THE CRIMINALIZATION OF COMPLIANCE

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Abstract

Corporate compliance is becoming increasingly "criminalized." What began as a means of industry self-regulation has morphed into a multi-billion-dollar effort to avoid government intervention in business, specifically criminal and quasi-criminal investigations and prosecutions. In order to avoid application of the criminal law, companies have adopted compliance programs that are motivated by and mimic that law, using the precepts of criminal legislation, enforcement, and adjudication to advance their compliance goals. This approach to compliance is inherently flawed, however—it can never be fully effective in abating corporate wrongdoing. Criminalized compliance regimes are inherently ineffective because they impose unintended behavioral consequences on corporate employees. Employees subject to criminalized compliance have greater opportunities to rationalize their future unethical or illegal behavior. Rationalizations are a key component in the psychological process necessary for the commission of corporate crime—they allow offenders to square their self-perception as "good people" with the illegal behavior they are contemplating, thereby allowing the behavior to go forward. Criminalized compliance regimes fuel these rationalizations, and in turn, bad corporate conduct. By importing into the corporation many of the criminal law's delegitimizing features, criminalized compliance creates space for rationalizations, facilitating the necessary precursors to the commission of white collar and corporate crime. The result is that many compliance programs, by mimicking the criminal law in hopes of reducing employee misconduct, are actually fostering it. This insight, which offers a new way of conceptualizing corporate compliance, explains the ineffectiveness of many compliance programs and also suggests how companies might go about fixing them.

Introduction

In 2001, the *Harvard Business Review* published a profile of Intel's antitrust compliance program. The article described how the company's aggressive approach to compliance, which had become an "integral element in the

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chip maker's business strategy," allowed it to avoid the type of litigation and regulatory intervention that was miring rival Microsoft at the time.[1] According to the authors, Intel's compliance efforts provided a "valuable model for any enterprise that may come under regulators' scrutiny."[2]

The centerpiece of the program was Intel's "active approach" to compliance. The brainchild of CEO Andy Grove and general counsel Tom Dunlap, active compliance mimicked the actions of aggressive regulators seeking evidence of corporate illegality. [3] After employees were trained in the "basic dos and don'ts" of antitrust—no price fixing, no exclusive contracts, no talking to competitors about pricing strategies—the legal department would conduct random audits of employee files.[4] Beginning with senior managers and "fann[ing] out through the company," Intel lawyers would "swoop in" and seize papers, disks, and emails, anything that might be demanded by the Federal Trade Commission (FTC) or the Department of Justice (DOJ) during an actual investigation.[5] If any irregularities were found, the seized materials would be used in a mock deposition of the senior executive in charge of the offending business unit. During the deposition, outside attorneys would cross-examine the executive in front of his or her colleagues, sometimes for more than an hour, attempting to establish that criminal statutes and regulations had been violated. Dunlap explained that these role-playing exercises served as a dramatic wake-up call for lax executives, giving them the experience of being in the crosshairs of a government investigation.[6] "Think about it: If you see a senior executive being grilled in front of his peers, will you write memos that will make you squirm? Will you let your people say things that will come back to haunt you?"[7] Dunlap suggested that Intel's approach to compliance was "the world's best."[8]

Now, that hardly seems the case. Since the early 2000s, Intel has been embroiled in one of the largest and longest-running antitrust sagas in history. First came lawsuits by Advanced Micro Devices (AMD) alleging that Intel was engaged in wide-ranging anticompetitive behavior concerning the sale of microprocessors. In 2009, Intel settled its almost decade-long litigation with AMD—"the computer industry's most bitter legal war"—by agreeing to pay its competitor $1.25 billion.[9] Next was a series of investigations by the FTC contending that Intel "waged a 'systematic campaign'" to cut off rivals' access

1 David B. Yoffie & Mary Kwak, *Playing by the Rules: How Intel Avoids Antitrust Litigation*, 79 HARV. BUS. REV. 119, 120 (2001).

2 *Id.*

3 *See id.* at 121–22.

4 *Id.* at 121.

5 *Id.*

6 *See id.* at 121–22.

7 *Id.* at 122.

8 *Id.* at 120.

9 Steve Lohr & James Kanter, *A.M.D.-Intel Settlement Won't End Their Woes*, N.Y. TIMES (Nov. 12, 2009), http://www.nytimes.com/2009/11/13/technology/companies/13chip.html?_r=0.

to markets.[10] In 2010, Intel signed a consent decree with the agency banning the company from engaging in future abusive antitrust practices. And in 2014, Intel lost its appeal of a $1.44-billion fine imposed by the European Commission, the largest antitrust penalty ever imposed on a single company.[11]

But most telling was the lawsuit filed against Intel by the New York State Office of the Attorney General (NYAG).[12] The suit made public the first detailed accounts of how Intel executives attempted to cover up their anticompetitive behavior. In one email, after discussing the need to "kick" competitors out of "the major . . . companies," an Intel executive warned against using such "strong language," because it might "come under antitrust scrutiny."[13] In other emails, executives implored colleagues to be careful about what they wrote because "[t]his is a very serious issue" and to "[please] delete after reading."[14] This led the NYAG to conclude that not only was Intel's compliance program ineffective, but that it contributed to the company's illegal behavior. "Whatever the intention," the complaint read, "the actual effect of the program was to school Intel executives in cover-up, rather than compliance."[15]

But if that is true, and Intel's once-lauded compliance program had become a tool of corporate misconduct, it begs the question: How is it that a compliance program could be a national model of effectiveness, but at the same time facilitate corporate illegality?

The answer to that question is what this Article explores. Drawing from criminological, behavioral ethics, and organizational legitimacy research, this

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10 Grant Gross, *US FTC Files Formal Antitrust Complaint Against Intel*, PCWORLD (Dec. 16, 2009), http://www.pcworld.com/article/184822/article.html.

11 James Kanter, *European Court Upholds $1.44 Billion Fine Against Intel*, N.Y. TIMES (June 12, 2014), http://www.nytimes.com/2014/06/13/business/international/european-court-upholds-1-06-billion-fine-against-intel.html. Ironically, this was mentioned offhandedly in the *HBR* profile as a "recently initiated [antitrust] investigation." Yoffie & Kwak, *supra* note 1, at 122. In 2011, Intel also paid $1.5 billion to Nvidia, a graphics rival, whom it harmed. *See* Jason Mick, *Intel Settles '09 NY Antitrust Case for Only 5 Hours Worth of Its Yearly Profit*, DAILYTECH (Feb. 11, 2012), http://www.dailytech.com/Intel+Settles+09+NY+Antitrust+Case+for+Only+5+Hours+Worth+of+its+Yearly+Profit/article23979.htm. In total, at least six government regulatory bodies representing thirty nations found that Intel engaged in anticompetitive behavior to preserve its market share. *See* Roger Parloff, *An Insider's View of AMD's War with Intel*, FORTUNE (May 2, 2013), http://fortune.com/2013/05/02/an-insiders-view-of-amds-war-with-intel/.

12 New York v. Intel Corp., 827 F. Supp. 2d 369 (D. Del. 2011).

13 Complaint at 19, New York v. Intel Corp., No. 09-827 (D. Del. Nov. 4, 2009) (internal quotation marks omitted).

14 *Id.* at 20.

15 *Id.* at 19. In November 2009, Intel reached a largely positive settlement with the NYAG, requiring no changes in the way the company does business and paying only $6.5 million to "cover some of the costs incurred" by the government in prosecuting the case. Eric Savitz, *Intel Settles Antitrust Suit with N.Y. Attorney General*, FORBES (Feb. 9, 2012), http://www.forbes.com/sites/ericsavitz/2012/02/09/intel-settles-antitrust-suit-with-n-y-attorney-general/ (internal quotation marks omitted).

Article contends that corporate compliance is becoming increasingly "criminalized"; that is, corporations are now approaching compliance primarily through a criminal law lens, using the precepts of criminal legislation, enforcement, and adjudication to advance their compliance goals. This can be seen in the Intel example, in which concerns over possible government intervention in the company's affairs resulted in a compliance regime that functioned like an ever-present criminal investigation. But the phenomenon of "criminalized compliance" is not an isolated one. Intel's approach, and its resulting failure, reveals a broader truth about how compliance operates in corporate America. After decades of scandal-driven legislation aimed at curbing corporate wrongdoing, companies have increasingly adopted criminal law-driven, deterrence-based compliance protocols to avoid criminal and quasi-criminal investigations and prosecutions.[16] These protocols have become criminalized because the criminal law is the primary paradigm through which they are derived and implemented.

The problem with approaching compliance through a criminal law lens is that it can never be fully effective in abating corporate wrongdoing. That is because criminalized compliance suffers from an inherent flaw: it imposes unintended behavioral consequences on corporate employees. These consequences stem from how employees facing criminalized compliance regimes rationalize their future unethical or illegal behavior. Rationalizations are the key component in the psychological process necessary for the commission of corporate and white collar crime—they allow potential offenders to square their self-perception as "good people" with the illegal behavior they are contemplating, thus allowing bad conduct to go forward.[17]

Criminalized compliance fuels these rationalizations, and in turn, bad corporate behavior. By virtue of its origins in and fidelity to the criminal law, criminalized compliance imports many of the criminal law's delegitimizing features into the corporation—from vague and overlapping rules, to aggressive and onerous monitoring, to inconsistent enforcement and adjudication. Employees recognize this illegitimacy and incorporate it into their own thought processes, thus creating an environment ripe for rationalizations. Once rationalizations take hold, there is little stopping an employee from committing an unethical or illegal act, regardless of the compliance program in place. The result is that many compliance regimes, by mimicking the

16 *See generally* Lynn S. Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 106, 109–11 (discussing rules-based compliance grounded in deterrence theory and its limitations).

17 *See generally* Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. MGMT. EXEC. 39, 40–44 (2005) (discussing how employees perpetrating corrupt acts engage in "rationalizing tactics" and identifying six tactics); Joseph Heath, *Business Ethics and Moral Motivation: A Criminological Perspective*, 83 J. BUS. ETHICS 595, 602–11 (2008) (suggesting that bureaucratic organizations "might constitute peculiarly criminogenic environments" and discussing how that fosters rationalizations); Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 228–34 (2005) (providing an overview of rationalization/neutralization theory).

criminal law in hopes of reducing employee misconduct, are actually helping to create it. This insight, which offers a new way of conceptualizing corporate compliance, not only helps explain the ineffectiveness of many compliance programs, but also how corporations might go about fixing them.

Part I of this Article explains what corporate compliance is, its goals, and how it has evolved over the past half-century. This Part demonstrates the influence criminal law has had on compliance and how it is being shaped by the application of the criminal law. Part II discusses the consequences of this evolution at the governmental, organizational, and individual level. The cumulative result is that compliance now shares many features of the criminal law, including the negative aspects of its enforcement and adjudication, which leads to the delegitimization of compliance programs in the eyes of corporate employees. Part III explains how this delegitimization fuels employee rationalizations, enabling the commission of unethical and illegal acts and undermining the goals of compliance. The Article's Conclusion offers a brief sketch of how corporate compliance might be reconceptualized in light of the above, the aim being to make it more effective at identifying and eliminating corporate wrongdoing.

I. The Evolution of Corporate Compliance

Although many think of corporate compliance as a recent phenomenon, its origins are at least a half-century old.[18] Since the 1960s, companies have been actively engaged in compliance and risk management.[19] Over time, compliance has evolved from basic self-regulation to complex internal corporate structures responding to specific changes in the criminal law. The result of this "quiet revolution" is a contemporary compliance function typified by its criminalized nature.[20]

A. Corporate Compliance Defined

Before delving into the evolution of corporate compliance, it is important to understand what compliance is. Although definitions vary, most com-

18 Corporate codes, one of the basic elements of compliance programs, have been linked to concepts dating back to ancient Rome, the "birthplace of the corporation." Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 Geo. L.J. 1559, 1574 (1990). More modern notions of compliance, particularly self-regulation, predate the American economy and go back to at least the Middle Ages. *Id.* at 1576. Some view compliance as originating much later with the passage of the Interstate Commerce Act of 1887. *See* Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 Am. Bus. L.J. 203, 210 (2016). This Article will focus on corporate compliance regimes operating from the 1960s to the present.

19 *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 961–62 (2009) (tracing the origins of modern compliance to the early 1960s); Bird & Park, *supra* note 18, at 210–11 (same).

20 Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 Wm. & Mary L. Rev. 2075, 2077 (2016).

mentators have embraced a variation of the following: "'Compliance' is a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law."[21] Put more succinctly, compliance is a set of processes companies use to ensure that employees "do not violate applicable rules, regulations or norms."[22]

Together, these definitions make explicit two areas of focus for corporate compliance regimes. The first is deterring violations of law, which may be criminal, quasi-criminal, or civil in nature. On the criminal side, compliance officers build and administer programs to prevent violations of state and federal laws prohibiting mainstay corporate and white collar crimes such as money laundering, bribery, antitrust, and fraud.[23] Because companies are broadly responsible for the criminal acts of their employees through *respondeat superior* liability, compliance efforts attempt to deter individual criminal behavior.[24]

Companies also create systems to prevent regulatory violations. These regulations, promulgated by government agencies with investigatory and enforcement power, can be considered quasi-criminal because they often form the basis of concurrent criminal and civil liability.[25] For example, banks must comply with a host of regulations enforced by the Securities and Exchange Commission (SEC), the Federal Reserve, the Office of the Comptroller of Currency, and the Federal Deposit Insurance Corporation. A civil enforcement action by one of these agencies often portends criminal investi-

21 Baer, *supra* note 19, at 958.

22 Geoffrey P. Miller, The Compliance Function: An Overview 1 (Nov. 18, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=25276 21. Professor Sean Griffith offers a more norm- and behavioral-focused definition: "[C]ompliance is the set of internal processes used by firms to adapt behavior to applicable norms." Griffith, *supra* note 20, at 2082. A fourth definition, albeit somewhat circular, states that compliance is "creating and managing policies and procedures around ethics and compliance to uncover and prevent misconduct." Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 87 (2014); *see* Joseph E. Murphy, *Policies in Conflict: Undermining Self-Policing*, 69 RUTGERS U. L. REV. (forthcoming 2017) (manuscript at 2, 3), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2827324, for a broader definition of compliance and its practical evolution.

23 *See* Griffith, *supra* note 20, at 2082; *see also, e.g.*, PFIZER, THE BLUE BOOK: SUMMARY OF PFIZER POLICIES ON BUSINESS CONDUCT 15–16 (2015) [hereinafter BLUE BOOK], https://www.pfizer.com/files/investors/corporate/bluebook_english.pdf (describing the company's anti-bribery and anti-corruption policies with reference to the U.S. Foreign Corrupt Practices Act (FCPA)).

24 *See* Pitt & Groskaufmanis, *supra* note 18, at 1570–74 (discussing the history of corporate criminal liability based on the doctrine of *respondeat superior*).

