropology.[69] Such approaches have brought to bear Freudian and other psychological theories in an effort to understand the relationship between culture, on the one hand, and individual mental processes and behavior, on the other. While these efforts have produced a wealth of fascinating specific insights on the relationship between the subjective and cultural worlds, a general theory remains elusive.

Culture has emerged more recently as a core concept in organizational psychology, applied psychology, and management studies. According to a recent comprehensive review article, organizational culture "was not much addressed" in the relevant literatures before 1970, but has subsequently become pervasive, with "the development of multilevel theory and methods" since 2000.[70] According to the same review, organizational climate and culture are "multiparented constructs," with "historical roots in Gestalt psychology, social anthropology and organizational theory."[71]

Notwithstanding these differences in age and ancestry, the basic definition of culture in these disciplines is consistent with anthropology's. For example, Schneider et al., commenting on the management literature, discern "five prominent conceptualizations of culture": "culture as values, culture as stories [a key to our method, as noted above], culture as frames, culture as toolkits, and culture as categories."[72] In a roughly similar vein, management scholars DeBode et al. write that organizational culture "reflects the collective mindset of the organization's leaders,"[73] whereas Trevino, Weaver, and Reynolds, in a review of "behavioral ethics" studies (a separate subfield of organizational psychology), refer to "the taken-for-granted assumptions about 'who we are' that are embedded in organizational cultures."[74] A particularly influential theory of organizational culture, and one on which DNB draws upon in its methodology, is that of management scholar Edgar H. Schein. Schein defines organizational culture as "[a] pattern of shared basic assumptions that the group learned as it solved its problems of external adaption and internal integration, and that have worked well enough to be considered valid and, therefore, to be taught to new members as the correct way you perceive, think, and feel in

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69. *See* Erickson & Murphy, *supra* note 62, at 72–80.
70. Benjamin Schneider et al., *Organizational Climate and Culture: Reflections on the History of the Constructs,* 102 J. Applied Psychol. 470, 473 (2017).
71. *Id.* at 468.
72. *Id.* at 475.
73. Jason DeBode et al., *Assessing Ethical Organizational Culture: Refinement of a Scale,* 49 J. Applied Behav. Sci. 460, 461 (2014).
74. Linda K. Treviño, Gary R. Weaver, & Scott J. Reynolds, *Behavioral Ethics in Organizations: A Review*, 32 J. Mgmt. 951, 963 (2006).

relation to those problems."[75]

Where organizational psychologists tend to differ from anthropologists is in their greater willingness to ask and answer detailed questions about cause and effect in cultural formation, continuity, and change, as well as about the relationship between culture and the individual. This is not surprising, given that anthropologists are not answerable to any real-world constituency in the way that management scholars and applied psychologists (and central bankers, of course) are. Thus, for example, in their review of behavioral ethics, Trevino, Weaver, and Reynolds have produced a chart, with directional arrows of causation, delineating the "categories of influences on behavioral ethics outcomes"; "ethical climate/culture" is one of the causal agents.[76] In a similar vein, the same authors adopt a definition of ethical culture "as a slice of the organizational culture that influences employees' ethical behavior through formal and informal organizational structures and systems."[77] Similar views of causation occur throughout the organizational psychology literature—for example, the observation by Debode et al., citing Schein, that "culture is responsible for an organization's effectiveness."[78] With respect to culture and the individual, Trevino, Weaver, and Reynolds refer to extensive research on the "multiple complex processes by which socialization into an amoral organizational culture can occur and by which such amoral cultures can be sustained or reinforced."[79]

As the choice of the label *Behavior and Culture* suggests, the theoretical questions posed by both anthropology, on the one hand, and organizational psychology and management studies, on the other, have great practical significance for DNB's initiative. It is evident that, in identifying the appropriate questions, DNB has considered all of the relevant theoretical perspectives, while in answering them, it has taken its primary guidance from organizational psychology and management studies. In so doing, it has been comprehensive, relying upon many of the sub-disciplines and influential writers and theorists in those fields.

At the outset, it is obvious from every theoretical perspective that culture is a meaningful concept in assessing financial institutions, and that there is a relationship between the culture of the organization and the behavior of its individual members. At a more specific level, the B&C initiative requires some answers to the previously discussed questions that anthropology views as contested. For example, DNB's time and resources are not infinite, and its staff can interview and observe the behavior of only a sample of a bank's employees. Who should they be? Those at the top, in the middle, or at the bottom? How much time should be devoted to things like mission statements and written policies? What are the critical events

75. Edgar H. Schein, *Coming to a New Awareness of Organizational Culture*, 25 Sloan Mgmt. Rev. 3, 3 (1984).
76. Treviño et al., *supra* note 74, at 953.
77. *Id.* at 966.
78. Debode et al., *supra* note 73, at 461.
79. Treviño et al., *supra* note 74, at 968.

to observe? Board meetings, middle-management group meetings, or perhaps the interactions between line employees and customers? From anthropology's perspective, DNB's answers to these questions will unavoidably embody some assumptions about what culture is and how it is shaped; organizational psychology and management studies, by contrast, may view these issues as relatively settled.

The details of DNB's supervision practice also require some decisions about the nature of the relationship between culture and individual behavior. What should DNB infer, for example, when it observes a CEO bullying the members of the management board? Is that an individual pathology, to be remedied by removing and replacing the offender? Or is it evidence—and possibly the source as well—of a pathological culture, requiring an organization-wide remedy? The answers to such questions will raise further questions about the process of cultural change. Can new cultural norms be taught, like, say, accounting rules? Can they be imposed on subordinates by their superiors, or must they arise from the ground up? Or can they even arise from outside forces, such as regulators or regulations? What motivates people to accept cultural change? More broadly, to what extent can individuals produce cultural change, and to what extent do they merely reflect it?

An additional set of issues when dealing with organizational culture is the relationship between structure and culture. Does the structure of the organization—who has responsibility for what, who reports to whom, and the like—set the cultural tone, or does structure reflect culture, or both? A parallel set of questions particularly relevant to corporations involves the relationship among culture, behavior, governance structures, and compensation schemes. Here again, a critical point is the presence or absence of causal relations among these features, and the direction of any causality. For example, can you "fix" a dysfunctional culture by changing a bank's governance or compensation plan, or are those things a byproduct of the relative health of the bank's "mindset"?

Anthropology also differs from organizational psychology and management studies in basic methods and, relatedly, its willingness to assess and evaluate particular cultures. Anthropology's core method is and has always been *ethnography*: long-term immersion in a culture, participant observation of its practices, and detailed qualitative interviews. The objective is *thick description,* a report that simultaneously reports, analyzes, and sometimes compares. As an aid to comparison, classic ethnographies tended to cover similar lists of topics, reflecting the long-term influence of the British Museum's *Notes and Queries in Anthropology*, first published in 1874. But even that rough protocol is now largely ignored, as ethnographies have become more focused on specific issues. Some disciplines (especially psychological and linguistic anthropology) have developed various surveys, tools, and instruments to shed light on their particular concerns, but detailed research protocols have never been the norm across the discipline.

Above all, anthropology has eschewed assessing or evaluating cultures against some external standard. On the contrary, *cultural relativism* has long been a generally accepted stance. This relativism can come into conflict with anthropology's tradition of progressive activism, a tension skillfully analyzed in Merry's (2009) multi-sited ethnography of the international human rights movement.[80]

The approach to culture taken by organizational psychology and management studies has been respectful of the need for long-term, immersive ethnographic study. As is recognized in an early DNB paper discussing its Behavior and Culture initiative, because "culture is mainly formed by non-observables (values and norms)," "it is not straightforward how to penetrate" through its multiple layers to the core of culture, its values.[81] According to Schneider et al., recognizing the concept's "sociological and anthropological origins, the methods employed by early culture researchers were qualitative in nature, emphasizing the importance of immersion in the setting to be studied."[82] More recently, though, psychologists and management scholars—recognizing their own origins in quantitative disciplines with direct real-world applications—have made increasing use of surveys, questionnaires, and other structured tools,[83] although not excluding more qualitative approaches to evaluating an individual organization's culture.

What truly distinguishes these approaches from anthropology is the willingness to assess and evaluate organizational cultures, whether in terms of moral values or the likelihood of producing desired outcomes. To cite but one example, DeBode and his colleagues in 2017 reviewed prior generations of instruments for assessing ethical culture, most notably Kaptein's (2008) Corporate Ethical Virtues Model Scale, and then proposed and tested an updated and abbreviated tool of their own.[84]

As will be evident in the sections that follow, DNB's approach follows a middle ground. Borrowing from anthropology, it respects the value of long-term immersion, at least in principle. At the same time, the disciplinary backgrounds of its staff and the practical demands of its project lead it to use many of the more focused methods—both quantitative and qualitative—developed by psychology and management studies. On the question of evaluation, as we will demonstrate, DNB is truly caught in the middle: its job is to identify behaviors or cultural attitudes at firms that may present financial risks or concerns for an institution's long-term viability, but it does not want to seem to micromanage the banks that it supervises.

2. *DNB's Published Views on Behavior and Culture*

DNB has clearly thought a great deal about these questions and continues to do so. Its high-level answers and operating assumptions are set forth in its 2015 book, *Supervision of Behaviour and Culture: Foundations,*

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80. *See* MERRY, *supra* note 67, at 29.
81. Nuijts & de Haan, *supra* note 61, at 157.
82. Schneider et al., *supra* note 70, at 469.
83. *See* DeBode et al., *supra* note 73, at 460–62.
84. *See id.*

Practice & Future Developments.[85] Most relevant to the present discussion is a chapter entitled "Model and Basic Assumptions" by former DNB B&C supervisor and organizational psychologist Mirea Raaijmakers, who was instrumental in establishing the program. Consistent with both anthropology and organizational psychology, Raaijmakers defines organizational culture as "the complex set of values, beliefs, philosophies and symbols that characterize the way in which a firm conducts its business."[86] Following MIT's Edgar Schein, she writes that "[c]ulture is typically learned by members when they cope with external and internal problems and taught to new members as the correct way to perceive, think and feel"[87]—perhaps a bit more prescriptive than most anthropologists would prefer, but not terribly controversial.