25 *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 24 (1997) ("[I]n cases arising under the securities laws, and under many other regulatory regimes, there is often no distinction between what the prosecutor would have to prove to establish a crime and what the relevant administrative agency or a private plaintiff would have to prove to show civil liability." (footnote omitted)).

gation and prosecution by the Department of Justice.[26] Indeed, regulators and prosecutors, particularly in the federal system, work in tandem to enforce the at least 10,000—but possibly upwards of 300,000—regulatory provisions that expose companies to overlapping civil and criminal liability.[27]

On the purely civil side, compliance officers are guarding against actions from both self-regulatory organizations (SROs) and private litigants. SROs, such as the Financial Industry Regulatory Authority (FINRA) or the Chicago Mercantile Exchange, act as the "private police officers of [the] financial system."[28] While these organizations do not have the explicit powers of a government agency, they can and do investigate and sanction members for rules violations. For example, FINRA ordered Barclays Capital to pay more than $13 million in restitution for failing to prevent "unsuitable switching" between mutual funds by its customers.[29] In addition, compliance programs attempt to prevent employee violations of tort-based statutes and regulations concerning workplace harassment and discrimination, occupational health, privacy, environmental protection, and healthcare.[30] These claims are raised through traditional private litigation and can expose companies to significant financial penalties and litigation costs.[31]

The second area of focus for corporate compliance regimes is norm generation. Compliance programs attempt to deter corporate wrongdoing by "generating social norms that champion law-abiding behavior."[32] That

26 For example, the Bank Secrecy Act requires banks to have anti-money-laundering programs with explicit compliance functions. *See* Miller, *supra* note 22, at 11. Failure to comply with these provisions can be the source of criminal and civil liability. *See* 31 U.S.C.A. § 5318(h) (West 2015); 18 U.S.C.A. § 1956(a) (West 2015).

27 *See* Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 531 n.10 (2012); *see also* Sally Quillian Yates, Deputy U.S. Attorney Gen., Remarks at American Banking Association and American Bar Association Money Laundering Enforcement Conference (Nov. 16, 2015), http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0 (announcing revisions to the U.S. Attorney's Manual to reflect the importance of "hav[ing] our criminal prosecutors and our civil attorneys working together").

28 William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 5 (2013).

29 Press Release, Fin. Indus. Regulatory Auth., FINRA Sanctions Barclays Capital, Inc. $13.75 Million for Unsuitable Mutual Fund Transactions and Related Supervisory Failures (Dec. 29, 2015), http://www.finra.org/newsroom/2015/finra-sanctions-barclays-capital-inc-1375-million-unsuitable-mutual-fund-transactions. FINRA penalties include censure, fine, or even permanent disbarment from the securities industry. FIN. INDUS. REGULATORY AUTH., FINRA MANUAL §§ 2010, 8310 (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=607.

30 Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 467 (2008); *see also, e.g.*, BLUE BOOK, *supra* note 23, at 37–38 (discussing company policies regarding sexual harassment and racial discrimination and referencing U.S. and international law).

31 *See* Miller, *supra* note 22, at 11 (discussing the effect that private litigation such as shareholder derivative suits has on compliance programs).

32 Baer, *supra* note 19, at 960. A definition of norm-based compliance is "the *processes* by which an organization seeks to ensure that employees and other constituents conform

behavior includes following external laws as discussed above, but also refers to abiding by internal company rules and culture. Norms fill the gaps left by more formal statutory and regulatory enforcement mechanisms. A company's norms exert pressure on employees to forgo wrongdoing by imposing reputational and other personal costs on transgressors.[33] Many consider norm generation to be the "ethical culture" aspect of corporate compliance, and a majority of companies consider fostering ethics and creating an ethical business culture to be the end goal of their compliance programs.[34]

In order to achieve legal deterrence and positive norm generation, compliance programs operate in three overlapping spheres. The first is education, where all "compliance begins."[35] Compliance professionals start by explaining to employees what the applicable laws and company norms are and how to comply with them.[36] This is principally accomplished through the drafting of formal codes of conduct, corporate policies, and organizational procedures.[37] Employees are then trained on these policies by compliance or human resources personnel, the aim being to ensure that employees can apply the policies to their day-to-day work.[38] In essence, compliance education and training is "policy-setting" by the company for its employees.[39]

Monitoring, the second sphere, is aimed at ensuring corporate policies are understood and followed, and that any violations are quickly identified. Monitoring can be both direct and indirect. Direct monitoring begins at the hiring stage when employees are screened for past instances of wrongdoing

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to applicable norms." GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE 3 (2014).

33 Baer, *supra* note 19, at 960; *see also* Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON REV. 227, 232 (2002). Social norms are often more powerful than legal proscriptions. *See* Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 438–39 (2003) (describing how norms expressed by Enron's culture overrode internal rules and external laws).

34 Griffith, *supra* note 20, at 2093–94, 2094 n.73; *see also* THOMSON REUTERS, TOP 5 COMPLIANCE TRENDS AROUND THE GLOBE IN 2016 (2016), https://risk.thomsonreuters.com/content/dam/openweb/documents/pdf/risk/infographic/top-5-compliance-trends-around-globe-2016-infographic.pdf (fifty-eight percent of businesses surveyed reported that building a culture of integrity was the ultimate goal of their compliance program).

35 Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with the Law*, 2002 COLUM. BUS. REV. 71, 81.

36 Baer, *supra* note 19, at 960; Griffith, *supra* note 20, at 2093. Some call this the advising function of compliance. James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP. FIN. & COM. L. 1, 9 (2013).

37 Langevoort, *supra* note 35, at 81; Fanto, *supra* note 36, at 9–10, 12.

38 *See* Gretchen A. Winter & David J. Simon, *Code Blue, Code Blue: Breathing Life into Your Company's Code of Conduct*, 20 ACCA DOCKET, no. 10, 2002, at 73, 82.

39 Baer, *supra* note 19, at 960; *see also* Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 450 (2008) (explaining that "inside counsel's duties have formally expanded to include training employees about potential liability . . . [and] planning and design of corporate compliance programs").

and company "fit."[40] On the job, employees are subject to regular monitoring of their behavior through informal interactions with their supervisors and peers, as well as formal performance reviews.[41] Indirect, or third-party, monitoring is a half-step removed. It includes telephone and email hotlines, mobile compliance apps, ombudsmen, and outside consultants and auditors, all of which are aimed at detecting and reviewing wrongdoing.[42]

If monitoring identifies a compliance risk or lapse, the company will likely initiate an internal review. This investigatory function of compliance may be independent of, parallel to, or in close connection with an investigation by an outside agency.[43] Most large organizations have set protocols for addressing routine violations of company rules, which are generally handled in-house.[44] More involved investigations, ones that are "large-scale inquir[ies] associated with violations that are serious, systematic, or likely to result in government enforcement actions," will almost assuredly involve outside legal counsel.[45] Because private employers are not subject to many of the constitutional limitations placed on government, and employees generally do not have an expectation of privacy at work, company investigations may be onerous on employees.[46] A company may read its employees' emails, listen to their phone calls, monitor their Internet activity, videotape them, confiscate their work, and interview them without providing counsel or disclosing the company's suspicion; and at the end of the investigation, all of the information gathered may be turned over to the government.[47]

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40 Langevoort, *supra* note 35, at 81; Miller, *supra* note 22, at 13.

41 Langevoort, *supra* note 35, at 81.

42 *Id.* at 82; Miller, *supra* note 22, at 14. Some consider this the "reporting function" of compliance because it allows employees to "safely report concerns to their managers and [ensures] information concerning potential violations is quickly related to the appropriate level in the organization." Griffith, *supra* note 20, at 2095. Indirect monitoring is key because it guards against intimidation, collusion, and conflicts of interest that exist in most hierarchical organizations. For example, many conflicts occur because "the primary supervisor with respect to . . . compliance is usually the same person who supervises and evaluates economic productivity, [and] whose compensation (usually) is based to a substantial extent on the net returns generated by his or her team." Langevoort, *supra* note 35, at 81–82.

43 Baer, *supra* note 19, at 960–61; *see also* Kim, *supra* note 39, at 450 (noting that inside counsel's duties also include "monitoring ongoing compliance practices").

44 Fanto, *supra* note 36, at 10; Miller, *supra* note 22, at 14.

45 Miller, *supra* note 22, at 14. Involving outside counsel transfers control over the inquiry and its costs from compliance personnel to others, but it is often necessary and prudent when facing future agency scrutiny. *Id.*; *see also* Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 162–64 (2015) (describing how the monitoring and investigation of an employee for fraud quickly transformed into an external investigation and enforcement by the SEC and DOJ).

46 Miller, *supra* note 22, at 14.

47 *Id.* at 14–15; *see also* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 86–91 (2013) (describing internal investigations and the pressures on employees to cooperate).

The third sphere of compliance is enforcement. Eventually, employees who have violated the law or company norms will be discovered and disciplined. The form this takes varies based on the severity of the offense, but most companies recognize a compliance program "will not be fully living and breathing unless it has teeth."[48] The most common punishment for a significant compliance violation is termination.[49] In fact, many consultants urge companies to "fire quickly" if there are any compliance lapses.[50] For serious wrongdoing, the threat of termination is just the beginning; cooperation by the company with a regulatory agency exposes employees to formal censure, fines, debarment, and even prison.

B. Corporate Compliance Evolved

While the overarching goals of compliance have largely remained static over the years, its focus has evolved. This evolution, which can be broken into four distinct eras, has led to the current state of increasingly criminalized compliance.

The first era of corporate compliance was one of self-regulation. Prior to the 1960s, compliance was largely a matter of business regulating itself. Following the model of merchant and craft guilds, many industries in the growing American industrial economy "sought to maintain an orderly way of life by regulating the conduct of members, [and] providing for their social welfare."[51] This occurred largely in response to society's distrust of corporations; to overcome it, industry leaders used self-regulation to boost corporate reputations by improving the public interest.[52] Self-regulation increased after the 1929 stock market crash, as banks were urged to practice better self-governance to serve society and "every member of their guild."[53] These

48 Winter & Simon, *supra* note 38, at 84.

49 *See* Griffith, *supra* note 20, at 2097; Miller, *supra* note 22, at 15.

50 Bruce Weinstein, *Hiring and Firing Lessons from the Toshiba Scandal*, FORTUNE (July 24, 2015), http://fortune.com/2015/07/24/toshiba-hiring-firing/. Such "zero-tolerance policies" increased during the post-Enron era but have always impacted mid-level executives and lower-level employees more so than those in the C-suite. *See* Landon Thomas, Jr., *On Wall Street, a Rise in Dismissals over Ethics*, N.Y. TIMES (Mar. 29, 2005), http://www.nytimes.com/2005/03/29/business/on-wall-street-a-rise-in-dismissals-over-ethics.html?_r=0 (describing the dismissal of two senior investment bankers over sharp business practices).

51 Pitt & Groskaufmanis, *supra* note 18, at 1576 (footnotes omitted).

52 *Id.* at 1577, 1577 n.93; *see also* Deven R. Desai, *The Chicago School Trap in Trademark: The Co-Evolution of Corporate, Antitrust, and Trademark Law*, 37 CARDOZO L. REV. 551, 562–63 (describing how corporation law in the late 1800s limited corporate activity to protect society).

53 Pitt & Groskaufmanis, *supra* note 18, at 1577 n.93 (quoting JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 184 (1982)).

industry-wide ideas filtered down to the codes and creeds of individual businesses.[54]

Of course, not all self-regulation was for the public's benefit. The "first generation" of American industry self-regulated in order to divide markets and control prices.[55] When government stepped in, industry reformulated its self-regulation to stave off more sweeping legislation.[56] These swings between government regulation and corporate self-regulation were common in an era that saw corporations greatly expand their role in society.[57] Indeed, compliance has always included a balance between government- and industry-initiated regulation. Some of this is driven by corporate self-interest, but it also reflects the realities of governmental oversight of business—government is simply unable to supervise all industries and their myriad companies and employees at all times.[58] Thus, the "self-government" model of regulation was seen as necessary for areas in which "self-government, and self-government alone, can effectively reach."[59] Pre-1960s, these areas of business were quite broad.

Much of that changed beginning with the second era of compliance. The hallmark of this era, which stretched three decades, was corporate scandal leading to industry-specific compliance responses. The "electrical cases" of the early 1960s are illustrative.[60] In 1961, a Justice Department investigation of price-fixing and other anticompetitive behavior in the heavy electrical equipment industry came to a close.[61] The investigation revealed that more than half a dozen companies, including General Electric, Westinghouse, and Allis-Chalmers, had agreed to divvy up markets, fix prices, and rig bids to secure their manufacturing monopolies.[62] In all, almost thirty companies and over forty individuals pleaded guilty or *nolo contendere* to criminal anti-

54 *See* George C.S. Benson, *Code of Ethics*, 8 J. BUS. ETHICS 305, 306 (1989) (analyzing 150 business codes and drawing connections between trade association codes of the 1920s and later corporate codes).

55 Pitt & Groskaufmanis, *supra* note 18, at 1577 n.94.

56 *Id.*

57 *See* Desai, *supra* note 52, at 580 ("As rail grew and cost structures prompted consolidation, rail took on a scale comparable to and greater than major parts of the national government.").

58 Pitt & Groskaufmanis, *supra* note 18, at 1577.

59 *Id.* at 1577 n.96 (quoting SELIGMAN, *supra* note 53, at 186). For example, in 1938, the Securities and Exchange Act of 1934, which created the SEC, was amended to authorize the delegation of the regulation of securities brokers to the National Association of Securities Dealers, a private trade organization. *Id.* at 1577–78. The SEC Commissioner at the time, George Matthews, stated that, "I think if we have any hope that the securities business is to be put on that high professional plane, we must look to help from within the industry." *Id.* (quoting LEO M. LOLL, THE OVER-THE-COUNTER SECURITIES MARKET 203–04 (4th ed. 1981)).

60 *See* JED S. RAKOFF & JONATHAN S. SACK, FEDERAL CORPORATE SENTENCING: COMPLIANCE AND MITIGATION § 5.02[1][a] (10th ed. 2012).

61 *Id.*

62 *Id.*

trust charges.[63] While corporate scandal on this scale is more commonplace today, the public was shocked that a "vast section of [the] economy," and many of the nation's largest companies, were involved in illegality.[64] So too were sentencing judges, who levied almost $2 million in fines and sent seven executives to jail.[65]

The "dramatic sentencing" of those executives caused businesses around the country to institute antitrust compliance programs.[66] Regulators hastened the adoption of these programs by suggesting that "closely supervised and honestly carried out" compliance regimes would go a "long way toward" proving that violations were inadvertent.[67] Thus, the "modern era" of corporate compliance was born. And its paradigmatic cycle—corporate scandal leading to an industry-specific compliance boom—would be repeated in the 1970s[68] and 1980s.[69]

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63 *Id.* at n.7.

64 *Id.* (quoting Richard Smith, *The Incredible Electrical Conspiracy (Part I)*, FORTUNE, Apr. 1961, at 133) (internal quotation marks omitted).

65 *Id.* Twenty-four individuals were given suspended sentences. *Id.* Although this sounds lenient by today's standards, sentencing white collar offenders to any term of imprisonment was almost unheard of at the time. *Id.* at n.15.

66 Pitt & Groskaufmanis, *supra* note 18, at 1578.

67 *Id.* at 1581 n.130 (quoting FTC Chairman Paul Rand Dixon).

68 In the mid-1970s, in response to corporate disclosures revealing that approximately 400 companies had collectively made $300 million in illegal payments to secure corporate benefits, Congress passed the FCPA. Pitt & Groskaufmanis, *supra* note 18, at 1582–87; *see also* Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, 41 SEC. REG. L.J. 241, 243 (2013). According to Congress, the "criminalization of foreign corporate bribery [would] to a significant extent act as a self-enforcing, preventative mechanism." Pitt & Groskaufmanis, *supra* note 18, at 1585 (quoting S. REP. NO. 95-114, at 10 (1977)). Although that claim may be a bit overstated, the statute did have an immediate effect on corporate compliance efforts. An academic survey taken in the early 1980s found that passage of the FCPA caused ninety-eight percent of corporate respondents to review their compliance policies; over sixty percent changed their policies based on the FCPA's provisions. *Id.* at 1585 n.157 (citing Bernard J. White & B. Ruth Montgomery, *Corporate Codes of Conduct*, 23 CAL. MGMT. REV. 80, 80 (1980) (finding that many companies "developed, expanded, or modified their codes of conduct to demonstrate compliance with the spirit and the letter" of the FCPA)). The "flurry of code adoptions" during this time suggests that written codes "effectively had become [a] mandatory" part of corporate compliance. *Id.* at 1585–86.

69 In 1988, after a series of prosecutions regarding insider trading at prominent banks, including that of Ivan Boesky and Michael Milken, Congress passed the Insider Trading and Securities Fraud Enforcement Act. Pitt & Groskaufmanis, *supra* note 18, at 1587–90. The Act amended criminal and civil securities laws, requiring broker-dealers to prevent the misuse of "material, nonpublic information." 15 U.S.C.A. §§ 78o(g), 80b-4(a) (West 2015). Just as the adoption of the FCPA increased corporate compliance efforts, so too did the new regulations, resulting in industry-specific training, monitoring, and enforcement related to insider trading offenses. Pitt & Groskaufmanis, *supra* note 18, at 1590–91 (the regulations "put[ ] the securities industry itself on the front lines in the fight against [insider trading]" (quoting 134 CONG. REC. H7,467 (daily ed. Sept. 13, 1988) (statement of Rep. Markey, one of the Act's sponsors))).

The 1990s began a new era of compliance with the creation of the United States Sentencing Guidelines for Organizations. This third era has undoubtedly had the biggest impact on how U.S. companies approach their compliance function. During this time, compliance was not only transformed from an industry-specific effort to a mainstream corporate concern, but it also became a tool by which government more easily intervened in business.

Promulgated in 1991, the Organizational Guidelines were appended to the existing sentencing guidelines for individual federal offenders.[70] While the guidelines for individuals focused largely on retribution, the Organizational Guidelines, acknowledging the practicalities of punishing organizational offenders, took a different approach.[71] Geared toward deterrence, they focus on imposing appropriate restitution and fines while crediting an organization for having an already-existing compliance program. Sometimes called "duty-based" sentencing, the Organizational Guidelines incentivize companies to police the criminal conduct of their employees by reducing corporate fines if firms have an effective program to prevent violations of law, promptly report wrongdoing, and fully cooperate with the government and accept responsibility.[72] This "carrot and stick approach" was intended to use criminal sentencing to convert companies from "passive bystanders who hoped their employees would behave well to active advocates for ethical conduct on the job."[73]

Although creation of the Organizational Guidelines was important from a policy standpoint,[74] because only roughly 200 companies are convicted and sentenced each year, the guidelines' direct reach is limited.[75] In addition,

70 *See* U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 (2014) (setting forth the applicability of chapter 8 to the "sentencing of all organizations").

71 Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 702–03 (2002).

72 U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f)–(g); Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 325 (2012). This has also been called a "composite liability system" because it holds companies strictly liable for their employees' illegal acts, but mitigates the effects of that liability upon a showing that compliance efforts were made. Baer, *supra* note 19, at 964 (citing Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997)).

73 ETHICS RES. CTR., THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS 16 (2012), https://www.theagc.org/docs/f12.10.pdf. A company with an effective compliance program that meets the specified criteria of the Organizational Guidelines can receive a reduction of up to ninety-five percent of its "base fine." *Id.* at 22.

74 At the time of their adoption, a majority of the public believed sentences for white collar and organizational offenders were too lenient. *See* Murphy, *supra* note 71, at 700 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STAT., SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 162 (1985)).

75 *Id.* at 698–99 (showing total corporate sentencings from 1996 to 1998 hovering around two hundred); U.S. Sentencing Comm'n, *No. of Organizational Cases over Time*, INTERACTIVE SOURCEBOOK, http://isb.ussc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&template=mantle&action=fig-

the DOJ's recent policy of using deferred and non-prosecution agreements (DPAs and NPAs) to deter corporate wrongdoing without formally convicting companies and subjecting them to sentencing has limited the Organizational Guidelines' direct reach even more.[76]

But that does not mean the Organizational Guidelines have had an insignificant impact on corporate compliance. To the contrary, they represent a "watershed change in compliance regulation."[77] That is due to how the Organizational Guidelines codified the minimum criteria necessary for companies to have an "effective" compliance program. Although the original version vaguely stated that effective compliance was key to reducing organizational culpability, later amendments set forth the specific "hallmarks" of an effective compliance and ethics program.[78] In addition to these core indicators of effectiveness, the guidelines now also require that companies periodically assess the risk of the occurrence of criminal conduct.[79]

The Organizational Guidelines spurred a massive increase in corporate compliance efforts. Companies now had a clear (or at least clearer) mandate from a government agency of what they should do to mitigate the expansive liability inherent in a *respondeat superior* legal regime. Compliance was no longer seen as a set of rules specific to particular industry regulations as during the antitrust, FCPA, and insider trading eras. Instead, the Organizational Guidelines made corporate compliance "a broad issue for organizations generally worthy of substantial attention" because it lessened culpability across all

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ure_xx.xcdf&table_num=Figure_Z01 (last visited Jan. 24, 2017) (indicating the same for the period from 2006 to 2013).

76 Arlen, *supra* note 72, at 326–28; *see also* BRANDON L. GARRETT, TOO BIG TO JAIL 6–7 (2014) (describing the rise of deferred and non-prosecution agreements and its ramifications).

77 Bird & Park, *supra* note 18, at 212; *see also* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 690 (2008) (calling the Organizational Guidelines "the most important influence" in compliance).

78 *See* Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 500–02 (2005). Effective compliance is judged on the following criteria:

> (1) standards and procedures to prevent and detect criminal conduct;
> (2) responsibility at all levels of the program, together with adequate program resources and authority for its managers;
> (3) due diligence in hiring and assigning personnel to positions with substantial authority;
> (4) communicating standards and procedures, including a specific requirement for training at all levels;
> (5) monitoring, auditing, and non-retaliatory internal guidance/reporting systems, including periodic evaluation of program effectiveness;
> (6) promotion and enforcement of compliance and ethical conduct; and
> (7) taking reasonable steps to respond appropriately and prevent further misconduct upon detecting a violation.

See id.; *see also* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)–(b).

79 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(c).

potential violations.[80] This breadth only increased when the Delaware Court of Chancery indicated that corporate directors might violate their fiduciary duties by failing to adopt compliance programs consistent with the Organizational Guidelines.[81] Every company—and every director—was now on the hook for implementing a guidelines-based compliance program.

Of course, this also increased the role of government agents, particularly federal prosecutors, in compliance. For prosecutors, the Organizational Guidelines became the "foundational document" necessary to assess corporate culpability.[82] If a company is convicted of wrongdoing, the guidelines act as the formal measure of culpability, as well as the benchmark for any future court-imposed monitoring.[83] Short of an indictment, the guidelines serve both as an arbiter of whether a deferred or non-prosecution agreement is appropriate, and as the template for reforms to a company's compliance program if an agreement is reached.[84] Either way, government agents—criminal prosecutors and regulatory agency staff—are directly involved in assessing, commenting on, and possibly recrafting a company's compliance program using the Organizational Guidelines as a guide.[85]

In addition, the Justice Department has issued a series of memoranda setting forth the principles on which prosecutors should make corporate charging decisions.[86] These memoranda largely follow the dictates of the Organizational Guidelines—voluntary disclosure, full cooperation, and "the existence and adequacy of [a] corporation's compliance program" determine a company's criminal culpability.[87] Although the focus and explicit

80 Bird & Park, *supra* note 18, at 212; Ford & Hess, *supra* note 77, at 690 (suggesting that the Organizational Guidelines "pushed compliance programs out of the defense industry, beyond limited issues such as antitrust and the FCPA, and into the mainstream").

81 *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); *see* Ford & Hess, *supra* note 77, at 690 (discussing the impact of *Caremark* on the increase in compliance efforts); Murphy, *supra* note 71, at 713–14 (same). Although it has been debated exactly what liability *Caremark* imposed on corporate directors, subsequent decisions have largely settled the issue. *See* Hillary A. Sale, *Monitoring* Caremark*'s Good Faith*, 32 DEL. J. CORP. L. 719, 730–33, 733 (2007) (stating that *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), "makes clear that when a board fails to implement compliance and monitoring systems or fails to respond to red flags, it fails to act as a faithful and loyal monitor" (footnote omitted)).

82 Griffith, *supra* note 20, at 2086.

83 Ford & Hess, *supra* note 77, at 686–90.

84 Baer, *supra* note 19, at 966.

85 *See infra* Section II.A.

86 *See* Griffith, *supra* note 20, at 2087; Murphy, *supra* note 71, at 712 (these memoranda were issued in the wake of the Guidelines).

87 Memorandum from Eric Holder, Deputy Attorney Gen., Dep't of Justice, on Bringing Criminal Charges Against Corps., to Dep't Component Heads & U.S. Attorneys (June 16, 1999), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.pdf.

terms of each memorandum vary, all draw from the principles outlined in the Organizational Guidelines.[88]

Federal regulators, following their DOJ counterparts, also factor in whether companies have effective Organizational Guidelines-style compliance programs when making enforcement decisions.[89] For example, during a debarment proceeding, agents might use as a mitigating circumstance whether a company "has implemented 'effective standards of conduct and internal controls.'"[90] More specifically, the SEC's Seaboard Report sets forth a list of criteria the agency may consider in determining whether and how much to credit corporate behavior.[91] The criteria echo much of that found in the guidelines and the associated DOJ memos.[92] In short, regardless of the agency involved, the Organizational Guidelines set the parameters of what is required of corporate compliance.[93] Not surprisingly, companies have reacted by implementing compliance policies focused on satisfying those parameters.[94]

88 For example, the Holder Memo, unlike the Organizational Guidelines, does not specify the elements of an effective compliance program. *See id.* But, subsequent memoranda building on it clearly signal what actions companies should take to avoid criminal charges, including those related to compliance. *See* Memorandum from Mark. R. Filip, Deputy Attorney Gen., U.S. Dep't of Justice, to All Component Heads and U.S. Attorneys (Aug. 28, 2008), http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf (discussing changes to charging guidelines for corporate fraud prosecution); Press Release, Office of the Deputy Attorney Gen., Justice Dep't Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2008aug28_DOJcorpchargeguidepressrelease.authcheckdam.pdf (stating that the Filip memorandum provides that "prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in evaluating whether to assign cooperation credit to the corporation"). New memoranda are quickly digested by attorneys and compliance professionals and then incorporated into the monitoring and enforcement spheres of compliance programs.

89 Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 892 (2007).

90 Murphy, *supra* note 71, at 713 (quoting H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post-*Caremark *Era*, 26 DEL. J. CORP. L. 1, 101 (2001) ("Furthermore, if the misconduct constitutes cause for debarment, the corporation may avoid debarment by virtue of having previously implemented an effective compliance program and a system of internal controls.")).

91 *See* SEC. & EXCH. COMM'N, SECURITIES EXCHANGE ACT RELEASE NO. 44969, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, (Oct. 23, 2001) [hereinafter SEABOARD REPORT], https://www.sec.gov/litigation/investreport/34-44969.htm.

92 *Id.* (setting forth thirteen criteria that the SEC "will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation").

93 *See generally* Garrett, *supra* note 89, at 897.

94 *See* Murphy, *supra* note 71, at 710–11 (discussing the broad impacts of Organizational Guidelines within companies); Paine, *supra* note 16, at 109 (explaining the "compelling rationale" for companies to follow the Organizational Guidelines, creating an emphasis on prevention through surveillance, control, and punishment).

If the Organizational Guidelines era was a watershed, the current era may be the "golden age."[95] This fourth era of corporate compliance began roughly in 2000 and is exemplified by unprecedented corporate scandal and equally unprecedented governmental response. The largest scandals of the early part of the decade are well known—Enron, WorldCom, Tyco, Adelphia, HealthSouth—but their scale is worth recalling. At the time of its collapse, Enron was valued at approximately $70 billion and employed upwards of 20,000 people;[96] and WorldCom was valued at $107 billion and was the United States' second largest long-distance telephone company.[97] By the end of 2002, after both companies were implicated in vast financial accounting frauds, WorldCom and Enron became the first and second largest bankruptcies in U.S. history.[98] As staggering as those numbers are, they seem almost quaint in light of what occurred at the end of the decade. In September 2008, Lehman Brothers became the largest bankruptcy in U.S. history at almost $613 billion,[99] and the financial crisis that Lehman's collapse tipped off is estimated to have been a $22-trillion event.[100]

The legislative and regulatory response to this "perfect storm" of scandal and crisis has been unparalleled.[101] In July 2002, the Sarbanes-Oxley Act became law, which "marked a major revision of the federal securities laws."[102] Although the act contained a series of criminal and civil provisions related to corporate governance, most important for compliance purposes was its "explicit requirement" that public companies adopt codes of conduct.[103]

95 Jeffrey M. Kaplan, Semi-Tough: A Short History of Compliance and Ethics Program Law 3 (May 16, 2012) (unpublished manuscript), http://webcache.googleusercontent.com/search?q=cache:qt8Pvm7MsG4J:conflictofinterestblog.com/wp-content/uploads/2012/06/Rand-Kaplan-White-Paper-post-publication4.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari.

96 *The Enron Scandal by the Numbers*, USA TODAY (Jan. 21, 2002), http://usatoday30.usatoday.com/money/energy/2002-01-22-enron-numbers.htm; *The Fall of Enron*, NPR, http://www.npr.org/news/specials/enron/ (last visited Jan. 24, 2017).

97 Simon Romero & Riva D. Atlas, *Worldcom's Collapse: The Overview*, N.Y. TIMES (July 22, 2002), http://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html.

98 *Id.* It is estimated that Enron and WorldCom caused a combined $35-billion loss to the economy in the first year of their demise alone. CAROL GRAHAM ET AL., THE BROOKINGS INST., POLICY BRIEF NO. 106, COOKING THE BOOKS: THE COST TO THE ECONOMY (2002), https://www.brookings.edu/wp-content/uploads/2016/06/pb106.pdf.

99 Erik Larson, *Lehman Recovery Seen as Justifying $2 Billion Bankruptcy*, BLOOMBERG (Sept. 11, 2013), http://www.bloomberg.com/news/articles/2013-09-11/lehman-recovery-seen-as-justifying-2-billion-bankruptcy.

100 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-180, FINANCIAL CRISIS LOSSES AND POTENTIAL IMPACTS OF THE DODD-FRANK ACT (2013), http://www.gao.gov/assets/660/651322.pdf.