Continuing to follow Schein, Raaijmakers develops an iceberg model for the specific relationship between behavior and culture. The tip of the iceberg poking above the surface of the sea is behavior—"everything people do that can be perceived by others."[88] Behavior rests on the broader (and just below the surface) substrate of "group dynamics," "defined as the interaction between different positions and patterns within a group or between groups, which affect overall effectiveness"—in a word, "atmosphere."[89] Underlying all of this, and hidden far below the surface, is "mindset"—"deeply held beliefs and values that often guide group dynamics and individual behavior."[90]

The iceberg model ultimately leads DNB to make five "basic assumptions of supervision of behavior and culture": that behavior and culture are ultimately the responsibility of financial institutions; that DNB supervisors can assess and mitigate behavior and culture risks in financial organizations; that behavior and culture are an integral part of a bigger organizational picture that includes business goals and practices; that behavior and culture supervision should adopt a "tailored" approach in setting expectations rather than "blueprinting" a correct culture; and that boards and top leaders should be the main focus of B&C supervision.[91]

Drawn as they are from the organizational psychology and management literature, most of the points made in the previous two paragraphs are not controversial from those perspectives. From anthropology's perspective, however, most of them are debatable, and many—for example, the directional, deterministic relation among the layers of the iceberg, and the focus on the top—would be controversial. But clearly DNB could not debate theoretical questions forever, nor could it maintain an academic agnosticism. It has a job to do in the real world—it is trying to solve *management* problems, not theoretical ones—and had to make assumptions.

85. DNB, Supervision of Behaviour and Culture, *supra* note 28.
86. *Id.* at 45.
87. *Id.*
88. *Id.* at 48.
89. *Id.* at 50.
90. *Id.* at 51.
91. *Id.* at 53-54.

Those that it made find ample support in the literatures on which DNB primarily relied. We next summarize the observations of the DNB staff in our interviews, and then discuss how the banking community, and others we have interviewed, perceive how B&C supervision is acting on those assumptions.

3. *DNB Staff's Practical Perspectives*

In our interviews with them, DNB staff members have provided abundant evidence that they have thought long and hard about—indeed, agonized over—all of the questions we have raised about culture, individual behavior, and organizational structures. It is equally clear that they find the answers to those questions to be difficult. The comments from the DNB staff fall into three principal categories.

We should note at the outset that as with all of our interviews, we recorded and transcribed our interviews with DNB staff members. We thus have extensive quotes from these interviews. We found the DNB staff members' comments to be exceptionally thoughtful and instructive. However, DNB's management has denied us permission to publish quotes from interviews with the staff. As a result, we have paraphrased their comments or quoted from DNB's published writings or public comments by its employees.

First, the staff members' general comments about the nature of organizational culture and the relationship between culture and individual behavior track the treatment of those issues in the social science literature: an awareness of the critical questions but an acknowledgement of the absence of clear answers.

Second, consistent with their published views, DNB staff members do not express a general operating theory about what a "good" corporate culture should look like. Consequently, they are reluctant to make definitive statements about what they are looking for in B&C supervision. In recent public comments, former B&C supervisor Mirea Raaijmakers, who is now global head of behavioural risk at ING, based in the Netherlands, observed that "we didn't say this is what a good culture should look like."[92]

Third, notwithstanding the above, the staff members we interviewed were able to identify some of the attributes of both healthy and unhealthy bank cultures, and their comments were generally consistent with their published writings. In general, supervisors stated that they are looking for cultures where openness to others' ideas is valued, where differences of opinion are expressed and discussed, and where there is time, particularly at the board and senior management levels, for process-based reflection on how decisions are being made. Unhealthy cultures were described as cultures that do not value countervailing views; that have leaders who will not

92. Henry Engler, *Bank Culture Forum: Behavioral Science Gains Role as Banks Address Culture, Conduct*, Reuters (Apr. 23, 2018), https://www.reuters.com/article/bc-finreg-bank-culture-forum-behavioral/bank-culture-forum-behavioral-science-gains-role-as-banks-address-culture-conduct-idUSKBN1HU1PW [https://perma.cc/R3FM-SUE3].

listen to others' views, or, on the contrary, are not decisive; or cultures in which problems are either buried or subjected to quick fixes, then individual employees are blamed, and very little thought is given to root causes of the problems. Former supervisor Raaijmakers gave a further illustration, commenting in a press interview that "having compliance driving culture change is a red flag."[93] She noted that "we said to several large banks 'you have a culture program going on that is being driven by compliance or HR. That has to stop. You own this. We want you to own this—the CEO and CRO [Chief Risk Officer]."[94]

4. *The Perspective of the Supervised Bankers*

Although their evaluative comments tend to be more critical than those of the DNB staff, the bankers we have interviewed say strikingly similar things about what they think DNB is looking for in its supervision. One member of the financial community succinctly captured both the significance and the difficulty of DNB's task:

> I think it's extremely important, culture . . . But there, as it's more of a soft thing, it must be extremely difficult to implement, but I think it's one of the major things that can make the success of a financial institution. It's the basis.

Another banker thought that DNB should take a broader general view of bank culture:

> We believe strongly that culture and behavior starts with defining, creating the role of the bank in society. Just talking about culture is for me half the story. . . . Who are we, what is our contribution to society and to business, what sort of bank do we want to be, what sort of role do we want to play?

This same banker was wary about the danger of DNB proceeding without a coherent understanding of culture:

> [I]f you give people who are unskilled in that, that toolbox you create a monster, if you're not careful. I'm being a little bit dramatic but you see what I mean. I mean you can really misjudge the whole thing if you don't know what culture is, what behaviour is, what psychology is, how it works.

Another banker thought that DNB should assess its own culture before judging the culture of others: "You can do oversight on culture but you have to apply it to yourself first."

There was virtually unanimous agreement among bankers that DNB (as it states in *Supervision of Banking and Culture*) is primarily focused on "proof of tone at the top," with "more of a focus on boardroom dynamics." As another described it, the DNB supervisors "said, 'Well, our main goal is to assess the role of the CEO in a meeting of the executive board.'" Not all agreed, however, that this focus on the top is appropriate. One banker commented that management influence on culture is "totally overrated,"

93. *Id.*
94. *Id.*

and that the superficial changes in executive behavior that it can produce are the "worst outcome of the oversight."

The bankers' comments about DNB's views on the attributes of good and bad cultures were largely consistent with what we heard from the DNB staff. One banker, for example, said that DNB's ideal is an "open culture without fear"—an ideal that his or her bank had achieved. Specifically, another commented, in focusing on boardroom dynamics DNB is interested in "not only the technical discussion but also time spent on, 'Okay guys, did we feel like we were able to share all the relevant facts and did we have a good conversation here?'" Conversely, excessive CEO dominance and the suppression of discussion and dissent were seen as problematic by that banker.

Overall, the bankers agreed with the DNB staff that culture, although important, is an extremely difficult concept to define and supervise, and that openness and over-control were indicators of, respectively, healthy and unhealthy organizational cultures. They also perceived DNB's agenda as taking a top-down view of culture. Some bankers observed that DNB, like anthropology, has had difficulty settling on a precise definition of culture, and worry about the practical implications of this difficulty.

5. *A Third View*

As is true with several of the issues we discuss in this Article, a particularly interesting perspective was offered by several people who are neither supervisors nor supervised: those who provide legal consulting, and recruitment services to the banking industry. They generally align with their banking clients and may hear about B&C supervision from them. But they have no first-hand experience with the process or its effects, and thus retain a relative distance from it.

One member of this consulting community commented extensively on the question of whether DNB has clear views on what constitutes a healthy or unhealthy corporate culture. This person's overall view is that DNB does have such views but is politically constrained in expressing them. Consequently, DNB supervisors are prone to say that they are merely providing banks with a *mirror* (a metaphor that recurs throughout this Article) to examine themselves:

> The politically correct answer is that DNB doesn't have a view on what good culture is, because if they would say so then they would make themselves vulnerable in two ways. One, it would spark a huge discussion on what indeed a good culture is. And secondly, the financial institutions would say, "Ha, see, DNB is actually going to put a standard on us, for which they have nowhere in the law to really stand on it. Because nowhere in the law it prescribes what our culture should look like, and now all of a sudden DNB is saying what our culture should be. . . . So that's one reason why I think DNB typically is trying to stay away from giving a yes answer and typically tries to put forward the mirror metaphor, which says no, no, no, we are just going to play back what we're seeing.

But the real answer, in this consultant's estimation, is that DNB does have views, at least on the attributes of unhealthy cultures, and it is exactly what we heard from many DNB supervisors and bankers. We quote the consultant at length:

> I think they do have a perspective. For example, if there is a board with a very clear and dominant CEO, who might be the brightest guy or woman on earth, so the classical enlightened leadership model of an organization, then I think typically DNB would frown upon that and say, "That's not what we really like. We like more of an equal dynamic in the board room, where there is not one perspective which tends to dominate the discussion." Another dynamic, which they actually may frown upon, is how does the board interact with the organization and how does the board ensure that sufficient information is actually available to the board whenever they are having discussions on whatever type of topic. Or how much filtering is actually going on when information moves up from within the organization towards the board. . . . If DNB has the observation that there is a lot of filtering going on because of a number of reasons, then they will actually frown as well. So in that sense, I mean these are two examples, which depending on how you define culture, I would say are, or can be, elements of a culture, and where DNB does have an opinion. It's not an opinion that they can enforce by law. So they cannot go in and say, "Look, we have observed a dominant CEO in the boardroom, and we refer to Article 174 Part B, where it says that you cannot have a dominant CEO." So that's not something that they can do. What they can do is make the observation and start putting pressure on the organization. And say, "Look, in our view this is dangerous because," and then there comes their story. So in that sense I think they do have opinions on culture.

6. *Summary*

On the basis of everything we have heard in our interviews to date, we agree with the consultant's comments quoted above. DNB does not seem to have an academically consistent theory of culture or of the relationship between culture and individual behavior, in large part because such a theory would be extremely difficult to articulate, let alone to validate, and such a theory has eluded generations of anthropologists and psychologists. Nonetheless, DNB is in the real world, not the academic one, so it cannot simply contemplate and ruminate, but must act. Although reluctant to articulate a vision of good versus bad institutional cultures to its supervised entities, DNB staff members hint—and bankers and others perceive the hint—that DNB does have views, at least on the attributes of unhealthy cultures. In the sections that follow we explore some of the consequences of this observation.

B. DNB's Methods

Many comments from every category of interview participant addressed the broad topic of the methods used in B&C supervision. The specific issues addressed include the appropriateness of DNB's focus on the top of the institutional hierarchy; whether B&C supervision is based on broad principles or a "box-ticking" approach, and the closely related question of whether B&C supervision can or should be more objective-and-criteria-driven; and whether DNB sees "real" behavior or a choregraphed corporate performance. Because the heading of "methods" encompasses multiple specific subtopics, this section is organized by issue rather than by category of respondent.

1. *DNB's Focus on the Top*

As described in its writing, summarized in Section II above,[95] much (although not all) of B&C supervision focuses on the quality of leadership and decision-making at the top of the organizations it evaluates. In its published writing, DNB provides sound theoretical justifications for this focus. Regarding leaders, DNB understands that "a leader's values and motives" will affect not only his or her decisions but will have an influence on the decisions of the management and supervisory board. Moreover, "leaders communicate their preferences [throughout the organization] through role modelling, feedback, choices, and the use of rewards and sanctions."[96] Regarding its evaluation of a firm's decision-making, including observing board meetings, DNB states that the "quality of the decision making process at board level is among DNB's core supervisory objectives" because "all [board] decisions taken together to a large extent determine the future success . . . of organizations," as recognized in the management literature.[97] In evaluating both decision making and leadership, DNB has clear published criteria concerning both board structure and the personal and behavioral aspects of leadership.[98]

Yet, as we noted in the previous section, some outsiders have doubts about how much this focus on the top can reveal about broader institutional culture. More specifically, as one banker characterized DNB's focus, B&C's "main goal is to assess the role of the CEO in a meeting of the Executive Board"; "it was all CEO domination or not." As another member of the banking community put it, "they stopped at board minus one." This focus is misleading, in the view of some (but not all) bankers; as one of them put it, "they should not focus too much on looking at the top team's behavior as a microcosm indicator of the broader cultural change in a bank."

A former B&C supervisor described this focus as pragmatic, but potentially of concern, stating that B&C supervision is "not going from top management to lower management to just the working floor. I think they

95. *See* Section II, *supra* pages 8–12.

96. DNB, Supervision of Behaviour and Culture, *supra* note 28, at 139 (citing Edgar H. Schein, Organizational Culture and Leadership (4th ed. 2010)).

97. DNB, Supervision of Behaviour and Culture, *supra* note 28, at 103 (citing S. Finkelstein, D.C. Hambrick, & A.A. Cannella Jr., Strategic Leadership: Theory and Research on Executives, Top Management Teams, and Boards (2009)); *see also* Dennis Veltrop, On Board(s): Studying Boards of Directors as Human Decision Making Groups (2012) (unpublished Ph.D. thesis, University of Groningen School of Management Research), available at https://core.ac.uk/download/pdf/148288373.pdf.

98. *See* DNB, Supervision of Behaviour and Culture, *supra* note 28, at 116–17 (table on decision making), 145–55 (leadership).

stick at the top of the organization and not so much into how it trickles down." Moreover, DNB's approach may fail to catch not only how culture trickles *down*, but also how it trickles *up*. A banker outside of DNB explained it as follows:

> I can see that the top is changing things, from the bottom there are different types coming up, and they meet somewhere in the middle, where we have in the end who really change the culture, and that's middle management. Middle management is the most important change agent in the bank.

Possible solutions to this perceived shortcoming all involved more time spent in the banks, observation and interviews of more people at more levels, and "deeper" conversations about what motivates people. One banker advocated what can only be described as ethnography: "give them three months of open space with no instructions." Whether such an approach would be feasible, given limits on DNB's personnel and resources, is a different question.

2. *Principles Versus "Box-Ticking"*

The DNB staff members we have interviewed have all made it clear that B&C supervision is—and should be—based on broad principles rather than specific attributes and behaviors. That is, DNB does not evaluate a bank's culture against an inflexible checklist. Rather, it recognizes that open and effective institutional cultures can vary in their details. To quote former B&C supervisor Raaijmakers again, "you decide what it [a good culture] looks like, what are key behaviors, where do you want to go."[99]

Some in the supervised banking sector have expressed skepticism about DNB's fidelity to this principles-based approach. By far the strongest statement of skepticism came from this banker:

> It's not about "trust me." It's about "prove [to] me, show me." It's about forms. It's about reports. It's about a tsunami of data gathering, about more I would say rules instead of principles. . . . To put it bluntly, I can be an asshole, but if I report completely and timely all the forms that are in place, I'm a very good bank manager.

The same banker then elaborated on the costs of compliance. Whereas "before the financial crisis some of the banks were too big to fail, now we have a different problem: too small to comply." The ultimate result of the new regime, this person fears, will be that "you don't start thinking anymore . . . it's not the bank who is responsible for the operational activities. It's the supervisor because they decide if you're good or bad . . . you just do a tick-the-box." Finally, a banker who is proud of his organization's culture went so far as to say, "We really had to defend our culture against their box-ticking approach."

Another banker theorized that the failure of the principle-based approach was almost inevitable: for DNB, "it went completely wrong because they were used to organizing supervision on numbers." As a con-

99. Engler, *supra* note 92.

sequence, DNB is "pure rule-based and not principle-based anymore." Echoing this point, a fellow banker commented that "they are struggling in, how do you measure culture? I mean at the end of the day, they have to depend on numbers and say the number of incidents and stuff that takes place."

Some of our interview subjects wondered about the about the possibility or desirability of a meaningful metric that might provide greater objectivity and transparency. We heard from the DNB staff that an early pilot version of B&C did employ a metric, but it was abandoned. Members of the banking community had divergent views about such a measurement device. One banker posed the rhetorical question to DNB, "Do you have a language?" This same banker, who characterized DNB's current approach as "still flawed with many executional problems," says that greater precision is possible: "There are things you can measure about culture. There are things you can ask, there are trackers you can follow, and they are a predictor of culture." Continuing, he argued that "you can measure cultural issues through surveys and other types of tools. You can do it frequently, you can do it on a consistent manner, you can predict problems." He said that his bank uses such a model, and that it "helps you understand how cultural change actually happens."

But even if it is possible, would objective measurement be desirable? The comments of DNB staff members indicate that they have recognized this issue, thought through it, and rejected a metric-based approach. They have concluded—and most anthropologists would agree—that evaluating culture is inevitably a matter of judgment based on broad principles. One size does not fit all. Any effort to reduce culture to a set of measurable variables is very likely to end up in the kind of box-ticking exercise that everyone seems eager to avoid. Moreover, the use of explicit cultural standards might constitute a form of stealth regulation that would exceed DNB's legal mandate and be dangerously undemocratic. A final comment from a member of the banking community focuses on the inherent difficulty of using principles rather than rules to perform a function that is fundamentally regulatory:

> If you turn from rule-based to principle-based, you cannot make the principle-based laws and regulations, turn them into rule-based according to your own principles. Because then you are an unreliable lawmaker and there's no democratic control.

3. *"Real" Behavior Versus Mere Performance*

A final—and potentially critical—methodological issue is whether B&C supervisors observe behavior that is representative of the organization when they observe a board meeting, or instead are treated to carefully choreographed performances put on for their benefit. As with many of the issues being discussed here, DNB recognizes the issue. It states in its book that:

> Board observations are a controversial part of the behavior and culture inspections. . . . Of course observing one board meeting isn't enough to draw major conclusions. Our experience is that a board observation solidifies the image that emerged using the other instruments. As such, this observation provides useful additional information and is often held in the latter phase of the inspections.[100]

As with so many other issues, we have heard widely divergent views from those outside DNB about how representative a single observed board meeting can be, and whether DNB can draw reliable conclusions about bank culture from observing such a meeting.

At one end of the spectrum is the view, held by several bankers (and attributed by them to DNB as well), that you simply cannot fake boardroom behavior. According to one banker, after observing a three-hour board meeting,

> [The B&C supervisors] felt, well, there was nothing strange about it, it was a normal meeting and [the CEO] behaved properly as a CEO, they said. And I said I could have played that role, and they [the supervisors] said, well, a real macho CEO can only do that for half an hour.

Another banker corroborated this view. In this account, the board members said to each other prior to the meeting, "OK guys, we have to be on our best behavior because we have these two people looking at us." But "then after five minutes it sort of falls into the background and you don't notice anymore."