101 RAKOFF & SACK, *supra* note 60, § 5.02[1][f].

102 *Id.*

103 *Id.* Some suggest that section 404 is the most significant compliance provision because it requires management to maintain a sound internal-control structure for financial reporting and to assess its effectiveness. *See* Stephen Wagner & Lee Dittmar, *The Unex-*

Accordingly, pursuant to section 406 of the Act, the SEC mandated that broker-dealers, investment advisors, investment companies, and banks disclose whether senior officers were governed by a corporate code.[104] Although legislation in previous compliance eras initiated large-scale prophylactic adoption of compliance codes by companies, Sarbanes-Oxley was different in that it made adoption of codes compulsory.[105] No additional substantive violations were necessary to punish corporations for their lack of compliance efforts.[106]

In addition, section 805 directed the Sentencing Commission to revise the Organizational Guidelines to ensure that they were "sufficient to deter and punish organizational criminal misconduct."[107] The Commission took the directive to heart, raising penalties for corporate offenders and further clarifying what constitutes an effective compliance program. As Miriam Baer explains:

> [T]he Sentencing Commission explicitly included provisions for board oversight and for compliance programs to educate employees on the importance of corporate ethics. As evidenced by the Commission's claims at the time, the reforms were intended to transform corporate governance by improving corporate culture. "Cultural corporate governance" in turn would result in more compliance and less crime.[108]

Although the Commission's predictions would be proven wrong by the looming financial crisis, the revisions to the Organizational Guidelines certainly "put[ ] the onus of adequate compliance on the board of directors and top-level management"—they are now the ones tasked with being knowledgeable about the company's compliance program and overseeing its effectiveness.[109]

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pected Benefits of Sarbanes-Oxley, HARV. BUS. REV. (Apr. 2006), https://hbr.org/2006/04/the-unexpected-benefits-of-sarbanes-oxley.

104 RAKOFF & SACK, *supra* note 60, § 5.02[1][f]. The SEC also required companies to disclose if their codes were being amended or waived for those officers. *See* Integrated Disclosure System for Small Business Issuers, 17 C.F.R. § 228 (2005); Standard Instructions for Filing Forms Under Securities Act of 1933, Securities Exchange Act of 1934 and Energy Policy and Conservation Act of 1975—Regulations S–K, 17 C.F.R. § 229 (2014); Forms, Securities Exchange Act, 17 C.F.R. § 249 (2014).

105 RAKOFF & SACK, *supra* note 60, § 5.02[1][f].

106 *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Penalizes Investment Advisers for Compliance Failures (Nov. 28, 2011), https://www.sec.gov/news/press/2011/2011-248.htm (reporting three investment advisers charged with failing to put into place procedures designed to prevent securities law violations). After the SEC revised its policies, other agencies and SROs followed suit. *See* Kaplan, *supra* note 95, at 4 (stating new compliance-related requirements adopted by the NYSE and NASDAQ).

107 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. background (2014) (quoting Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 805(a)(5), 116 Stat. 745).

108 Baer, *supra* note 19, at 965 (footnotes omitted).

109 RAKOFF & SACK, *supra* note 60, § 5.02[1][g]; *see also* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2) & app. 2, 3.

Further, the passage of the Dodd-Frank Act in 2010,[110] the sweeping legislative response to the financial crisis, led to additional criminal and quasi-criminal regulations aimed at compliance. On the criminal side, the Act expands existing laws such as the Commodity Exchange Act to include previously unregulated transactions.[111] On the quasi-criminal side, the Act requires investment advisors to designate a chief compliance officer responsible for implementing procedures to prevent violation of the Investment Advisers Act.[112] Failure to do so subjects companies to both criminal and civil sanctions.[113] Although the compliance-aimed regulations of the Act are still unfolding, "it is clear that Dodd-Frank has placed additional emphasis on the effectiveness of organizations' internal reporting [and compliance] procedures."[114] As expected, companies have ratcheted up their compliance programs to meet these new concerns.[115]

So where are we now? Whether the golden age of compliance is nearing an end, and what era may come after, is unclear. But it is clear that the "law and practice of corporate compliance has evolved greatly" since the 1960s.[116] What started as straightforward corporate self-regulation has transformed into a compliance structure driven by the cycle repeated each of the last five decades—corporate scandal, followed by public outcry, followed by criminal investigation and prosecution, followed by sweeping criminal and quasi-criminal legislative response, all culminating in increased compliance efforts. This cycle has embedded the criminal law, and its precepts, into corporate compliance. The result is that compliance is becoming "a creature of federal criminal law"—it is becoming criminalized.[117]

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110 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

111 Jennifer G. Chawla, *Criminal Accountability and Wall Street Executives: Why the Criminal Provisions of the Dodd-Frank Act Fall Short*, 44 Seton Hall L. Rev. 937, 951–52 (2014) (discussing various criminal provisions of Dodd-Frank).

112 *See* Compliance Procedures and Practices, 17 C.F.R. § 275.206(4)–7 (2012); *see also* Bird & Park, *supra* note 18, at 213.

113 Tiffany M. Joslyn, Criminal Provisions in the Dodd-Frank Wall Street Reform & Consumer Protection Act 2–6 (2010), http://www.fed-soc.org/publications/detail/criminal-provisions-in-the-dodd-frank-wall-street-reform-consumer-protection-act. In addition, the Act directed the Sentencing Commission to revisit the Organizational Guidelines once again, resulting in further clarification of how companies should appropriately respond to employee misconduct. *See* Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview (March 2014)*, *in* Corporate Compliance and Ethics Institute 2014, at 87, 101 (Theodore L. Banks & Rebecca Walker eds., 2014).

114 Walker, *supra* note 113, at 117.

115 *See* Bird & Park, *supra* note 18, at 213 (discussing new duties of chief compliance officers); Abha Bhattarai & Catherine Ho, *Four Years into Dodd-Frank, Local Banks Say This Is the Year They'll Feel the Most Impact*, Wash. Post (Feb. 7, 2014), https://www.washingtonpost.com/business/capitalbusiness/four-years-into-dodd-frank-local-banks-say-this-is-the-year-theyll-feel-the-most-impact/2014/02/07/12c7ca48-877e-11e3-a5bd-844629433ba3_story.html (reporting regulation's impact on banks).

116 Walker, *supra* note 113, at 136.

117 Baer, *supra* note 19, at 972.

II. The Consequences of Criminalized Compliance

If the evolution of corporate compliance is indeed resulting in its increased criminalization, it is important to understand the consequences of that evolution. This Article suggests that criminalized compliance regimes impact governmental, organizational, and individual actors in a number of ways, which ultimately leads to the larger behavioral consequence at the heart of this Article. Criminalized compliance delegitimizes the compliance function so as to foster employee rationalizations, thus facilitating the very corporate wrongdoing compliance is intended to prevent.

A. Criminalized Compliance Invites Government Agents into the Corporation

The preceding Section demonstrates the significant role the criminal law plays in corporate compliance. This of course means that the Department of Justice, and government regulatory agencies more generally, also play a significant role in compliance.[118] How that came to be from a historical standpoint is largely explained above, but a discussion of some additional specifics, and more importantly, the consequences stemming from that role, is warranted. Put simply, criminalized compliance invites government agents into corporations.

How this happens is a function of two related phenomena. The first is familiar: the growing number of white collar and corporate criminal laws. William Stuntz explained this fundamental truth more than fifteen years ago.[119] According to Stuntz, the expansion of criminal statutes since the 1850s, but particularly in the recent past, has created criminal laws that are "deep as well as broad: that which they cover, they cover repeatedly."[120] Stated another way, the sheer number of federal criminal codes has created a set of overlapping circles, such that a single criminal act could be treated as though the offender committed many different crimes.[121]

This feature of modern criminal law—its "depth and breadth"—consolidates power in prosecutors and government agents.[122] One way this happens

118 *See* Garrett, *supra* note 89, at 855 (describing power of federal prosecutors in corporate prosecutions and corporate compliance); Griffith, *supra* note 20, at 2092 (arguing that the government, specifically federal prosecutors, have been "the leading force in the development of compliance").

119 *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519–20 (2001). Although there has been some nibbling around the edges of Stuntz's findings, no one has seriously challenged them in the fifteen years since they were made. *See* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1, 5 (2012) (providing some empirical support for the argument that the number of federal crimes has had little effect in the "real world of federal criminal justice enforcement").

120 Stuntz, *supra* note 119, at 518.

121 *Id.* at 518–19.

122 *Id.* at 519–20.

is that lawmaking shifts from legislatures to "law enforcers."[123] Because the criminal law is so expansive, it cannot be enforced as written; there are simply too many violations to prosecute.[124] Therefore, decisions about enforcement fall on the law enforcers in the executive branch, primarily prosecutors and their agency counterparts. This results in enforcement "on-the-street" that differs from the "law-on-the-books."[125] Stuntz explained that this is the "criminal justice system's real lawmak[ing]"—government lawyers and regulatory agents making law through their enforcement choices, not legislatures through traditional democratic governance.[126]

The other way power is consolidated in law enforcers is that they, not courts, adjudicate crime. With so many overlapping criminal statutes and regulations to choose from, prosecutors and agents have available to them a range of crimes that govern the same conduct.[127] They can investigate and charge a wrongdoer with the easiest crime to prove, the crime with the highest penalty, or—by stacking multiple charges—both. This allows enforcement of the laws "more cheaply," thereby lowering the costs of conviction, primarily through forcing plea and settlement agreements.[128] Government agents are "not so much redefining criminal law . . . as deciding whether its requirements are met, case by case."[129]

Although Stuntz's observations were aimed at the criminal justice system as a whole, he might as well have been focusing on corporate and white collar crime. A 2010 report found that at the end of 2007 there were at least 4450 federal criminal statutes; there are likely more than 5000 now.[130] Add to that the estimated 300,000 federal administrative regulations that can be enforced criminally, many of which are targeted at business-related conduct, and the massive size of the criminal code becomes clear.[131] Notably, white collar and corporate crime underwent the biggest expansion of federal law in

123 *Id.* at 519. This group includes prosecutors and FBI agents, but also regulatory agency attorneys and investigators, such as those at the SEC. Any government agent with jurisdiction to enforce criminal or quasi-criminal statutes or regulations qualifies as a "law enforcer" under Stuntz's conception. *See id.*

124 *Id.*

125 *Id.* at 521.

126 *Id.* at 506.

127 *Id.* at 519.

128 *Id.* at 519–20.

129 *Id.* at 519.

130 *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 LEGAL MEMO. 1, 1–2 (2008) (finding that Congress creates approximately five hundred crimes per decade). Between 2002 and 2007, Congress created, on average, one new crime per week, for each week of each year. *Id.* at 1; *see also* Shana-Tara Regon, *White Collar Crime Policy*, 38 CHAMPION 49 (2014).

131 Podgor, *supra* note 27, at 531 n.10; *see also* Stuntz, *supra* note 119, at 513–14 (explaining the growth of the criminal code); George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417, 1419 (2007) (cataloging problems caused by the "explosive growth in federal regulatory prosecutions" and how changing legal doctrines have made it easier to prosecute corporations).

three of the past five decades.[132] This is largely a product of the cycle discussed above—each new corporate scandal results in the passage of criminal legislation meant to combat it.

Take for example a statute mentioned earlier, the Sarbanes-Oxley Act. After Enron's collapse and Arthur Anderson's indictment for destroying evidence of the company's wrongdoing, lawmakers were "anxious to participate in the national response" to the "growing financial crimes epidemic."[133] So Congress created two new obstruction of justice provisions as part of the Act—18 U.S.C. §§ 1512(c) and 1519.[134] As a result, there are now five overlapping federal obstruction crimes—some redundant, all wide in scope—applicable to white collar and corporate offenders.[135]

Prosecutors have used this redundancy and expansive scope in predictable ways. Last term, the Supreme Court heard *Yates v. United States*,[136] a case in which federal prosecutors were faced with a small-town commercial fisherman who threw a crate of undersized red grouper overboard, against a fish and game officer's instructions.[137] The government could have elected to decline prosecution, letting stand a civil citation issued to Yates for catching the fish.[138] Instead, prosecutors indicted him for three felonies: destroying property to prevent a federal seizure in violation of 18 U.S.C. § 2232(a); destroying the undersized fish—an alleged "tangible object" under Sarbanes-Oxley—to impede an investigation in violation of 18 U.S.C. § 1519; and making a false statement to a federal officer in violation of 18 U.S.C. § 1001(a)(2).[139] Although the precise issue before the Supreme Court was whether Yates was deprived of fair notice that the destruction of fish fell within the meaning of § 1519, the case highlighted the issues of overcriminal-

132 Stuntz, *supra* note 119, at 525. Not everyone agrees this expansion is problematic. *See* Klein & Grobey, *supra* note 119, at 5; Kip Schlegel et al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 140 (2001) (finding that while there has been an increase in criminal sanctions for securities offenses, it was consistent with the increase in the cases initiated).

133 Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 727 (2013).

134 The provisions are largely redundant; they cover essentially the same conduct, requiring only slightly different mental states. *Id.* at 729–30 (comparing the text of each provision).

135 These individual offenses can be imputed to the corporation through *respondeat superior* liability. This is precisely what happened in the Arthur Anderson case. *See* Kurt Eichenwald, *Enron's Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry*, N.Y. TIMES (Mar. 15, 2002), http://www.nytimes.com/2002/03/15/business/enron-s-many-strands-investigation-andersen-charged-with-obstruction-enron.html?pagewanted=all.

136 Yates v. United States, 135 S. Ct. 1074 (2015).

137 Brief for the United States at 6–8, *Yates*, 135 S. Ct. 1074 (No. 13-7451).

138 John Yates, *A Fish Story*, POLITICO MAG. (Apr. 24, 2014), http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html.

139 Brief for the United States, *supra* note 137, at 8.

ization and prosecutorial discretion.[140] In fact, during oral argument, an exasperated Justice Scalia asked the government, "What kind of a mad prosecutor would try to send this guy up?"[141]

The prosecutor was not exactly mad; he was maximizing his "lawmaking" function. Both §§ 1519 and 2232(a) covered exactly the same conduct—throwing the fish overboard. Prosecutors charged Yates with § 1519 because it carries a twenty-year statutory maximum, as opposed to § 2232(a)'s five-year maximum.[142] But they also charged § 2232(a) because it has the weakest mens rea requirement—all the government had to show was that Yates knowingly destroyed property subject to seizure.[143] By stacking the charges this way, prosecutors got the benefit of an easily provable violation, with the leverage provided by a possible twenty-year sentence.[144] The ability of agents and prosecutors to choose among broadly worded, overlapping statutes when charging individuals, and then to use the threat of significant punishments to pressure agreements, exemplifies how government agents maximize their enforcement and adjudicatory powers.[145]

The second phenomenon that increases the role of government agents in corporations flows from the first. Prosecutors and regulators have leveraged their power to more easily charge and convict individual white collar offenders, and through them their companies, in attempted reformations of corporate culture. Brandon Garrett terms this approach "structural reform prosecution," and it describes the Justice Department's willingness to use the criminal law as a means of influencing the inner-workings of companies.[146] Instead of focusing on convictions, prosecutors and their agency counterparts use deferred and non-prosecution agreements to "reshape the governance of leading corporations."[147]

Again, an example coming out of the Enron scandal illuminates the government's approach. After the prosecution of Arthur Anderson, which many believed caused the accounting firm's demise, the Justice Department reformulated its enforcement policies for corporations. In what became known as the "Brooklyn Plan," prosecutors strategized an approach that allowed them to investigate and punish corporate crime without risking the fate of compa-

140 *Yates*, 135 S. Ct. at 1100 (Kagan, J., dissenting) ("That brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code.")