At the other end of the spectrum is this account from a bank CEO:

> When I have my conversation with my board, with those individuals doing the oversight, I'm in a meeting and I said, "Guys, what is happening here (laughing), you're acting weird." And so if that is the data point that they [the supervisors] derive their conclusions from it's a completely bizarre experiment.

This same banker told us that his board works through its disagreements *before* the meeting that DNB will observe, lest the supervisors misinterpret disagreement as a sign of dysfunction:

> We are not going to display the disagreements because they [the supervisors] might completely misinterpret our disagreements. The disagreement is good, but they cannot deal with disagreement on these topics, because they will interpret it completely the wrong way.

We would note that this concern seems odd, given that B&C supervisors (and many bankers) repeatedly told us that robust debate is a sign of a healthy culture, the antithesis of CEO dominance. Nonetheless, this was not a purely idiosyncratic concern, as a member of the consultant community referred to a specific client and said, "I know there has been some situation where the meeting where the observer from DNB was in the room, they said it created a totally different, a bit of a funny dynamic." The consultant also told us that, among his clients, "the sensitive topics are not

100. DNB, Supervision of Behaviour & Culture, *supra* note 28, at 83.

discussed in [the observed] meeting. They would rather postpone it than putting it in the open with DNB." Consequently, "I doubt if the effectiveness is as big as DNB thinks."

On balance, it is difficult to assess the prevalence or effectiveness of bankers' efforts to "fool" B&C supervisors. The supervisors are said to believe that it is impossible to keep up a disingenuous performance for very long, and some bankers agree. Yet others claim to have done it or to have been told about it. At a minimum, some say, bank boards avoid difficult issues when DNB is there. If play-acting is a problem, the only solution would seem to be more observation, cross-checked against interviews of those lower in the corporate hierarchy.

4. *Summary*

There is no consensus on the overall adequacy of DNB's current B&C supervision methods. There is broad support, among both supervisors and the supervised, for a principles-based approach, to avoid devolution into a box-ticking exercise. But there is also concern, based on both pragmatic considerations and democratic theory, about an alleged lack of objectivity in DNB's approach. But none of the critics has offered a middle ground that would enhance consistency while avoiding box-ticking. Finally, there is a division of opinion whether bankers can and do put on performances that may prevent DNB from seeing their real behavior and culture.

C. Is B&C Supervision "Toothless," Or Is It Too Strong?

One of the areas where we have heard sharp disagreements between DNB and the regulated entities, and within the regulated entities themselves, is on the question of enforcement. Is B&C simply a talking shop, with DNB unable or unwilling to enforce its views? If so, does this mean that banks do not take its assessments seriously? Or, conversely, are B&C assessments feeding *sub silentio* into the Fit and Proper evaluations of supervisory and management board members? (Fit and Proper testing takes place as a wholly different part of its supervision, outside of B&C, by which DNB assesses "prospective directors and supervisory board members for fitness and propriety for their position[;]" they cannot assume their positions unless they pass this assessment.[101]). If B&C assessments are feeding into Fit and Proper evaluations, it would be what one person called a "strange informal use of power," in essence too much power not explicitly constrained by democratic accountability. These issues created lively divisions among our informants.

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101. *See* DNB, *Fit and Proper Assessments,* https://www.dnb.nl/en/supervision/bestuurderstoetsingen/index.jsp (last visited Feb. 18, 2019). Fit and proper assessments have been instituted throughout the European Union since November 2014, as part of the European Central Bank and its Single Supervisory Mechanism. *See* EUROPEAN CENTRAL BANK, GUIDE TO FIT AND PROPER ASSESSMENTS 3 (2017), available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.fap_guide_201705.en.pdf [https://perma.cc/L39H-BYXW].

1. *DNB Staff Perspectives*

All of the DNB staff members we interviewed were quite clear that B&C's powers were to challenge, to continue to monitor, to come back for more interviews, and to feed their risk assessments into the line supervisors' ongoing supervisions, *unless* serious, unaddressed behavior and culture risks became obvious and needed immediate attention. This situation would occur:

> whenever a board is unable to challenge its beliefs and does not recognize risky or unsound behavior. . . . So in the case of the absence of reflection and recognition, the [high-risk] category applies, immediate action is required and short-term changes are necessary. In this phase, learning basically has no priority. It is all about intrusive supervision and boosting pressure on the financial institution in order to intervene and act upon the behavioral and cultural risks.[102]

In this view, B&C's teeth are sharp enough, at least in cases where prompt intervention is required, but not so sharp as to pose a threat of arbitrary discipline. DNB staff members described its usual exercise of authority as "informal," more in the nature of strong persuasion than command and control. A key factor is the ability of the supervisors to keep coming back to evaluate a bank's response to their recommendations—eventually, we were told, the institution will realize that DNB is serious.

DNB staff members were consistent in stating that there is no direct connection between B&C supervision and Fit and Proper assessments, though some acknowledged that there could be leakage of B&C concerns in the course of routine information-sharing with line supervisors. One B&C supervisor raised the possibility of triggering a Fit and Proper reassessment of a suspect manager or director, but then said that this had never happened.

2. *Bankers' Perspectives*

Bankers and members of other kinds of financial institutions seemed to fall into either of two divergent camps: the "B&C is toothless" camp, believing that DNB does not enforce its assessments with strong sanctions; or the "B&C has too much undemocratic power, because it can enforce its assessments through various means not set out in regulations" camp.

Indicative of the first view is this statement from a highly-placed executive at a large bank who is "very supportive of their initiative, because it's really crucial," but who thinks it should be backed up with clearer sanctions:

> And then they should get rid of management which is not fit and proper in terms of behaviour and culture. But that would be quite a step, but they have the potential power to do it. Of course you first try to convince sitting management that they should behave differently and maybe should put far more attention to these kinds of subjects. But if management is not willing or able to do it, you should have change of management.

102. DNB, SUPERVISION OF BEHAVIOUR AND CULTURE, *supra* note 28, at 91.

But this person suspected this view is not widely shared in the industry: "I think most of the others [in the industry] didn't think it was a very good idea."

From what we have heard, most of the others did not think that using such hard power was a very good idea. In fact, the more widely shared perspective considered that DNB was already exercising such power through communicating with Fit and Proper supervisors. Illustrative statements include: "For me, yes, every meeting with the DNB is part of my Fit and Proper" evaluation; and "the only moment I realized that [the B&C process] could have been of added value was at my so-called Fit and Proper test." While this perception is frankly disputed by B&C, it is seemingly pervasive in the regulated community.

Another perspective we have heard among members of the regulated community is that there is a lack of democratic accountability when B&C conclusions could be the basis for enforcement without clearly articulated standards. As stated by one in-house lawyer, the specific concern is that:

> If you want to change the law you have to go to The Hague. You don't have to do the lawmaking yourself, because that's not the way it should work. If you turn from rule-based to principle-based, you cannot make the principle-based laws and regulations, turn them into rule-based according to your own principles. Because then you are an unreliable lawmaker and there's no democratic control.

3. *Third-party Views*

Lawyers and management consultants who advise financial institutions have provided particularly cogent analyses of question of enforcement, and how important it is or is not. One lawyer who has advised many boards views the B&C initiative as having definitely changed the relationship between the supervisory board and the management board. Supervisory boards are taking more responsibility to ask tough questions and investigate managerial decision-making. Each party is taking more responsibility for attending to culture, which has created healthy tension in the relationship. This lawyer credits the B&C program for these changes. Still, in this lawyer's view, virtually none of those positive effects would have occurred without the perception—indeed, perhaps the misperception—that Fit and Proper determinations could be affected by what B&C supervisors concluded:

> People—I mean, you can be a little bit—it's not as skeptical as it sounds, but with a little bit of skepticism you can say that people do not change when there's no sanction. If it would be only the program on behavior and culture that the DNB would have developed without any sanctions, probably a lot less would have changed. . . . But they put a very strong sanction on it. Namely the suitability test, and they have discovered, at least it's my view or experience if you will, that from all the possible sanctions that they have as a supervisory authority this one is the—is the strongest.

D. How Effective is B&C Supervision?

Our study was not designed to evaluate the effectiveness of DNB's program, and so we state no conclusions about its effectiveness. The program has been evaluated by an independent Dutch consultancy, and its conclusions were generally positive. Among its findings, according to DNB's published reports, were that "supervision is professional and respectful" (a conclusion with which our interview subjects from the banking community generally concur; we would add that the B&C supervisors we interviewed are all serious about their task and well-educated in organizational psychology, management, or law); and that DNB has "developed an original and effective supervision method."[103] But what we can report is what our interview subjects say about the efficacy of B&C supervision, and their ideas for its improvement. In reporting these views, we recognize that people in an organization who are being evaluated by outside "experts" might tend to dislike or distrust that process, regardless of its efficacy. Thus, negative comments from the supervised community do not mean that B&C supervision is failing in its mission of mitigating risk and changing firm cultures for the better.

1. DNB Staff Perspectives

All of the DNB staff members we interviewed believe that, at a minimum, B&C supervision succeeds by forcing bankers to stop and think about the state of their institutional culture. Multiple DNB staff members used the metaphor of the *mirror*: if nothing else, the B&C program holds up a mirror in front of the supervised bankers and compels them to look into it. But DNB personnel are equally consistent in saying that, while holding up a mirror was a starting point, the B&C program has evolved well beyond this. As DNB's published writings state, "[a]fter all, we aim to influence behavior and culture; the ultimate goal is not the diagnosis."[104] In the view of multiple staff members, B&C's ultimate value lies in the depth of the external and self-assessment that it brings about.

To judge from our interviews, most B&C supervisions prove relatively uneventful, in the sense that few serious problems requiring major remedies have been uncovered. But we also heard about a few memorable instances where DNB uncovered a problem and pursued a remedy with at least some success. In one instance that was hinted at in a number of our interviews, a clearly dysfunctional CEO was identified and persuaded to leave; that person ultimately thanked DNB since he had recognized that he was the wrong person for the job but could not find a way to exit gracefully.

In the less dramatic, more usual case, the protocol is straightforward: findings are brought back to the bank or other financial institution in a "challenging dialogue" and changes monitored in follow-up communica-

103. DNB, SUPERVISION OF BEHAVIOUR AND CULTURE, *supra* note 28, at 16.
104. *Id.* at 86.

tions and observations.[105] Even in the more routine cases, however, successful outcomes may start with stiff resistance to critical B&C findings. We were told of one case where a board member expressed outright anger at the B&C report—yet two years later the proposed changes had been successfully implemented. But in another case of resistance that was recounted to us, the follow-up revealed little change and persistent resentment.

2. *Bankers' Perspectives*

The judgments of the bankers we interviewed about the effectiveness of B&C supervision vary widely. Some bankers we interviewed thought that it has no effect, for a variety of reasons. For some, the supervision merely reaffirmed their belief that they have a well-functioning institutional culture: "They said your culture's okay; why should we ask questions?" Some of those who thought their banks already had effective cultures nonetheless found value in the process, even if it could be painful at times. One even used the *mirror* metaphor we often heard from DNB staff. This banker found B&C supervision to be

> a very fruitful and also very useful exercise to go through . . . . I appreciated it, and obviously out of that came a couple of remarks that I didn't like because they reflected my personal behavior and my personal leadership style, but nonetheless very useful to have that mirror be put in front of your face and do something with it.

Other comments focused specifically on the value of the psychological perspective that B&C supervision provides. One advocated replacing "some of the hard-core financial people" who typically conduct financial supervision and building more of a "cross-discipline team." And another commented more expansively on the specific value of psychologists: "They are organizational psychologists, and from that perspective give you feedback, give you advice, give you a present."

But these positive assessments were not universal. One banker, when asked, "Could you imagine a program that works in terms of culture?" responded with a blunt "No." Some questioned DNB's competence to engage in this type of supervision. One argued that DNB "is being pushed by politicians . . . their own leaders have no clue." This person asked DNB rhetorically, "Do you have a language [for analyzing B&C]?"

In another view, B&C supervision is in danger of becoming "something of a hobby of the field psychologists." There were also comments that the B&C staff is too junior to have credibility among senior bankers. The speakers usually attribute such sentiments to unnamed colleagues. A polite version of the seniority critique took this form: "where I was a little bit putting a question mark is the level of seniority." A more explicit version is this comment by a member of the banking community, who referred to "the older generation" of retired executives who populate bank boards:

105. *Id.* at 91–92.

> [T]hey feel that it is a bit awkward to have a 32-year-old that they call a boy or a girl who could be their son or daughter, in the room looking [to see] if they are doing their job well. And they find it quite annoying in certain situations.

To conclude this review of bankers' perspectives on the efficacy of B&C supervision, we should mention a possible methodological limitation we encountered. Several bankers have declined our requests for interviews for unstated reasons, including one large bank where the request to be interviewed was discussed at the [executive] board level. It is possible—we cannot know—that some of these people declined because they had had what they consider a negative experience with B&C supervision. That is, they were told about B&C deficiencies in their respective organizations, were required to take remedial steps, and were revisited by DNB. Such supervisions would have been effective in the literal sense, albeit unpleasant for or even resented by the subject bankers. If such interactions have occurred, we have not yet heard the bankers' perspectives on them.

3. *A Third Point of View*

A particularly interesting perspective was offered by several people who are neither supervisors nor supervised: those who provide professional, consulting, and recruitment services to the banking industry. They generally align with their banking clients and may hear about B&C supervision from them. But they have no first-hand experience with the process or its effects, and thus retain a relative distance from it.

In the view of one of these professional service providers, DNB limits itself to holding up a mirror: "[DNB] typically tries to put forward the mirror metaphor, which says no, no, no, we are just going to play back what we're seeing." This same person also believes that DNB "use[s] moral suasion, I think that would be the term to use, to actually influence the organization." Overall, this person told us, "I think it's worthwhile that DNB does it, I think it adds value, but from the point of view of the financial institution it feels a bit uncomfortable." Another professional advisor to the financial community was even more positive:

> I certainly have seen changes as a result of the program by DNB . . . certainly for a number of banks, you can see that their culture has actually changed, but certainly when it comes to the way that particularly supervisory boards discharge themselves of their responsibilities a lot has changed.

This person also believes that appreciating B&C supervision is a generational issue:

> [T]he younger bankers within many banks understand much better the point that DNB is trying to make . . . . That these types of organizations need to operate differently than they used to do. That what the DNB is asking from banks is nothing more than what society is asking from them.

A third service provider was more negative, concluding that "there is no evidence yet that [B&C supervision] is actually working," and that "DNB believes that they are doing a much better job than what they actually are doing." Notwithstanding this negative overall assessment, this person has seen recent cultural changes in at least a couple of major banks, though these changes may have been driven more by public relations concerns than DNB's efforts:

> [Two banks] have actually changed their behaviour. They are more in favour of what, more concerned about, "what is the public going to say when we do a certain move, when we are announcing certain things." So I've seen change in behaviour in their boardrooms.

A final negative point raised by a member of the external advisor community is that B&C supervision may create a "moral hazard." That is, bankers may stop thinking independently and critically about their institutional cultures and instead defer, or even pander, to DNB. In this view, B&C supervision "has as a result that everybody looks at the Dutch Central Bank to just tell them what they should do." Satisfying—or perhaps fooling—DNB may thus become a substitute for morally conscientious self-assessment and change.

4. *Summary*

As we noted at the outset of this section, proving or disproving the efficacy of B&C supervision is not something we have set out to do. Not surprisingly, the views of all three categories of people we interviewed—DNB staff, members of the banking community, and external consultants—are mixed. On the positive side, some claimed to have observed specific cultural changes in particular banks. Others saw value, and thus a form of efficacy, in the process of reflection and assessment that B&C supervision requires.

At the negative end of the spectrum, some of the people we interviewed saw the process as a waste of time and resources, even if no particular harm ensues. A more ominous version of this critique is that B&C supervision is a rote exercise that distracts both the supervisors and the supervised from pursuing more meaningful changes.

In comparing the respective views of the DNB staff and the bankers they supervise, the major division does not concern *what* is happening during B&C supervision, but rather the *value* of that process. For example, people on both sides of the supervision divide have broadly agreed on the "mirror" function of the process. Where they are more likely to disagree is on whether this forced reflection is a valuable exercise, a harmless waste of time, or a mischievous distraction.

Our role is not to judge the validity of our informants' competing views, but to report and analyze them. This leads us to make three points. The first is that it is still very early in the history of B&C supervision, so early that it may be unwise to try to draw actionable inferences about efficacy. The second is that, even at this early stage, some consistent themes are already emerging among the various B&C constituencies. Given their consistency, and the force with which they are stated, they should be taken seriously by DNB and other regulators who might emulate DNB. The third point relates to the methodological intractability of the efficacy question. In their ongoing assessments of how effective B&C supervision is, DNB officials are unlikely to discover any kind of magic measure. They are aware of this, of course and that is why they use multiple methods of evaluation, challenge their own conclusions, and draw conclusions based on multiple sources of data. Nonetheless, they would be well-advised to look painstakingly at the judgments expressed by those inside and outside the process and factor those various judgements into their decisions about the future form of B&C supervision, and, perhaps as important, into future decisions about how they will communicate what they are doing and why. Their published writings are clear and comprehensive about the program and its scientific basis, but few participants in the regulated industries are likely to have read everything that B&C has published.

E. Suggestions for Improvement of B&C Supervision

In every interview, we raised the question of how B&C supervision might be improved. There were a number of recurrent suggestions, with some offered by both DNB personnel and members of the banking community. We conclude this report by reviewing several of the issues that received prominent attention in our interviews. As will be evident, many of these suggestions—whether made by regulators or the regulated—might have the effect of requiring *more* supervision.

1. *B&C's Focus on the Top.* Several respondents commented that B&C supervision is too focused on the top of the organization, paying almost exclusive attention to the interaction between the CEO and the board. They suggested that the supervisors should assess B&C throughout the organization.
2. *The Enforceability of B&C Supervision.* A second and related suggestion was that B&C supervision should begin to focus more on enforcement. A specific suggestion is that DNB should insist on more specific B&C compliance plans and then make more return visits to monitor compliance. Another specific suggestion (from a member of banking community) was to link B&C evaluation directly to Fit and Proper testing, because that is where the "real power" is. As discussed above, other bankers expressed the belief that B&C already is linked to Fit and Proper, with DNB's observation during B&C somehow feeding into Fit and Proper. While this is a misperception, it is one that we found often expressed. It was also suggested that those at the top of the DNB hierarchy should emphasize the importance of B&C.
3. *The Objectivity of B&C Supervision.* Our interview subjects expressed divergent views on whether DNB should strive for more objective and transparent B&C criteria. Some members of the banking community urged that DNB should try to find measurable performance indicators, seek comparability across B&C evaluations, and be more open about its methods. There is a contrary view expressed by people both within the DNB and in the banking

community. According to this view, DNB's flexible, principle-based approach to B&C supervision is the program's greatest value, and it would be in danger of being subverted by an overly rigid "box-ticking" mentality. There is also concern in the banking community about the undemocratic nature of using broad principles rather than specific rules to perform a function that is fundamentally regulatory.