141 Transcript of Oral Argument at 28, *Yates*, 135 S. Ct. 1074 (2015) (No. 13-7451).

142 18 U.S.C. §§ 1519, 2232(a) (2012).

143 *See* 18 U.S.C. § 2232(a).

144 For how this plays out in more traditional white collar and corporate cases, see Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 608–18 (2005).

145 *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 766–67 (2005); Dervan, *supra* note 133, at 751–52; Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795 (2012).

146 Garrett, *supra* note 89, at 854.

147 *Id.* at 936.

nies and the resulting public backlash.[148] Using a model taken from juvenile proceedings, companies would agree to cooperate with the government, pay hefty fines, and reform their ways, all "in exchange for a conditional promise [by the DOJ] *not* to prosecute."[149] Thus, corporate deferred and non-prosecution agreements were born.[150]

These agreements are now widely used. In 2014, the Department of Justice entered into thirty deferred and non-prosecution agreements with companies, up from two in 2000.[151] Between 2000 and 2014, over 300 agreements were entered into, compared to just thirteen in the nine years prior to 2001.[152] And no wonder—companies benefit from the agreements by limiting their exposure, both as to further investigation and future criminal liability. In addition, companies ensure they will not suffer the collateral consequences that may be triggered by a conviction.[153] Prosecutors also like these agreements because they dramatically "reduce the costs associated with prosecutorial action."[154] While there is still the cost of investigation, "there are no trials, no risk of los[ing], and no collateral consequences" to innocent employees and stockholders that might upset the public.[155]

The rise in use of deferred and non-prosecution agreements to address corporate wrongdoing is rooted in something deeper than a prosecutor's fear of losing a trial or raising the public's ire, however. Most prosecutors use these agreements because they genuinely believe they are having an

148 GARRETT, *supra* note 76, at 55; Griffith, *supra* note 20, at 2088.

149 Griffith, *supra* note 20, at 2088.

150 As Garrett puts it, "The new approach suggested that corporations were more like juveniles—not entirely innocent, but mainly in need of guidance, rehabilitation, and supervision." GARRETT, *supra* note 76, at 55. This strategy was formalized (and then reformulated) in the series of DOJ memos described above. *See supra* text accompanying notes 87–89.

151 GIBSON DUNN, 2015 MID-YEAR UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 2 chart 1 (2015) [hereinafter 2015 MID-YEAR UPDATE], http://www.gibsondunn.com/publications/pages/2015-Mid-Year-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx. The yearly high was forty, which occurred in 2010. *Id.*

152 *See id.*; David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1308 (2013).

153 *See* Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1864, 1873 (2005) (describing how prosecutors entered into a deferred prosecution agreement with Prudential Securities over allegations of fraud related to oil and gas sales, allowing the firm to continue its investment advising activities).

154 Griffith, *supra* note 20, at 2088. Further, deferred and non-prosecution agreements "simultaneously offer[ ] the prospect of large monetary recoveries from corporate defendants." *Id.* In 2012, the total payout under these agreements was $9 billion, three times the amount in 2011. 2015 MID-YEAR UPDATE, *supra* note 151, at 2 chart 2. The total for just the first half of 2015 was over $4 billion, almost equaling the previous year's total of over $5 billion. GARRETT, *supra* note 76, at 68–69; 2015 MID-YEAR UPDATE, *supra* note 151, at 2 chart 2.

155 Griffith, *supra* note 20, at 2088.

impact—that they are changing corporate culture for the better.[156] This belief is demonstrated by the terms of the agreements themselves, which prosecutors draft with the help of regulatory agents.[157] The focus of the agreements is often not the large fines, but what changes a company will make to ensure laws are not broken in the future. For example, while Pfizer's 2009 deferred prosecution agreement related to its illegal marketing of the painkiller Bextra contained an eye-popping $2.3-billion charge, the bulk of the agreement focused on corporate governance and compliance.[158] Indeed, most agreements contain provisions aimed at refining corporate policies and procedures, and improving employee training and monitoring—two of the three spheres of compliance.[159] SEC enforcement action settlements often include equally detailed reform-oriented provisions.[160]

While these practices may indeed change corporate cultures for the better,[161] they also allow prosecutors into the corporation. Prosecutors have become "super-regulators" by "expanding the prosecutorial scope [of law enforcement] and interweaving compliance matters with criminal matters."[162] By maximizing their enforcement and adjudicative power, provided by expansive federal criminal law, government agents now directly intervene in compliance matters through the terms of DPAs and NPAs,[163] allowing them to "impose affirmative obligations on companies to change personnel, revamp their business practices, and adopt new models of corporate govern-

156 Judge Jed Rakoff, Senior District Judge from the Southern District of New York, has forcefully articulated this argument, albeit in regards to why no senior Wall Street executives have been convicted for conduct occurring during the financial crisis. *See* Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/?pagination=false.

157 GARRETT, *supra* note 76, at 68 (demonstrating that in ninety-one percent of DPAs or NPAs, a regulatory agency was involved, most commonly the SEC).

158 Gardiner Harris, *Pfizer Pays $2.3 Billion to Settle Marketing Case*, N.Y. TIMES (Sept. 2, 2009), http://www.nytimes.com/2009/09/03/business/03health.html?_r=0 (explaining that the company entered into a corporate integrity agreement aimed at helping the company avoid future illegality).

159 Griffith, *supra* note 20, at 2089. Some agreements call for detailed corporate changes, such as hiring new compliance professionals, closing a business line, or altering compensation practices. *Id.*

160 *See* Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793, 796 (describing SEC "undertakings" that require the "creation of new management positions, adoption of new accounting and reporting practices, reconfiguration of corporate training programs, and establishment of specific board-level committees and procedures").

161 Some argue this is not the case. *See* Garrett, *supra* note 89, at 936 (offering praise for structural reform prosecutions aimed at specific factors in companies that encourage illegal behavior, but also finding a cause for concern); *see also* Barnard, *supra* note 160, at 794–96 (same).

162 Hillary Rosenberg & Adam Kaufmann, *The Pros and Cons of DOJ Hiring a Compliance Expert*, LAW360, (Aug. 11, 2015), http://www.law360.com/articles/689277/the-pros-and-cons-of-doj-hiring-a-compliance-expert.

163 Griffith, *supra* note 20, at 2109.

ance."[164] Thus, irrespective of their intentions, prosecutors, and by extension regulatory agents, have found their way deep into America's corporations through compliance. This is an important development in corporate and white collar criminal law, and it directly impacts how companies approach their core compliance function.[165]

B. Criminalized Compliance Increases Organizational Focus on Keeping Government Agents Out of the Corporation

Companies facing the prospect of increasing governmental intervention in their business, either through broad investigations of criminal or quasi-criminal wrongdoing, or through settlement agreements that direct future compliance efforts, want to minimize the possibility of that happening. As Jayne Barnard has reported, "everybody hates" government intrusion into their company.[166] While that is undoubtedly true, it is important to understand what companies want to avoid and why. And it is equally important to understand how companies have shaped their compliance efforts to achieve that goal.

From a company's perspective, it is trying to avoid three primary effects of government intervention. First, no company wants to be convicted of criminal wrongdoing by the DOJ or admit to an SEC violation. While this is largely true because of the reputational and monetary costs the firm will incur, which are explored below, there are also more direct reasons. One is that convictions and judgments trigger collateral consequences that may drastically alter a company's future. The most explicit example is a company whose business involves selling or providing services to the government; a conviction may bar future government contracts and effectively put the company out of business.[167] Even if a company is not entirely dependent on government contracts, a conviction and resulting debarment could impact revenues so significantly that it might put the company in peril. Arthur Anderson succumbed to collateral consequences;[168] British Petroleum's U.S. operations might have too if it were formally debarred based on convictions

164 Anthony S. Barkow & Rachel E. Barkow, *Introduction* to PROSECUTORS IN THE BOARDROOM 1, 3 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); *see infra* Section II.B.

165 *See* Garrett, *supra* note 89, at 936 (stating that "[t]he move towards a structural reform approach is . . . the most important development in decades in the law of organizational crime").

166 Barnard, *supra* note 160, at 817 (quoting Interview with Anonymous Source 1 (Sept. 26, 2007; Nov. 15, 2007)).

167 *See* Marc R. Greenberg, Beware: Debarment Can Prove to Be More Damaging than the Criminal Penalty (Jan. 28, 2014) (unpublished manuscript), http://www.musickpeeler.com/images/ps_attachment/attachment1183.pdf (outlining the collateral consequences of debarment for convicted companies, particularly those subject to EPA jurisdiction).

168 *See* GARRETT, *supra* note 76, at 150 ("The true death sentence for Arthur Anderson was not the $500,000 fine but the SEC debarment."); Barkow & Barkow, *supra* note 164, at 2.

related to the Deepwater Horizon disaster.[169] Although criminal convictions of large companies are somewhat rare given the Justice Department's preference for deferred and non-prosecution agreements,[170] the threat of dire collateral consequences stemming from a conviction is real to most companies.[171]

Second, the more pressing concern for companies is less existential than economic. Be it a criminal investigation and prosecution by the DOJ or a lawsuit by the SEC, having the government interested in your business is enormously expensive. These expenses include remediating wrongdoing after a legal violation, mounting a legal defense against criminal or civil charges, and conducting internal investigations at the outset of an agency inquiry. A 2011 study found that multinational companies spend on average approximately $3.5 million a year on compliance, over twenty percent of which is allocated to incident management, legal defense, and redress.[172] Siemens A.G. reported spending more than $1 billion solely related to the government's inquiry into the company's payment of foreign bribes.[173]

An even more prominent example is the cost incurred by large banks related to the financial crisis. Bank of America estimated that the total cost of its litigation expenses related to the crisis topped $36 billion.[174] Indeed, the total cost of financial crisis-related litigation for the largest global banks

169 Greenberg, *supra* note 167, at V-18 (explaining that a conviction-triggered debarment would have prevented BP from renewing oil leases and selling jet fuel to the U.S. military, resulting in billions of dollars in losses).

170 In addition, even when convictions or judgments do occur, so-called "bad boy provision" waivers may allow companies to continue operating in highly regulated industries. *See* Robert J. Anello & Richard F. Albert, *Convicted Corporations Aren't Really Bad Boys*, 253 N.Y. L.J., no. 4, June 2, 2015 (describing how four international banks pleaded guilty to manipulating foreign exchange rates, subjecting them to significant collateral consequences, but were granted waivers by the SEC to continue operating in the United States).

171 *See* Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. Colo. L. Rev. 1, 25–27 (2014) (discussing the externalities to corporate prosecutions, specifically regarding banks). It should also be apparent that no company wants to see its executives go to jail or be barred from working in the industry. As a relative matter, however, few executives are actually convicted of criminal charges. *See* Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 Va. L. Rev.1789, 1805–09 (2015).

172 Ponemon Inst., The True Cost of Compliance: A Benchmark Study of Multinational Organizations 7 fig.3 (2011), http://www.tripwire.com/tripwire/assets/File/ponemon/True_Cost_of_Compliance_Report.pdf. The report estimated the average cost to firms of non-compliance is $9.4 million. *Id.* at 2.

173 Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. Times (Mar. 5, 2012), http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/?_r=0.

174 John Maxfield, *We Finally Know How Much the Financial Crisis Cost Bank of America*, Motley Fool (Sept. 26, 2015), http://www.fool.com/investing/general/2015/09/26/we-finally-know-how-much-the-financial-crisis-cost.aspx. Bank of America was the largest player in the mortgage-backed securities (MBS) arena, issuing $637 billion in MBS between 2005 and 2008. *See* Matthew Frankel, *JPMorgan Chase's Settlement Was Just the Beginning*, Motley Fool (Jan. 26, 2014), http://www.fool.com/investing/general/2014/01/26/jpmorgan-chases-settlement-was-just-the-beginning.aspx.

since just 2010 was more than $300 billion.[175] And that is just the *direct* costs of litigation; that is, settlements and legal fees stemming from criminal and civil violations. These figures do not represent business costs incurred through staffing changes and restructuring that were precipitated by government intervention. In 2012, Bank of America spent $3.1 billion a quarter to wind down its subprime mortgage business, a move that was largely dictated by the government's 2008 intervention in the bank's affairs.[176] The expense now runs approximately $900 million a quarter.[177] Not exactly a minor cost.[178]

Even assuming companies are able to absorb the direct costs of government intervention, they still face a host of indirect costs. Companies that are publicly outed as being under investigation by the DOJ or another government agency incur significant reputational costs and loss of market share.[179] Just one week after allegations surfaced that Volkswagen was being investigated for installing "defeat devices" to thwart EPA standards, the company's stock plunged nearly thirty percent.[180] Analysts are questioning whether the carmaker will ever truly recover from the scandal (which is just beginning to be investigated by various agencies and will stretch on for years), citing reputational costs and spillover effects, including the downgrading of company debt by rating agencies and loss of key personnel.[181]

Third, companies simply want to avoid the disruption that is inevitable when government intervenes in business. This includes small-scale govern-

175 *See* Ben McLannahan, *Banks' Post-Crisis Legal Costs Hit $300bn*, FIN. TIMES, (June 7, 2015), http://www.ft.com/intl/cms/s/0/debe3f58-0bd8-11e5-a06e-00144feabdc0.html#axzz3q5TEVcrZ.

176 Maxfield, *supra* note 174; *see also* Janet E. Kerr, *The Financial Meltdown of 2008 and the Government's Intervention: Much Needed Relief or Major Erosion of American Corporate Law? The Continuing Story of Bank of America, Citigroup, and General Motors*, 85 ST. JOHN'S L. REV. 49, 51–52 (2011) (describing the government pressuring of Bank of America to purchase Merrill Lynch and its "toxic" subprime assets).

177 Maxfield, *supra* note 174.

178 Barclays reportedly rejected a DOJ demand for a $5-billion settlement payment related to wrongdoing during the financial crisis because over the past five years almost all of the company's profits have been "erased by 20 billion pounds ($24.5 billion) of misconduct charges." Zeke Faux & Hugh Son, *Why Barclays CEO Staley Opted for War When Dimon Chose Surrender*, BLOOMBERG (Dec. 28, 2016), https://www.bloomberg.com/news/articles/2016-12-23/why-barclays-ceo-staley-opted-for-war-when-dimon-chose-surrender.

179 *See* Barnard, *supra* note 160, at 817 (reporting "adverse signal[s] to the market" when compliance consultants are included in an SEC settlement); Faux & Son, *supra* note 178 (quoting Jamie Dimon, JPMorgan CEO, suggesting that if he had not quickly settled with the DOJ for $13 billion, the health of his company would be threatened).

180 Paul R. La Monica, *Volkswagen Has Plunged 50%. Will It Ever Recover?*, CNN MONEY (Sept. 25, 2015), http://money.cnn.com/2015/09/24/investing/volkswagen-vw-emissions-scandal-stock/. The scandal cost Volkswagen $7.3 billion in the third quarter of 2015, and experts predict total losses of between $20 and $78 billion. Sue Reisinger, *Scandal-Plagued VW, GM and Deutsche Bank Take Big Hits to Bottom Line*, CORP. COUNSEL (Nov. 5, 2015), http://www.corpcounsel.com/id=1202741772940/ScandalPlagued-VW-GM-and-Deutsche-Bank-Take-Big-Hits-to-Bottom-Line?slreturn=20160924164431.