4. *Seniority, Psychology, and the Staffing of B&C Teams.* A final category of suggestions involves the makeup of the B&C supervisory teams. Among bankers, a consistent theme is that the B&C people are too junior to have credibility with some of their senior colleagues. The speakers usually attribute such sentiments to unnamed colleagues. The bankers we have interviewed also have had divergent views on the appropriateness of psychologists conducting the supervision of financial institutions. Not surprisingly, some DNB staff members have challenged these views.

We do not believe that is our role to advocate for or against any of these suggestions. Nonetheless, we do believe that all of them should be taken seriously, since they come from both supervisors and people being supervised, all of whom have a strong interest in the quality of B&C supervision. It is particularly interesting to us that many of the comments from the banking side amount to seeking *more* B&C supervision from DNB—more in the multiple senses of more time on site, more attention to lower levels of the organization, more in-depth interviews, more follow-up, and more enforcement of B&C standards. It is also striking that some of those who discussed the objectivity of B&C supervision stressed the importance of protecting the value of B&C's qualitative, principles-based approach.

It may be that our sample is biased toward bankers who have a positive view of B&C, on the theory that those who have had a negative experience may have disproportionately declined our interview requests. Nonetheless, most of those we talked to acknowledge the importance of a healthy organizational culture, see value in the B&C initiative as a result, and are interested in contributing constructively to its ongoing refinement.

V. Theoretical Implications of DNB's Program

The impetus for this research came from our view that regulatory theory has much to learn from psychology and anthropology, especially when taking on collective design problems such as promoting integrity within corporations. We thus started the study with the belief that incorporating insights from those fields into regulatory design may lead to improved outcomes. Studying DNB's unique effort to incorporate a sophisticated understanding of psychology and culture into its regulatory oversight of finance was a way to test our own thinking. We now turn to what we have learned about that effort in practice, and how that might further inform regulatory design.

Here, we discuss first the problems with the individualistic perspective of much thinking about law compliance, especially in the U.S. We bring into the discussion the insights of those legal scholars who have relied on organizational psychology to think about producing ethical corporate cultures. Second, we discuss the DNB program in light of that organizational framework. Finally, we set out some questions to ponder, posed by DNB's initiative and the challenges of organizational design.

A. The Individualistic Premises of Thinking about Corporate Law Compliance

Much thinking about law compliance derives from rational-actor models, which emphasize penalties and probabilities of detection and conviction as core determinants of legal versus illegal behavior. As originally hypothesized by Nobel laureate Gary Becker, rational-actor models are based on the theory that an economic framework of expected utility can be applied to the decision to commit a crime.[106] Becker explicitly understood his theory to be applicable either to individuals or organizations, stating that he intended his theory to be used to cover "not just felonies—like murder, robbery, and assault . . . but also tax evasion, the so-called white-collar crimes, and traffic and other violations."[107] According to Becker's theory, there is a function relating the number of offenses by *any person* to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities, the frequency of nuisance arrests, and his willingness to commit an illegal act.[108]

Models based on Becker's rational-actor theory have contributed important insights about, for instance, the relative importance of detection and enforcement of criminal statutes versus levels of penalties, or how best to allocate scarce law enforcement resources. And there are many organizational circumstances when using an economic, rational-actor view of law compliance is sensible. When municipalities are designing their enforcement budgets, for instance, or when corporations are deciding how to deploy their compliance resources, it makes sense to at least consider the social costs of various crimes, and the potential penalties, at least as an indication of the seriousness with which society views various crimes.

Yet there are limits to penalty-driven efforts to encourage organizational commitment to law, a point made by John Coffee in his classic article on corporate law compliance "No Soul to Damn; No Body to Kick" over 35 years ago.[109] Moreover, with respect to both the nature of the person and the factors affecting law compliance, the rational actor model is incom-

106. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 207–09 (1968).

107. *Id.* at 170.

108. *Id.* at 177 (emphasis added).

109. *See* John C. Coffee, Jr., *"No Soul to Damn; No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 424–25 (1981).

plete—over-simplified, as Becker himself recognized.[110] Incorporating a more realistic perspective on human nature, and some understanding of organizational cultures and climates, may suggest ideas for better regulatory design, or in this case, better regulatory oversight. We interpret DNB's efforts as having a basis in a broadly similar view: that culture matters, and that organizational psychology can provide a useful foundation for a more comprehensive approach to financial supervision. We will briefly elaborate on those points here.

B. The Nature of the Person

Regarding the nature of the person, the rational actor model assumes a self-interested utility maximizer. But psychological theory and evidence in the organizational justice literature show that individuals have multiple motivations for action, definitely including self-interest, but also including relational and moral motivations.[111] Each of these motivations for action derives from significant, deeply-rooted psychological needs: self-interest from the need for control over one's life and prospects; relational motivations from the need to connect with others and belong to a group; and moral motivations from the need for a meaningful life.[112] Each of those individual motivations becomes highly complicated in an organizational setting.

Financial institutions often have strong, market-oriented cultures that have been shown, experimentally and empirically, to promote competitive success.[113] The conditions under which some participants work (espe-

110. *See* Becker, *supra* note 106, at 178.

111. An excellent overview of the organizational justice literature, discussing thirty years of empirical evidence and theory in psychology, demonstrates the existence of these multiple motivations for action by which people evaluate the "justice climate" in organizational settings. *See* Russell Cropanzano et al, *Three Roads to Organizational Justice*, 20 RES. PERSONNEL & HUM. RESOURCES MGMT. 1, 79–83 (2001). The "multiple motives" framework is just one of many in social and/or organizational psychology, but one these authors have found useful in applying to corporate law challenges and regulatory design. A more recent review article traces organizational climate research for one-hundred years in the Journal of Applied Psychology, but with an emphasis on research in the last fifteen years. It also discusses recent research on the more sociologically or anthropologically-informed concept of organizational culture. *See* Schneider et al., *supra* note 70, at 468–82.

112. *See* Cropanzano et al., *supra* note 111, at 9–10 (overview of the model); Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard/Soft Law Continuum,* 12 THEORETICAL INQUIRIES L. 581, 582–96 (2011) (discussing the three motivations model and applying to "new governance"/soft law); Deborah E. Rupp et al, *Increasing Corporate Social Responsibility through Stakeholder Value Internalization (and the Catalyzing Effect of New Governance): An Application of Organizational Justice, Self-Determination and Social influence Theories, in* MANAGERIAL ETHICS: MANAGING THE PSYCHOLOGY OF MORALITY 69–88 (Marshall Schminke, ed.) (2011) (same, but with more attention to underlying psychological theories).

113. *See* Chad A. Hartnell, Amy Yi Ou & Angelo Kinicki, *Organizational Culture and Organizational Effectiveness: A Meta-Analytic Investigation of the Competing Values Framework's Theoretical Suppositions*, 96 J. APPLIED PSYCHOL. 677, 679 (2011) (discussing a taxonomy for identifying firm culture types that includes clan, adhocracy, market, and hierarchy, and finding, based on a meta-analysis, that market oriented cultures out-per-

cially in investment banking, currency trading, broker/dealer activities and "front-office" sales work generally), however, can inflame insecurity and provoke excessively self-interested motivations.[114] Up to a certain point the "competitive and aggressive drive" of self-interest is valuable to firms, because it can lead to creativity and innovation.[115] Beyond a certain point, however, self-interest can lead to unethical behavior, including cheating and fraud.[116]

Don Langevoort has deeply engaged with this problem in thinking about cultures of compliance: how best can firms discourage the dark side of self-interest while still allowing room for its positive creativity and drive?[117] He recognizes that it is an intractable problem, to which traditional compliance approaches have not yet found a fully-satisfying solution. He argues that incorporating insights from behavioral ethics and organizational psychology may suggest approaches that may be more effective than current strategies.[118] Langevoort argues, that in general, values-based approaches to encouraging compliance are to be preferred to penalty-driven approaches, based on solid evidence that the latter can crowd out intrinsic motivations towards ethical behavior and in some cases encourage a calculating, cost-benefit view of whether to comply with law or not.[119] Such values-based approaches generally need to "edit the scripts"[120] by which self-interested rationalizations can overcome the best of ethical intentions; interrupt self-serving illusions within firms, such as that "aggressive sales tactics are mitigated by written disclosures to custom-

form financially (as one would hope), but on the basis of "competitiveness[ ] and aggressiveness").

114. *See generally* Karen Ho, Liquidated, *supra* note 68, 181-87; Karen Ho, *Disciplining Investment Bankers, Disciplining the Economy: Wall Street's Institutional Culture of Crisis and the Downsizing of "Corporate America,"* 111 American Anthropologist 177, 185-87 (2009).

115. Hartnell et al., *supra* note 113, at 679.

116. *See* Langevoort, *Cultures of Compliance, supra* note 19, at 947.

117. *See id.* Professor Langevoort has long recognized the value of psychology in thinking about problems of corporate law compliance and securities regulation. *See, e.g.,* Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 Geo. L.J. 797 (2001); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. Pa. L. Rev. 101 (1998); Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 Brook. L. Rev. 629 (1997).

118. *See* Langevoort, *Cultures of Compliance*, *supra* note 19, at 957, 966-69.

119. *See id. See also* Treviño et al., *supra* note 74, at 971-72 (reviewing literature finding that rules-based systems of compliance with penalties attached and values-based systems both produce ethical behavior, but a values-based system does a better job, including by supporting people's concerns with their own integrity). The classic study here is the Israeli day-care study, which found that penalizing parents for picking their children up late with a small monetary fine actually increased the number of late pick-ups: "paying the price" seemed to change the frame by which the parents interpreted their own behavior, from one of moral fault and guilt for being late, to one of economic rights to decide whether to pay the fine and arrive later. *See* Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. Legal Stud. 1, 8-15 (2000).