181 *See* La Monica, *supra* note 180.

ment inquiries that cause minor workflow disruptions; for example, answering subpoenas and document requests by government agencies and following cease and desist orders.[182] But it also includes more intrusive intervention, such as when a court-imposed monitor is tasked with evaluating a company's day-to-day compliance with a deferred prosecution, non-prosecution, or settlement agreement.[183] In addition to the significant monetary costs of employing a monitor,[184] the monitor's staff may be attending business meetings, interviewing board members and senior managers, reporting on the actions of C-suite executives, and engaging in hands-on development of corporate compliance initiatives[185]—not to mention engaging in what many companies see as "a bunch of [other] busy work."[186] All this takes time, energy, and focus away from what employees see as their real responsibilities.

Even without a monitor inside the company, government intervention can be incredibly disruptive. For example, KPMG's sale of illegal tax shelters resulted in a deferred prosecution agreement that required the company to close its entire private tax practice.[187] A Bristol-Myers Squibb agreement compelled the company to separate the positions of CEO and chairman of the board and appoint a new outside board member.[188] Other agreements "micromanage" firms by dictating hiring and firing.[189] On the whole, companies find these business disruptions "painful, time-consuming, and colossally expensive."[190]

These three effects, and the ease with which prosecutors and government agents may trigger them, have caused companies to greatly expand their compliance programs. Industry trends tell the story. Since 2008, compliance "has been [a] real growth business."[191] What a decade ago was a

182 *See* Barnard, *supra* note 160, at 799.

183 Ford & Hess, *supra* note 77, at 680–83.

184 For example, then-United States Attorney Chris Christie directed a monitoring contract to his former boss, John Ashcroft, that allowed Ashcroft's firm to bill up to $2.9 million per month for its monitoring services. *See* Claire Heininger, *Ashcroft's Firm to Collect $52m to Monitor Implant Case*, NJ.COM (Nov. 20, 2007), http://www.nj.com/news/index.ssf/2007/11/when_us_attorneys_christopher_c.html; Philip Shenon, *Ashcroft Deal Brings Scrutiny in Justice Dept.*, N.Y. TIMES (Jan. 10, 2008), http://www.nytimes.com/2008/01/10/washington/10justice.html?pagewanted=all.

185 Ford & Hess, *supra* note 77, at 706.

186 Barnard, *supra* note 160, at 817 n.119.

187 *See* GARRETT, *supra* note 76, at 72.

188 *See id.*

189 Barnard, *supra* note 160, at 818.

190 *Id.* at 817 n.119 (quoting Interview with Anonymous Source 2 (Sept. 27, 2007) (speaking explicitly about the appointment of compliance consultants)). Of course, disruption of a company's practices is often exactly what a deferred or non-prosecution agreement is intended to do. *See* Ford & Hess, *supra* note 77, at 720 ("[T]he presence of a monitor can be a sufficiently disruptive force to cause the company to conduct a meaningful re-evaluation of its practices.").

191 Anthony Effinger, *The Rise of the Compliance Guru—and Banker Ire*, BLOOMBERG (June 25, 2015), http://www.bloomberg.com/news/features/2015-06-25/compliance-is-now-calling-the-shots-and-bankers-are-bristling.

relatively unglamorous trade has ballooned into an almost $30-billion industry.[192] And the corporate compliance department "has emerged, in many firms, as the co-equal of the legal department."[193] Recent surveys confirm that modern compliance departments function with greater authority, organizational support, and funding than in the past.[194]

None of this is without cost to corporations. One study found that for companies with more than $1 billion in revenue, total compliance costs now equal that of 190 full-time employees.[195] In the securities industry, between 2002 and 2006, compliance-related out-of-pocket expenditures rose a minimum of 88% and a maximum of 473% depending on the type of expense.[196] The percent increase for capital expenditures related to compliance was 366%, rising to almost $4 million per firm.[197] Recent surveys show compliance budgets are continuing to increase in highly regulated industries.[198]

Part of the increasing budgets goes to additional compliance staff, which must be hired to oversee the growing landscape of criminal and quasi-criminal regulations. For example, JPMorgan has hired 8000 compliance and control personnel since the financial crisis;[199] HSBC has added 1600.[200] Some large companies hire "hundreds, even thousands, of compliance officers at a time."[201] As Robert Bird and Stephen Park put it: "Driven by the new regulatory environment, a compliance officer is being termed a 'dream career,' . . . [and] [t]here is a 'battle royal for talent in the compliance space, across the board.'"[202]

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192 *See* Dov Seidman, *Why Companies Shouldn't 'Do' Compliance*, FORBES (May 4, 2012), http://www.forbes.com/sites/dovseidman/2012/05/04/why-ceos-shouldnt-do-compliance/.

193 Griffith, *supra* note 20, at 2077.

194 *See, e.g.*, DELOITTE, IN FOCUS: 2015 COMPLIANCE TRENDS SURVEY 5 (2015), http://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-aers-reg-crs-2015-compliance-trends-survey-051515.pdf.

195 RICHARD M. STEINBERG, THE HIGH COST OF NON-COMPLIANCE: REAPING THE REWARDS OF AN EFFECTIVE COMPLIANCE PROGRAM 3 (2010), https://www.securityexecutivecouncil.com/common/download.html?PROD=238. Another study found the costs associated with compliance to be almost $10,000 per employee. *See* Robert Bird & Stephen Park, *An Efficient Investment-Risk Model of Compliance*, CLS BLUE SKY BLOG (Nov. 30, 2016, 12:05 AM), http://clsbluesky.law.columbia.edu/2016/11/30/an-efficient-investment-risk-model-of-corporate-compliance/.

196 SEC. INDUS. ASS'N, THE COSTS OF COMPLIANCE IN THE U.S. SECURITIES INDUSTRY: SURVEY REPORT 10 fig.6 (2006), https://www.sifma.org/uploadedfiles/research/surveys/costofcompliancesurveyreport(1).pdf.

197 *Id.* at 11.

198 *See* Griffith, *supra* note 20, at 2103.

199 Effinger, *supra* note 191.

200 Gregory J. Millman & Samuel Rubenfeld, *Compliance Officer: Dream Career?*, WALL ST. J. (Jan. 15, 2014), http://www.wsj.com/articles/SB10001424052702303330204579250722114538750.

201 Griffith, *supra* note 20, at 2077.

202 Bird & Park, *supra* note 18, at 217–18 (footnotes omitted) (citing Millman & Rubenfeld, *supra* note 200 (quoting Cory Gunderson, head of the risk-and-compliance practice at Protiviti, a research consulting firm)).

But it is not just the increase in cost and number of compliance staff that explains the organizational consequences of criminalized compliance—it is who is being hired. There is no formal credential or educational background necessary to be a compliance officer, yet sought-after hires tend to be attorneys and those with legal or regulatory backgrounds.[203] This makes sense given that compliance officers are tasked with "keeping up with increasingly strict and complex regulatory systems," and then training, monitoring, and enforcing those systems.[204] The optimal skill set naturally skews personnel toward lawyers.

For high-level compliance positions the trend is even more pronounced. Top compliance officers at major corporations are often not just attorneys, but many are former prosecutors and regulatory agents. For example, Lumber Liquidators, Target, and Standard Chartered all recently hired attorneys with audit or regulatory backgrounds to be their chief compliance officers.[205] In Standard Chartered's case, its hire was the top federal prosecutor in Connecticut, David Fein.[206] While Fein does not have "much banking expertise," he did spend time at the DOJ and in the White House, which should help him navigate the ongoing fallout from the bank's recent $667 million in fines for violating U.S. sanctions laws.[207] Likewise, Pershing Square Capital Management recently hired a former Manhattan federal prosecutor to oversee the hedge fund's compliance efforts.[208] Increasingly, the heads of compliance for major U.S. companies have spent significant time prosecuting,

203 Effinger, *supra* note 190 (reporting that a chief compliance and ethics officer stated that "[m]ost of us tend to be auditors or attorneys"); *Neil Getnick and the Failure of Law Driven Compliance Programs*, Corp. Crime Rep. (Sept. 18, 2014), http://www.corporatecrimereporter.com/news/200/neil-getnick-failure-law-driven-compliance-programs/ (stating that "companies typically rely on 'law-driven' compliance"); Aruna Viswanatha & Brett Wolf, *Wall Street's Hot Hire: Anti-Money Laundering Compliance Officers*, Reuters (Oct. 14, 2013), http://blogs.reuters.com/financial-regulatory-forum/2013/10/14/wall-streets-hot-hire-anti-money-laundering-compliance-officers/.

204 Millman & Rubenfeld, *supra* note 200.

205 Tomi Kilgore, *Lumber Liquidators Hires New Chief Compliance Officer*, Mkt. Watch (Aug. 18, 2015), http://www.marketwatch.com/story/lumber-liquidators-hires-new-chief-compliance-officer-2015-08-18; Jonathan Randles, *Target Pulls in GM Compliance Chief to Helm Data Security*, Law360 (Nov. 7, 2014), http://www.law360.com/articles/594467/target-pulls-in-gm-compliance-chief-to-helm-data-security; Viswanatha & Wolf, *supra* note 203.

206 Viswanatha & Wolf, *supra* note 203.

207 *See id.* Standard Chartered's former global head for anti-bribery and corruption, Hui Chen, is now the Justice Department's chief compliance officer, the first person to hold that position. Sue Reisinger, *DOJ Compliance Chief's Boss Lays out the Agency's Plans*, Corp. Couns. (Nov. 4, 2015), http://www.corpcounsel.com/id=1202741499801/DOJ-Compliance-Chiefs-Boss-Lays-Out-the-Agencys-Plans. Chen was hired to "conduct more exacting interviews of compliance personnel" and "probe what companies are telling us [the DOJ] about their compliance." Yin Wilczek, *DOJ's Compliance Counsel Improving Fraud Probes: Official*, Bloomberg (Sept. 9, 2016) (on file with author).

208 Matthew Goldstein, *Ex-Federal Prosecutor in New York Joins Ackman's Hedge Fund*, N.Y. Times (Feb. 6, 2015), http://dealbook.nytimes.com/2015/02/06/ex-u-s-prosecutor-dabbs-joins-ackmans-pershing-square/?_r=0.

suing, or investigating other major U.S. companies on behalf of the government. Arguably, these individuals know best how to navigate the government intervention their companies so desperately want to avoid.

C. Criminalized Compliance Increases Criminal Law-Focused Compliance Efforts by Individual Compliance Officers

"Over-compliance is the new compliance."[209] That is how Harvey Pitt, former SEC chairman and now CEO of Kalorama Partners, a firm specializing in compliance and regulatory risk management consulting, describes his approach to designing compliance programs. Pitt further explains that he tells his corporate clients that "[m]inimal muster is for losers," counseling them to "get[ ] ahead of the curve" and optimize their compliance procedures.[210]

If this type of heavy-handed approach to compliance sounds like an outlier, it is not. Pitt and other leaders in the compliance industry have capitalized on the evolution of criminalized compliance, and their regulatory backgrounds, to advocate for a compliance approach that is firmly rooted in principles of criminal law and deterrence.[211] While this Article contends that such an approach is misguided, it has gained traction in corporate America. Individual compliance officers are increasingly using deterrence-based, command-and-control compliance models that are grounded in and draw from the criminal law.

In many ways this is unsurprising given how compliance has evolved. A company facing broad *respondeat superior* liability for the criminal and quasi-criminal acts of its employees seeks to avoid that risk.[212] The most obvious way, perhaps, is to formulate a set of rules that align with the source of the risk—the criminal law. This approach tends to shape compliance programs toward a focus on preventing unlawful conduct, "primarily by increasing surveillance and control and by imposing penalties for wrongdoers"—the standard tools of criminal law enforcement.[213]

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209 Ashlee Vance, *Over-Compliance Is the New Compliance, Says Former SEC Chairman*, REGISTER (May 18, 2005), http://www.theregister.co.uk/2005/05/18/pitt_sec_kalorama/.

210 *Id.*

211 A more cynical view is the following: "Vendors of all types have stapled 'Compliance' onto whatever product they find laying around, hoping fear might generate a sale." *Id.* This is reflected in many compliance departments' focus on "the crisis *du jour*." Griffith, *supra* note 20, at 2101 (providing the example of data privacy and confidentiality as "a top area of attention" for compliance because of recent high profile corporate data breaches).

212 Indeed, a broad view of corporate compliance is that its mission is to minimize all "downside risk" associated with any employee misconduct or mistake. Griffith, *supra* note 20, at 2083.

213 *See* Paine, *supra* note 16, at 109. The Organizational Guidelines' carrot-and-stick structure and their emphasis on reducing culpability through the detection of criminal violations reinforces that focus. *See id.*; *see also* Johann Graf Lambsdorff, *Preventing Corruption by Promoting Trust—Insights from Behavioral Science* 3, 9 (Univ. of Passau, Working Paper No. V-69-15, 2015), https://www.researchgate.net/publication/286441815_Preventing_Corruption_by_Promoting_Trust_-_Insights_from_Behavioral_Science (arguing current

On the level of an individual compliance officer, this plays out as follows: there is now "deep and broad" white collar and corporate criminal law available to government agents. Those agents use their resulting adjudicatory and enforcement power to increasingly intervene in business in an attempt to improve corporate cultures. When those same agents transition to the private sector as highly sought-after compliance professionals, they are faced with preventing the very governmental intervention they used to lead, which is enormously costly and disruptive to their new companies. Accordingly, there is great organizational pressure on them to predict, prevent, and mitigate corporate wrongdoing.[214] In order to do so, they fall back on their training and expertise as lawyers and investigators, treating compliance as a problem that can be solved with the familiar tools of the criminal law. And the most powerful tools government agents possess are those of "law enforcers"—aggressive enforcement and adjudication.

Intel's "active approach" to compliance provides a compelling example of how this occurs. In order to stave off the expense and disruption of antitrust investigations and lawsuits, the company, led by General Counsel Tom Dunlap, developed a compliance program that was modeled on a continuing, and arguably relentless, criminal investigation. The tactics that became the program's centerpiece, and which ultimately led to additional illegality within the company,[215] were the epitome of criminal law-driven, deterrence-based compliance.

But Intel's approach is far from unique. In fact, the monitoring and enforcement spheres of many U.S. compliance programs follow a similar approach.[216] For example, Morgan Stanley was recently in the news for its successful FCPA compliance program. The program, developed by Raja Chatterjee, global head of the bank's anti-corruption group and a former federal and state prosecutor, "won praise from the government" and a rare public declination concerning bribery payments made by an executive to a Chinese official.[217] Central to the government's decision to only prosecute the executive, Garth Peterson, and not the company was Morgan Stanley's

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approaches to combating corruption, including the Organizational Guidelines, focus on prevention and repression, and are "based on a principle of distrust"); Robert B. Cialdini et al., *The Hidden Costs of Organizational Dishonesty*, MIT SLOAN MGMT. REV., Spring 2004, at 67, 72 (explaining the rise in popularity of internal controls and monitoring systems as based partly on overestimates of their effectiveness).

214 *See* LRN, THE 2015 ETHICS AND COMPLIANCE EFFECTIVENESS REPORT 14 (2015), http://pages.lrn.com/the-2015-ethics-and-compliance-program-effectiveness-report (discussing the pressures on compliance officers to justify their departments' returns on investment).