120. Langevoort, *Cultures of Compliance*, *supra* note 19, at 966.

ers;"[121] attend to incentives in hiring, firing, and promotions; and promote fairness, as developed in the organizational justice literature.[122] Yet Langevoort recognizes that a number of these theoretically well-supported approaches will be resisted by many firms.

Langevoort's colleague at Georgetown Law School, Mitt Regan, has similarly engaged with the problem of relational motivations (in our terms). Regan asks how firms can encourage collaboration and cooperation within the firm and within the work group, producing commitment to a strong values-led approach to compliance while avoiding such strong group commitment that people are willing to "ignore or disadvantage those outside the group" or the firm.[123] Like Langevoort, Regan finds no easy answers, but he too brings to bear the insights of the social sciences. He emphasizes the "dual-system revolution"[124] in moral psychology, which suggests that moral intuitions are formed before conscious awareness, and then justified after the fact by rational processes.[125] Incorporating additional insights from procedural justice theorists,[126] Regan argues that if systems within the organization are perceived to be fair, this is likely to trigger moral intuitions that it is safe for employees to cooperate with organizational goals, such as acting with integrity and high ethical standards.[127] To discourage such strong group identification that outsiders are treated with indifference, or even exploited, Regan suggests that firms should recognize that moral intuitions are triggered by what happens closest to the person, thus within the firm. Consequently, arguments that treating outsiders badly can damage the firm are likely to be more effective than appeals to general welfare considerations or social responsibility.[128]

C. The Organizational Context

The individualistic perspective on law compliance also does not adequately account for influences on the individual from working within, and being influenced by, an organization. Many regulators and regulatory theorists, as well as members of the public, were no doubt taken aback by research on bankers' ethics reported in 2014 in the prestigious scientific

121. *See id.* at 959.
122. *See id.* at 966–70.
123. *See* Milton C. Regan, *Moral Intuitions and Organizational Culture,* 51 St. Louis L. Rev. 941, 970 (2007).
124. Celia Moore & Francesca Gino, *Approach, Ability, Aftermath: A Psychological Process Framework of Unethical Behavior at Work*, 9 Acad. Mgmt. Annals 235, 237 (2015) (literature review).
125. Regan builds his analysis on the basis of human moral intuitions, which evidence shows occur before deliberative moral judgement *See* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 Psychol. Rev. 814 (2001); and on the advantage during evolution for humans of moral intuitions that lead to cooperative and collaborative behavior. *See* Regan, *supra* note 123, relying upon Treviño et al., *supra* note 74.
126. *See* Cropanzano et al., *supra* note 111, for a literature review of the procedural justice field.
127. *See* Regan, *supra* note 123, at 978.
128. *See id.* at 983.

journal *Nature*.[129] This study found that bankers cheat more in a coin-flip experiment when reminded they are bankers than when not primed to remember their profession.[130] In fact, 26% of the bankers cheated when reminded of their profession, whereas none did without such a prompt.[131] No other tested profession showed this cheating effect. (The other professions tested included manufacturing, pharmaceuticals, telecommunications, and information technology.) The researchers' explanations for the increased cheating by bankers when reminded of their profession were tautological. As a descriptive matter, the result was stated to be "specific to the business culture in banking."[132] The more probing explanation, based on prior research showing that "the concept of money triggers more selfish behaviours,"[133] was that because banking is "intrinsically tied to the concept of money," the treatment effect may have been based on an "increase in the salience of money" for a group of people already well-attuned to care about money.[134] More work clearly needs to be done to understand the effect. Yet, if this empirical result is reliable (and one would generally assume that research published in *Nature* has been subject to adequate peer review), the challenge of developing honest cultures in banking is unusually difficult.

Then again, developing honest firm cultures with high standards of integrity is generally difficult. Organizational psychologists have exten-

129. *See* Alain Cohn et al, *Business Culture and Dishonesty in the Banking Industry*, 516 NATURE 86, 86 (2014).

130. *Id.* In the experiment, 128 bankers from an international bank, with on average 11.5 years' experience, were given a coin toss project whereby they were asked to report on how often they'd flipped a coin "heads" or "tails" out of 10 attempts. For each "heads" or "tails" coin flip they could earn $20, depending on which pay-off condition the banker was operating under. Each subject knew which was the pay-off condition, "heads" or "tails." Subjects were unobserved and reported their outcomes on-line in such a way that the experimenters could not say who cheated, but could observe the dishonesty of each group as a whole. For the treatment condition, the bankers were first asked seven questions about their professional background, such as "At what bank do you work? What is your position?," etc. In the control group, the bankers were first asked seven entirely unrelated questions, such as "How many hours a week do you watch television, on average." The results were as follows: in the control group, the bankers reported 51.6% successful coin flips, which the authors found was not significantly different than the 50% expected by random chance; in the treatment group, when reminded they were bankers, the bankers reported 58.2% successful coin flips, which was a significant increase at the 95% confidence level. Further refinements showed that bankers in core units cheated more than bankers in support functions. The results were robust even when controlled for "age, gender, education, income, and nationality," among other factors. *Id.* at 87.

131. *Id.* at 87.

132. *Id.* at 88.

133. *Id.* (citing Kathleen D. Vohs et al*, The Psychological Consequences of Money,* 314 SCIENCE 1154, 1154 (2006) (reporting on nine experiments, the authors find that "[r]elative to participants primed with neutral concepts, participants primed with money preferred to play alone, work alone, and put more physical distance between themselves and a new acquaintance," which they interpret as an increase in self-interest motivations and a decrease in relational motivations)).

134. Cohn et al., *supra* note 129, at 88.

sively studied the "justice climates" and cultures within firms.[135] They have detailed how different modes of communication; systems of power and influence; relationships among peers and between employees and supervisors; and opportunities for people to exercise autonomy, responsibility, creativity and concern interact to support or inhibit responsible, positive, ethical actions.[136] Recent experiments in moral psychology and cognitive neuroscience provide evidence that contextual factors such as anxiety, stress, sleep-deprivation and insecurity can mute moral deliberation and increase unethical behavior.[137] Given that many of these contextual factors are prevalent in high-stakes jobs in financial institutions, the challenge that DNB has taken on is, again, shown to be particularly difficult.

From an anthropological perspective, all of these interactions and influences help to shape the firm "culture"—or sub-cultures—summarized by us previously as the "set of shared norms, beliefs, and practices that define a social group's way of life, the mental map that guides individual members of the group" in reacting to daily events and challenges.[138] Moreover, relevant to our discussion here, culture is not a fixed attribute of a group, although there may be features that change slowly; rather, "the shared beliefs and practices that identify a culture are usually in a state of negotiation, contestation, resistance," and change.[139]

What we conclude from this sketch of these rich literatures is that fostering honest, ethical cultures in any organization is possible, but not easy. The task is likely to be particularly difficult in banking, given that the industry is all about money, which can inflame self-interest, and given that factors that have been found to mute moral motivations, including stress, time pressure, sleep-deprivation, and high stakes, are prevalent. Thus, by any measure DNB has set itself an extremely difficult task. That it is an outsider to the firms it hopes to influence—and a regulator, thus an outsider with power—may complicate its mission. It is in light of this complex of factors that we interpret the comments we have heard from bankers and outside consultants.

VI. Concluding Observations and Questions for Further Discussion

In previous publications, we have theorized with our colleagues that participation in certain kinds of self-regulation or collaborative co-regulation with government could better invoke the relational and moral motivations of the regulated participants, which in turn might create conditions

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135. *See* Schneider et al., *supra* note 70, at 474–75.

136. *See* Cropanzano et al., *supra* note 111, at 21; Moore & Gino, *supra* note 124, at 245; Treviño et al., *supra* note 74.

137. *See* Moore & Gino, *supra* note 124, at 254, 266–67, 273 (literature review); Treviño et al, *supra* note 74, at 964–65 (literature review).

138. Cynthia A. Williams & John M. Conley, *The Social Reform of Banking*, 39 J. CORP. L. 459, 465 (2014).

139. *Id.* at 465–66.

that better promote regulatory objectives.[140] Through its initiative, DNB is attempting to develop a collaborative, trust-based relationship with its regulatory subjects, such that those subjects will be motivated to engage in board-level self-reflection and to be open to criticism and culture change. The potential pitfalls in such an approach are many, not least the difficulty of an outside entity having a psychological and cultural effect within a firm. And notwithstanding DNB's collaborative, "horizontal" intent, both parties understand that the relationship can "go vertical" if need be, with DNB reverting to its regulatory role. This causes us to ask whether it is really possible to develop collaborative co-regulation with government. Alternatively, are such initiatives inevitably affected by, and potentially undermined by, the inherent power dynamics between regulator and regulated?

Collaborative approaches to governance between governments and regulated entities is one of the hallmarks of "new governance." There are a growing number of examples of apparently collaborative public-private enterprises in the realm of standard-setting.[141] One familiar example is the framework for financial reporting, the International Financial Reporting Standards (IFRS), now required to be used by companies in over eighty countries. IFRS was initially the product of a private organization, the International Accounting Standards Board (IASB). Once IFRS had achieved a certain market penetration as a result of companies' voluntary adoption, many governments began to participate. Some governments required financial standards to be produced according to IFRS, causing a hardening of the initially soft law. This was followed by the development of elaborate collaborative governance mechanisms in which both governments and private standard-setters have voice. Does this collaborative approach to developing regulation make a difference to the uptake of the regulatory standards? It would seem at the outset to have the potential to reduce the resistance of the regulated entities, but it is still an outside entity—the accounting profession—telling insiders within firms how to measure and report their results.[142]

DNB's initiative shows a different kind of collaboration: between a government supervisor and the governance bodies within financial firms.