215 *See* Complaint, *supra* note 13, at 19.

216 *See* Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 137 (1999) (finding deterrence-based compliance dominates in Fortune 1000 firms).

217 Scott Cohn, *Ex-MS Banker in China Bribery Case: My Side of Story*, CNBC (Aug. 16, 2012), http://www.cnbc.com/id/48693573 (reporting that the payments were intended to secure a real estate deal benefiting Morgan Stanley and the executive); *see also* Howard Sklar, *The Most Marketable Compliance Officer in the World*, FORBES (Apr. 30, 2012), http://

preexisting compliance program, self-disclosure, and extensive cooperation.[218] In particular, the government highlighted Morgan Stanley's "robust" due diligence program, which included random audits and transaction monitoring, extensive employee training regarding FCPA compliance, and frequent updates of its anti-corruption program.[219]

While these publicly reported efforts are now considered "best practices" for FCPA compliance, Morgan Stanley also likely benefited in the government's eyes from its more aggressive tactics.[220] A review of Peterson's case demonstrates that Morgan Stanley's "compliance personnel regularly surveilled and monitored client and employee transactions," "randomly audited selected personnel in high-risk areas," made pretextual phone calls to verify transactions, and ran criminal background checks on the principals of deal partners.[221] Lanny Breuer, the assistant attorney general at the time, characterized this approach as properly "rigorous compliance" and "smart, and responsible, enforcement."[222]

Another example is JPMorgan. In response to multiple compliance failures over the last decade, the bank undertook a major revision of its compliance program. Some of its efforts are typical of large companies attempting to forestall future government intervention: the bank "hired 2,500 compliance workers and spent $730 million over the past three years to improve [compliance] operations."[223] But the bank also took a novel and extremely aggressive approach to employee monitoring—it created an in-house surveillance unit and developed proprietary software to monitor the email and telephone communications of its traders.[224] While employee monitoring, even high-tech monitoring, has been part of compliance programs for years,

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www.forbes.com/sites/howardsklar/2012/04/30/the-most-marketable-compliance-officer-in-the-world/.

218 *See* Press Release, Dep't of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required.

219 *See* Sklar, *supra* note 217.

220 Thomas Fox, *Morgan Stanley Gets Thumbs Up from DOJ & SEC for Best Practices Compliance Program*, CORP. COMPLIANCE INSIGHTS (May 3, 2012), http://corporatecomplianceinsights.com/morgan-stanley-gets-thumbs-up-from-doj-sec-for-best-practices-compliance-program/.

221 Information at 6, 10, United States v. Peterson, 859 F. Supp. 2d 477 (E.D.N.Y. 2012) (No. 12-224), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/04/26/petersong-information.pdf.

222 Press Release, Dep't of Justice, Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

223 Hugh Son, *JPMorgan Algorithm Knows You're a Rogue Employee Before You Do*, BLOOMBERG (Apr. 5, 2015), http://www.bloomberg.com/news/articles/2015-04-08/jpmorgan-algorithm-knows-you-re-a-rogue-employee-before-you-do.

224 *See* Portia Crowe, *JP Morgan Is Working on a New Employee Surveillance Program*, BUS. INSIDER (Apr. 8, 2015), http://www.businessinsider.com/jpmorgans-employee-surveillance-program-2015-4.

JPMorgan's efforts are noteworthy because the bank's software algorithms attempt to predict illegal trading behavior *before* it occurs. This so-called "predictive monitoring" uses technology that was created specifically to combat terrorism.[225] The bank executive in charge of the surveillance program is Sally Dewar, a former top regulator in the UK's Financial Services Authority.[226] Much like during her regulatory enforcement days, Dewar is hoping to catch employees that are colluding or concealing their bad intentions, and then expel or prosecute those employees. It would be difficult for compliance to be any more criminalized. Some believe this type of vigorous compliance "offers a glimpse into Wall Street's future."[227] Given the evolution of compliance, the pressures facing compliance officers, and those officers' backgrounds, that future seems likely for many companies.

D. Criminalized Compliance Delegitimizes the Compliance Function

The above examples illustrate a particular irony. In the quest to avoid costly government intervention into their businesses, which is a product of expansive criminal law and aggressive government agents, companies have turned to those same agents and are now employing the most aggressive enforcement aspects of the criminal law as part of their compliance efforts. Irony aside, however, criminalized compliance has important ramifications for the efficacy of compliance as a whole. By importing into the corporation these negative aspects of the criminal law, criminalized compliance regimes have also imported many of the criminal law's delegitimizing features.

To understand exactly what these features are, a brief return to Stuntz is necessary. Stuntz explained that while it was problematic that expansive criminal law had transferred lawmaking and adjudication to government "law enforcers," there was an additional related consequence.[228] If law enforcers have the power to make and adjudicate the criminal law, then they *are* the criminal justice system.[229] According to Stuntz, this is a natural consequence of a structure that allows law enforcers to freely embody the criminal justice system and use it as they wish. The inevitable result is the "selective enforcement and unequal treatment of similarly situated defendants."[230] This does not necessarily occur through intentional bias or vindictiveness; a government prosecutor or regulatory agent may simply be enforcing his or her own

225 Son, *supra* note 223. Credit Suisse is developing a similar program with Palantir Technologies, a Silicon Valley tech company focused on data analysis for police and intelligence services. Jeffrey Voegeli, *Credit Suisse, CIA-Funded Palantir to Target Rogue Bankers*, BLOOMBERG (Mar. 23, 2016), https://www.bloomberg.com/news/articles/2016-03-22/credit-suisse-cia-funded-palantir-build-joint-compliance-firm. Palantir has received funding from In-Q-Tel, the CIA's investment arm. *Id.*

226 Son, *supra* note 223.

227 *Id.*

228 Stuntz, *supra* note 119, at 520 (explaining how this consequence was "the most important of all").

229 *See* Luna, *supra* note 145, at 795; Stuntz, *supra* note 119, at 519–23.

230 Beale, *supra* note 145, at 757.

sincerely held view of morality.[231] But it guarantees enforcement and adjudication of the criminal law that is at best inconsistent and arbitrary, and is at worst pretextual or discriminatory.[232] Some have called these consequences the criminal law's "vices."[233]

Importantly, these vices have led to an even more profound consequence: the criminal justice system has become more uncoordinated and illogical, more unjustifiable. When society is faced with the inconsistent enforcement and arbitrary adjudication of its criminal laws, it affects how the public views the criminal justice system as a whole—it erodes the criminal law's legitimacy. This is one of the reasons overly expansive criminal law, and the power it gives prosecutors and agents, is so problematic. The vices of the criminal law "degrade the quality of criminal codes . . . jeopardizing the quality of justice the system generates."[234] White collar and corporate criminal law is no exception.[235] The public sees a "legal order that is deeply compromised" in this area.[236]

It is this degradation, this erosion of legitimacy, that criminalized compliance is importing into the corporation. Because criminalized compliance mimics the criminal law, and has adopted many of its precepts—including deterrence-focused rules, aggressive and onerous monitoring, and inconsistent enforcement and adjudication—it suffers from the same lack of legitimacy in the eyes of corporate employees as white collar and corporate criminal law does in the eyes of the public.[237] As Scott Killingsworth explains, "'command-and-control' oriented [compliance] programs . . . [pro-

231 *See id.* at 758; *see also supra* Section II.A (discussing the motivations of prosecutors and regulatory agents when intervening in corporate affairs).

232 *See* Beale, *supra* note 145, at 758–59.

233 *Id.* at 749.

234 Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 589–90 (2012).

235 *See* Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS. 33, 34 (2012) (finding a disconnect between the public's perception of white collar criminal law and its reality); Haugh, *supra* note 45, at 190–91 (citing Andrea Schoepfer et al., *Do Perceptions of Punishment Vary Between White-Collar and Street Crimes?*, 35 J. CRIM. JUST. 151, 160 (2007) (presenting findings suggesting educated and wealthier individuals have more experience with white collar crime and perceive it as going "largely undetected")).

236 Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1662 (2012); *see also* Podgor, *supra* note 27, at 529–30.

237 Although more direct empirical data regarding the public's views are needed, opinion polls demonstrate that most people feel white collar crime enforcement is varied and inadequate. *See* Donald J. Rebovich & John L. Kane, *An Eye for an Eye in the Electronic Age: Gauging Public Attitude Toward White Collar Crime and Punishment*, 1 J. ECON. CRIME MGMT., no. 2, 2002, at 12. And recent studies suggest that those segments of the public most likely to encounter white collar crime deem its detection and punishment as uncertain. *See* Schoepfer et al., *supra* note 235, at 160 ("More educated and wealthier individuals were less likely to view white-collar crimes as being more certain of detection and less likely to be punished than street crimes, especially with regard to how they perceived the criminal justice system currently operated.").

vide] [t]he explicit message [that] is the same as the message from law enforcement: follow the rules or pay the penalty."[238] The resulting employee reactions "range from resentment, to an 'us-versus-them' attitude towards management,"[239] both of which cause the "legitimacy of the program [to be] slowly chipped away."[240] Scholars have documented this erosion of legitimacy in corporate compliance regimes that share the features of the criminal law.[241]

This is the story of Intel, whose employees, despite being subject to a compliance program that was "the world's best," saw it first as oppressive and then as a lesson in how to hide their wrongdoing.[242] It is also the story of Morgan Stanley.[243] While the company's rare declination ensures its compliance program will be lauded for its effectiveness, in reality its own employees believed the program lacked legitimacy. In an interview after his sentencing, Garth Peterson explained that despite the public perception that Morgan Stanley "had this wonderful compliance program," it was overly aggressive at times and pro forma at others.[244] Former colleagues of Peterson agreed.[245] In other words, the program suffered from the same "vices" that the criminal law does—it was a command-and-control regime inconsistently, and possibly arbitrarily, enforced. These vices lessened the program's overall legitimacy from the perspective of company employees.

Interestingly, Peterson concluded his interview by commenting that the problem with Morgan Stanley's compliance program was that it failed to

238 Scott Killingsworth, *Modeling the Message: Communicating Compliance Through Organizational Values and Culture*, 25 GEO. J. LEGAL ETHICS 961, 966 (2012).

239 *Id.* at 968.

240 David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 364 (2016).

241 *See, e.g.*, Langevoort, *supra* note 35, at 97–98 (discussing the work of social psychologist, Robert Cialdini, who predicts reduced employee morale and lower rates of compliance when companies "turn[ ] up the heat" on monitoring); *see also* Killingsworth, *supra* note 238, at 968 (discussing research that suggests command-and-control tactics such as aggressive monitoring cause employees to "'live down' to the low expectations that are projected upon them"); Lambsdorff, *supra* note 213, at 3–5 (discussing research finding that aggressive monitoring and signaled distrust in the workplace undermine workplace morale and create suspicion between employees and management); Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 818–19 (2014) (same); Paine, *supra* note 16, at 111 (explaining that "[e]mployees may rebel against programs that stress penalties" and view compliance programs that do not address root causes of misconduct skeptically).

242 Yoffie & Kwak, *supra* note 1, at 122 (noting that employees under the program were described as "often shaken"); Complaint, *supra* note 13, at 19 (alleging that "the actual effect of the program was to school Intel executives in cover-up").

243 And, it will likely be the story of JPMorgan. *See supra* text accompanying notes 227–28, 242.

244 Cohn, *supra* note 217.

245 *Id.* (reporting that Peterson's colleague acknowledged that "little attention was paid to the U.S. anti-bribery laws during the Chinese real estate boom" and that "most employees 'knew very little' about the FCPA" at the time).

"get[ ] into people's heads, which is what really matters."[246] This sentiment—that to be successful, compliance must take into account how employees think—provides a fitting transition to the behavioral implications of criminalized compliance.

III. The Behavioral Impacts of Criminalized Compliance

Much has been written regarding the adverse impacts that a lack of legitimacy has on compliance effectiveness.[247] But while most scholarly work focuses on the general connection between illegitimacy and ineffectiveness, this Article contributes a more direct argument as to the underlying reason for why that occurs. Delegitimized compliance regimes can never be fully effective because they fuel employee rationalizations that allow unethical and illegal behavior to go forward. This is the inherent flaw of criminalized compliance—it facilitates the behaviors that compliance is intended to prevent.

A. How Rationalizations Operate in White Collar and Corporate Offenders

To demonstrate this point, it is necessary to understand how rationalizations operate to allow wrongdoing by white collar and corporate offenders.[248] Rationalization theory begins with the work of criminologist Donald Cressey. Cressey used a study of embezzlers to develop a social psychological theory regarding the causes of "respectable" crime.[249] Building on Edwin Sutherland's theory of differential association, which posited that criminal behavior involves "motives, drives, rationalizations, and attitudes favorable to

246 *Id.*

247 The groundbreaking work of Tom Tyler and others has demonstrated this repeatedly. *See* Tom R. Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 Cal. Mgmt. Rev. 31, 35 (2008); Tom R. Tyler & Steven L. Blader, *Can Business Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 Acad. Mgmt. J. 1143, 1153 (2005); Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 Bus. Ethics Q. 315, 333 (1999); Paine, *supra* note 16, at 111; *see also* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 212 (2012).

248 This Article uses the terms rationalization and neutralization more or less interchangeably, albeit using the former much more than the latter. This is consistent with criminological and behavioral ethics literature. *See, e.g.*, Anand et al., *supra* note 17, at 40; Maruna & Copes, *supra* note 17, at 234–39. *But see* Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 Am. Soc. Rev. 664, 666–67 (1957) (using the term "rationalization" to mean post-act justification or excuse, and "neutralization" to mean pre-act vocabulary of motive).

249 Donald R. Cressey, Other People's Money: A Study in the Social Psychology of Embezzlement 19 (1973); Donald R. Cressey, *The Respectable Criminal*, 3 Criminologica 13, 14–15 (1965).

the violation of law,"[250] Cressey determined that three key elements are necessary for violations of a financial trust—the essence of all white collar and corporate crime—to occur.[251]

First, Cressey theorized that an individual must possess a nonshareable financial problem; that is, a financial problem the individual feels cannot be solved by revealing it to others.[252] Second, the individual must believe that the financial problem can be solved in secret by violating a trust.[253] Third, the individual must verbalize the relationship between the nonshareable financial problem and the illegal or unethical solution in "language that lets him look on trust violation as something other than trust violation."[254] Put another way, the individual uses words and phrases during an internal dialogue that makes the behavior acceptable in his mind, thus keeping his perception of himself as an honest citizen intact.[255]

Cressey called verbalizations "the crux of the problem."[256] He believed that the words a potential offender uses during his conversations with himself were "actually the most important elements in the process which gets him into trouble, or keeps him out of trouble."[257] Cressey did not view these verbalizations as after-the-fact excuses that offenders used to relieve their culpability upon being caught. Instead, he found that verbalizations were vocabularies of motive, words and phrases not invented by the offender "on the spur of the moment," but that existed as group definitions labeling deviant behavior as appropriate.[258] Importantly, this meant that an offender's rationalizations were created *before* wrongdoing occurred. As Cressey put it, "[t]he rationalization is his motivation"—it not only justifies his behavior to others, but it makes the behavior intelligible, and therefore actionable, to

250 *See* Sykes & Matza, *supra* note 248, at 664; *see also* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 240 (1983). Sutherland's groundbreaking work "invented the concept" of white collar crime.