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140. *See generally* Rupp & Williams, *supra* note 112; Rupp et al., *supra* note 112.

141. For examples in apparel, chemicals, diamonds, extractives, fisheries, forestry, project finance, fair trade goods such as coffee, tea, cocoa, cotton, and others, see Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey Gordon & Georg Ringe eds., 2018).

142. There are probably better contexts in which to try to explore this and related questions. One example that comes to mind is the Carbon Disclosure Project (CDP) initiative, in which $100 trillion of invested capital, working through CDP, asks the Global 1000 companies to report on their thinking and actions regarding risks to the company from climate change. Although the dollar amount of invested capital asking is impressive, companies can still volunteer—or not—to participate. And if they volunteer year after year to produce this information, is there any discernible effect on how the company manages these issues? *See About Us*, CDP, https://www.cdp.net/en/info/about-us [https://perma.cc/4Y6Y-L4HX] (last visited Feb. 19, 2019).

The objective (at least from DNB's side) is to develop enough trust between DNB and members of the bank boards that all parties can engage in honest reflection and deliberation about risks from patterns of communications and cultural elements in the boards and the firm. Does this relationship feel like collaboration from the perspective of the firms? We have not heard strong evidence of that, but we also did not ask the question directly, since it has emerged only in the course of our subsequent analysis. Has this relationship—which we might call quasi-collaborative—motivated firms to think differently about behavior and culture? Again, we have not heard strong evidence of that, but we have heard that DNB's initiative has put culture more explicitly on various banks' agendas.

DNB's own perspective, clearly articulated in its writings and affirmed in our interviews, leaves the firm to decide how its cultural supervision reverberates, unless DNB perceives serious and immediate risks. DNB recognizes that a next phase of its work is to figure out how to get a better understanding of what effects the B&C program is having, especially at deeper levels within banks. We would thus conclude that some of these questions are still open, particularly the fundamental question of whether it is even possible to have collaborative co-regulation between government and regulated entities, given the power differential.

A related issue is whether DNB's attention to culture, and the specifics of its B&C supervision, have the unintended effect of crowding out firms' intrinsic motivations to think seriously about cultural risks. This is a question that we have asked directly. Having put culture on the boards' agenda, do those boards feel empowered to continue to develop their own thinking on the issues, or do they look to DNB for answers? From the discussions we have had with bankers, it appears that DNB's initiative is not crowding out independent reflection on culture at the board level (management and supervisory). In fact, we have heard thoughtful, independent ideas about how specific bankers have either initiated culture change in their organization (after a serious integrity incident) or contributed to what they view as a healthy culture. That said, a number of these same bankers have emphasized that these are matters they would take seriously with or without DNB's oversight, particularly given the severity of the financial crisis and the ongoing societal distrust of banks and bankers. While a number of lawyers we interviewed did seem to see crowding out, that "top management stops thinking for themselves on these issues," the bankers themselves did not see that as a problem.

What was seen as a problem, both within some banks and among advisors, was the suspicion that B&C supervision of the board's group dynamics was implicitly or explicitly feeding into the Fit and Proper assessments of individual board members. From what we have heard, this suspicion has undermined the sought-after sense of trust and collaboration in some instances. We would also suggest that it could undermine what DNB emphasizes as the collective nature of its B&C assessment, that it is evaluating the board as a whole and not individual board members.

The concern that B&C supervision could affect Fit and Proper assessments, or promote reassessments, is interesting from a regulatory theory perspective. Influential theorists, starting with John Braithwaite, have suggested that self-regulation and "soft law" can work best in the shadow of the state, and thus of hard law.[143] Here, however, the hard, embarrassing, individual possibility of being sanctioned by DNB by being reassessed for one's fitness to serve on the board seemed to loom large in the imagination of a number of the people we interviewed, and to conflict with the goals that DNB set out to achieve. The possibility that hard law might undermine the benefits of soft law has also been recognized in the regulatory literature.[144] In this instance, does the potential of hard sanctions cause greater concentration on the softer, cultural matters with which DNB is concerned? Or does it so undermine trust that individuals are too guarded in discussions with DNB to honestly thrash out dilemmas and concerns? While we are cautious about generalizing from a relatively small, non-random sample of interview subjects, we wonder whether a trust-based relationship would more easily develop if hard sanctions were off the table—or, to be specific, if the B&C team at DNB could more confidently assure bankers that B&C supervision is not a surreptitious mechanism for informing Fit and Proper evaluations.

This concern points to a difficult dilemma in regulation. Social and organizational psychology show that both hard sanctions in a rules-based compliance system, and no sanctions in an ethically-based compliance system, can reduce the incidence of unethical behavior, but that the latter does a better job of developing individuals' "commitment to the organization and a sense of individual integrity."[145] Thus, DNB is probably on the right track in trying to emphasize its soft power (the power to come back, to continue to observe meetings and conduct interviews), and to continue to try to dispel the notion that it represents a back-door path to a new Fit and

143. The idea that soft law can be most effective when there is at least the possibility of hard law intervening to complement the soft law standards, or enforce them as needed, is at the core of Ian Ayres and John Braithwaite's important book *Responsive Regulation*. *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992). The core idea of the "enforcement pyramid" that was discussed in *Responsive Regulation* had been developed before 1992 by John and Valerie Braithwaite, and others in their research group at the Australian National University, but they had not used the term "responsive regulation" before the book with Ian Ayres was published. *See Responsive Regulation*, JOHN BRAITHWAITE: WAR, CRIME, REGULATION, http://johnbraithwaite.com/responsive-regulation/ [https://perma.cc/P4G5-AF7C] (last visited Feb. 19, 2019). For an overview of the principles of responsive regulation, with citations to many related ideas and authors building upon the construct, see generally John Briathwaite, *The Essence of Responsive Regulation*, 44 U.B.C. L. REV. 475 (2011).

144. *See, e.g.*, Gregory C. Shaffer & Mark A. Pollack, *Hard v. Soft Law: Alternatives, Complements, and Antagonists in International Governance,* 94 MINN. L. REV. 706, 708 (2010) (recognizing that soft law and hard law might not only complement each other, as had been the predominant view, but could also conflict with each other and undermine the effectives of either regime in specific instances).

145. *See* Regan, *supra* note 123, at 973–74 (discussing Anne E. Tenbrunsel and David M. Messick, *Sanctioning Systems, Decision Frames, and Cooperation,* 44 ADMIN. SCI. Q. 684 (1999)).

Proper exam. But it is unlikely that any regulator, DNB included, could truly embrace a "no sanctions" regime. Having looked at bank culture through observations and interviews of top executives and supervisory board members, B&C personnel can hardly be expected not to raise serious concerns that emerge about those individuals with its supervisory colleagues. So it cannot entirely enter the "no sanctions" regime, much as it might see the value of such an approach from a theoretical perspective. Such is the messiness of putting theory into practice.

One final question we ponder is whether or how DNB or well-intentioned bank leaders can overcome the "banker effect," if the *Nature* findings discussed above are generalizable.[146] After all, bankers are primed to remember that they are bankers every day they walk into the bank. At a minimum, the banker effect will not be overcome if top management does not try to do so, or if it adopts unrealistic performance goals and then puts pressure on middle management to meet those goals. (Witness the drama at Wells Fargo in 2017 and 2018, where highly unrealistic performance goals led 5,000 employees to open scores of unnecessary, and in some cases unauthorized, accounts for customers.)[147] DNB's focus on the dynamics of top management and the supervisory board, in an effort to understand the psychology of banks' leaders, is at least a first step toward identifying top-management teams who are either ignoring or exacerbating the banker effect. More in-depth work needs to be done here, connecting with literatures on incentives, demographics, and governance.[148] DNB recognizes that this work needs to be done, and is now taking steps to consider how to better understand the operation of culture at levels below top management.

We conclude with two further observations. The first is that there may be something uniquely Dutch about the B&C experiment. We heard repeatedly that Dutch business culture, like Dutch culture more generally, is "horizontal" to a fault. That is, people are accustomed to working through things on a collaborative, even egalitarian basis. This tendency is epitomized in the Dutch word *polder,* which refers to a consensus-building discussion. We were reminded that the Dutch approach is not the norm in the Anglo-American business world, or elsewhere on the continent. It is therefore possible that the Dutch model, even if successful domestically, will simply not prove exportable.

Our second concluding point is to emphasize that DNB has embarked on an important experiment. It should not be surprising that some members of the regulated industry do not appreciate this new approach. It

146. *See supra* note 130 and accompanying text.

147. *See, e.g.*, Emily Flitter, Binyamin Appelbaum & Stacy Cowley, *Federal Reserve Shackles Wells Fargo after Fraud Scandal*, N.Y. Times (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/business/wells-fargo-federal-reserve.html [https://perma.cc/7T6V-SNCG] (reporting that Wells Fargo was restricted from growing any larger than it was at the end of 2017 as a result of its deception of its customers by opening "dummy accounts in their names and forcing some to take out unnecessary auto insurance.").

148. *See* Langevoort, *supra* note 19, at 38–42.

should also not be surprising that there may be further improvements that could be made to the B&C approach over time. That there could be improvements would be expected with any fundamentally new process. DNB's perspective that corporate cultures matter is theoretically grounded, and empirically demonstrated every day. From what we have observed, the B&C team is highly professional, experienced, thoughtful, and models the behaviors of reflective challenge and change it seeks from the regulated entities. We hope that some of the unvarnished reflections of those outside DNB quoted in this Article can be useful in DNB's continuing development of this new and promising model of complementary financial supervision.