251 *See* Cressey, *supra* note 249, at 14.

252 *Id.* Cressey explained that the problem may not seem dire from the outsider's perspective, but "what matters is the psychological perspective of the potential [white collar criminal]." *Id.* Thus, problems may vary in type and severity, from gambling debts to business losses, which the individual is ashamed to reveal. Cressey's definition of a nonshareable problem also encompasses standard notions of greed. *See* JAMES WILLIAM COLEMAN, THE CRIMINAL ELITE 195 (5th ed. 2002).

253 Cressey, *supra* note 249, at 14–15.

254 *Id.* at 14–15.

255 *See id.* The prototypical verbalization is an embezzler telling herself she is "borrowing" the money and will pay it back.

256 *Id.*

257 *Id.*

258 *Id.*

himself.[259] Thus, verbalizations permit behavior to proceed that would otherwise be psychologically unavailable or unacceptable to an offender.[260]

Shortly after Cressey published his theories, two other criminologists, Gresham Sykes and David Matza, advanced a sophisticated theory of how juvenile delinquents rationalize their behavior. Like Cressey, Sykes and Matza found that while rationalizations might occur following deviant behavior, they also preceded behavior and made it possible.[261] By rationalizing their conduct *ex ante*, offenders were able to limit the "[d]isapproval flowing from internalized norms and conforming others in the social environment."[262] Sykes and Matza called these rationalizations "techniques of neutralization," and the two believed they explained the episodic nature of delinquent behavior more completely than competing theories.[263] Neutralization techniques—what are commonly called rationalizations—explained how offenders could "remain[ ] committed to [society's] dominant normative system," yet qualify that system's imperatives in a way to make periodic violations "'acceptable' if not 'right.'"[264] Rationalization theory and its core idea—that the psychological mechanisms offenders use to rationalize their behavior are a critical component in the commission of crime—have greatly influenced the study of both white collar crime and business ethics.[265]

Although rationalization theory has applicability to all criminal behavior, it has particular force in explaining white collar and corporate crime. As an initial matter, rationalization theory has its roots in Cressey's study of "respectable" crime.[266] Indeed, Sykes and Matza recognized that rationalizations are used not only by juveniles, but might also be used by adults engaged in general forms of deviance, including those committing crimes in the workplace.[267]

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259 CRESSEY, *supra* note 249, at 94–95. Cressey explained that his interviews of embezzlers revealed "significant rationalizations were always present *before* the criminal act took place, or at least at the time it took place, and, in fact, after the act had taken place the rationalization often was abandoned." *Id.* at 94.

260 *See id.* at 153. Cressey conducted interviews with inmates at three penitentiaries who were incarcerated for crimes defined as "the criminal violation of financial trust." *Id.* at 22. Although criminological studies such as Cressey's often rely on such qualitative interviews, concerns regarding sample selection and generalizability cannot be ignored. *See* Maruna & Copes, *supra* note 17, at 260–70 (discussing the pros and cons of interview-based, survey-based, and quantitative rationalization research).

261 Sykes & Matza, *supra* note 248, at 666.

262 *Id.*

263 *Id.* at 667.

264 *Id.*

265 *See* Maruna & Copes, *supra* note 17, at 222 (stating that the "influence of this creative insight has been unquestionable"); *see also* Anand et al., *supra* note 17, at 39 (applying rationalization theory to business law and ethics in a widely cited work); Heath, *supra* note 17, at 610–11 (same).

266 Cressey, *supra* note 249, at 13, 16.

267 Sykes & Matza, *supra* note 248, at 666; *see also* William A. Stadler & Michael L. Benson, *Revisiting the Guilty Mind: The Neutralization of White-Collar Crime*, 37 CRIM. JUST. REV.

More fundamentally, rationalization theory is especially applicable in describing the causes of corporate crime because "almost by definition white-collar offenders are more strongly committed to the central normative structure."[268] They are older, more educated, better employed, and have more assets than other offenders.[269] These factors suggest that white collar offenders are able to conform to normative roles and have a self-interest in doing so—they have a "greater 'stake' in conformity" than other categories of offenders.[270] Therefore, white collar offenders must rationalize their behavior through "elaborate . . . processes prior to their offenses."[271] Without employing rationalizations, they would be unable to "bring [their] actions into correspondence with the class of actions that is implicitly acceptable in . . . society."[272] Not surprisingly, numerous studies have documented the use of rationalizations by white collar and corporate offenders.[273]

B. Common White Collar and Corporate Offender Rationalizations

To put rationalization theory in better context, below are eight of the most prominent rationalizations used by white collar and corporate offenders.[274] These are also the key rationalizations that employees of Intel, Morgan Stanley, JP Morgan, and other companies with criminalized compliance regimes rely on when committing illegal or unethical acts.[275]

Denial of Responsibility. Called the "master account," the denial-of-responsibility rationalization occurs when the offender defines her conduct in a way that relieves her of responsibility, thereby mitigating "both social disapproval

494, 495–96 (2012) (explaining the applicability of Sykes's and Matza's theories to white collar offending).

268 Michael L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, 23 CRIMINOLOGY 583, 587 (1985). Of course, defining what exactly is society's central normative structure is difficult. As used here, it means only a law-abiding structure; however, it is easily extended to norm-abiding behavior within corporations.

269 *See* MICHAEL L. BENSON & SALLY S. SIMPSON, WHITE-COLLAR CRIME: AN OPPORTUNITY PERSPECTIVE 51–52 (2009).

270 Scott M. Kieffer & John J. Sloan III, *Overcoming Moral Hurdles: Using Techniques of Neutralization by White-Collar Suspects as an Interrogation Tool*, 22 SECURITY J. 317, 324 (2009).

271 Benson, *supra* note 268, at 587.

272 *Id.* at 588.

273 *See, e.g.*, *id.* at 591–98 (finding antitrust, tax, financial trust, fraud, and false statements offenders were "nearly unanimous" in rationalizing their criminal conduct by "denying basic criminality"); Petter Gottschalk, *Rotten Apples Versus Rotten Barrels in White Collar Crime: A Qualitative Analysis of White Collar Offenders in Norway*, 7 INT'L J. CRIM. JUST. SCI. 575, 580–81 (2012) (applying rationalization theory in a study of Norwegian white collar offenders); Stadler & Benson, *supra* note 267, at 496 (listing the domains in which researchers have explored the use of rationalizations, including occupational deviance, corporate crime, and other forms of white collar offending).

274 Sykes and Matza originally identified five rationalization techniques. *See* Sykes & Matza, *supra* note 248, at 667–70. Currently, researchers have identified between fifteen and twenty. *See* Maruna & Copes, *supra* note 17, at 234; Stadler & Benson, *supra* note 267, at 496–97.

275 *See supra* Section II.C.

and a personal sense of failure."[276] Generally, offenders deny responsibility by claiming their behavior is accidental or due to forces outside their control.[277] White collar offenders deny responsibility by pleading ignorance, suggesting they were acting under orders, or contending larger economic conditions caused them to act illegally.[278] The complexity of laws regulating white collar crimes and the hierarchical structure of companies offer offenders numerous ways to deny their responsibility.[279]

Denial of Injury. This rationalization focuses on the injury or harm caused by the illegal or unethical act.[280] White collar offenders may rationalize their behavior by asserting that no one will really be harmed.[281] If an act's wrongfulness is partly a function of the harm it causes, an offender can excuse or mollify her behavior if no clear harm exists.[282] The classic use of this technique in white collar crime is an embezzler describing her actions as "borrowing" the money—by the offender's estimation, no one will be hurt because the money will be paid back.[283] Offenders may also employ this rationalization when the victim is insured or the harm is to the public or market as a whole, such as in insider trading or antitrust cases.[284]

Denial of the Victim. Even if a white collar offender accepts responsibility for her conduct and acknowledges that it is harmful, she may insist that the injury was not wrong by denying the victim in order to neutralize the "moral indignation of self and others."[285] Denying the victim takes two forms. One is when the offender argues that the victim's actions were inappropriate and therefore he deserved the harm.[286] The second is when the victim is "absent, unknown, or abstract," which is often the case with property and economic

276 Maruna & Copes, *supra* note 17, at 231–32.

277 Sykes & Matza, *supra* note 249, at 667 ("By learning to view himself as more acted upon than acting, the delinquent prepares the way for deviance from the dominant normative system without the necessity of a frontal assault on the norms themselves.").

278 *See* Kieffer & Sloan, *supra* note 270, at 320–21 (explaining how white collar offenders blame violations on "personal problems, such as alcoholism, drug addiction, or perceived dire financial difficulties").

279 *See* Benson, *supra* note 268, at 594 (reporting that an income tax offender referred to criminal behavior as "mistakes" resulting from ignorance or poor bookkeeping); Maruna & Copes, *supra* note 17, at 232 (describing how an engineer at B.F. Goodrich failed to inform his supervisor of the reporting of false documents because he "learned a long time ago not to worry about things over which [he] ha[d] no control").

280 Sykes & Matza, *supra* note 248, at 667.

281 Maruna & Copes, *supra* note 17, at 232.

282 *Id.*

283 *See* Cressey, *supra* note 249, at 15; Kieffer & Sloan, *supra* note 270, at 321–22.

284 *See* COLEMAN, *supra* note 252, at 196 (providing an example of a price fixing offender asserting that while his conduct may have been "illegal," it was "not criminal" because "criminal action meant damaging someone, and we did not do that").

285 Sykes & Matza, *supra* note 248, at 668.

286 *See* Maruna & Copes, *supra* note 17, at 232; *see also* Kieffer & Sloan, *supra* note 270, at 322 (describing physicians committing Medicare fraud as claiming the excess reimbursements they submitted were "only what they rightfully deserved for their work").

crimes.[287] In this instance, the offender may be able to minimize her internal culpability because there are no visible victims "stimulat[ing] the offender's conscience."[288] White collar offenders may use this rationalization in frauds against the government, such as false claims or tax evasion cases, and other crimes in which the true victim is abstract.[289]

Condemning the Condemners. White collar offenders may also rationalize their behavior by shifting attention away from their conduct and onto the motives of other persons or groups, such as regulators, prosecutors, and government agencies.[290] By doing so, the offender "has changed the subject of the conversation"; by attacking others, "the wrongfulness of [her] own behavior is more easily repressed."[291] This rationalization takes many forms in white collar cases: the offender calls her critics hypocrites, argues they are compelled by personal spite, or asserts they are motivated by political gain.[292] The claim of selective enforcement or prosecution is particularly prominent in this rationalization.[293] In addition, white collar offenders may point to a biased regulatory system or an anticapitalist government to rationalize their acts.[294]

Appeal to Higher Loyalties. The appeal-to-higher-loyalties rationalization occurs when an individual sacrifices the normative demands of society for that of a smaller group to which the offender belongs.[295] The offender does not necessarily reject the norms she is violating; rather, she sees other norms that are aligned with her group as more compelling.[296] In the white collar context, the group could be familial, professional, or organizational. Offenders rationalizing their behavior as necessary to provide for their families, protect a boss or employee, shore up a failing business, or maximize shareholder value are employing this technique.[297]

Metaphor of the Ledger. White collar offenders may accept responsibility for their conduct and acknowledge the harm it caused, yet still rationalize their behavior by comparing it to their previous good behaviors.[298] By creat-

287 Maruna & Copes, *supra* note 17, at 233; Sykes & Matza, *supra* note 248, at 668.

288 Maruna & Copes, *supra* note 17, at 233.

289 *See* Kieffer & Sloan, *supra* note 270, at 322.

290 Maruna & Copes, *supra* note 17, at 233; Sykes & Matza, *supra* note 248, at 668.

291 Sykes & Matza, *supra* note 248, at 668.

292 *See* Kieffer & Sloan, *supra* note 270, at 323.

293 *Id.*

294 *Id.*

295 Sykes & Matza, *supra* note 248, at 669.

296 Maruna & Copes, *supra* note 17, at 233.

297 *See* Kieffer & Sloan, *supra* note 270, at 323 (describing an antitrust offender who justified his conduct by saying, "I thought . . . we were more or less *working on a survival basis* in order to try to make enough to keep our plant and our employees" (quoting JOHN E. CONKLIN, CRIMINOLOGY 176 (8th ed. 2004))).

298 *See* 1 ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME 913 (Lawrence M. Salinger ed., 2d ed. 2013) [hereinafter ENCYCLOPEDIA]; Paul Michael Klenowski, "Other People's Money": An Empirical Examination of the Motivational Differences Between Male and Female White Collar Offenders 53–54 (May 2008) (unpublished Ph.D. dissertation, Indiana University of Pennsylvania) (on file with author).

ing a "behavior balance sheet," the offender sees her current negative actions as outweighed by a lifetime of good deeds, both personal and professional, which minimizes moral guilt.[299]

Claim of Entitlement. Under the claim-of-entitlement rationalization, offenders justify their conduct on the grounds that they deserve the fruits of their illegal behavior.[300] This rationalization is particularly common in employee theft and embezzlement cases, but is also seen in public corruption cases.[301]

Claim of Relative Acceptability/Normality. The final white collar rationalization entails an offender justifying her conduct by comparing it to the conduct of others. If "others are worse" or "everybody else is doing it," the offender, although acknowledging her conduct, is able to minimize the attached moral stigma and view her behavior as aligned with acceptable norms.[302] In white collar cases, this rationalization is often used by tax violators and in real estate, accounting, and insider trading frauds.[303] It is particularly prevalent when the organizational culture is strong and insulated.[304]

The above discussion highlights a few additional points about rationalization theory. First, rationalizations are not "one size fits all." Offenders employ them in different degrees, combine them with other rationalizations, and use them at different times. Moreover, the exact verbalizations an offender uses to rationalize her behavior will be specific to her circumstances because they are part of her internal dialogue influenced by her unique environment.[305] The above list suggests that some rationalizations will overlap and that offenders may use multiple rationalizations to fully minimize their behavior.

Second, it is often questioned how researchers can be sure that an offender's rationalizations are occurring prior to the unethical or criminal act, thereby allowing the behavior to proceed, versus occurring after the act, rendering the rationalizations mere excuses.[306] Longitudinal studies demonstrate the presence of *ex ante* rationalizations, yet the "sequencing question" persists in the criminological literature.[307] As to white collar and corporate

299 *See* ENCYCLOPEDIA, *supra* note 298, at 913.

300 COLEMAN, *supra* note 252, at 198.

301 *Id.* (describing a former city councilman who explained his involvement in corruption as due to his low salary and lack of staff); Klenowski, *supra* note 298, at 209–10.

302 COLEMAN, *supra* note 252, at 197; Klenowski, *supra* note 298, at 67, 209–10.

303 *See* COLEMAN, *supra* note 252, at 197 (describing a real estate agent rationalizing fraud as rampant); Benson, *supra* note 268, at 594 (describing tax offenders claiming that "everybody cheats somehow on their taxes").

304 *See* Heath, *supra* note 17, at 603, 608–09 (describing business pressures that may foster the "everyone else is doing it" rationalization).

305 MARK M. LANIER & STUART HENRY, ESSENTIAL CRIMINOLOGY 168–69 (2d ed. 2004).

306 *See* Maruna & Copes, *supra* note 17, at 271 (calling this the "lingering 'chicken-or-the-egg' debate").

307 *See, e.g.*, Robert Agnew, *The Techniques of Neutralization and Violence*, 32 CRIMINOLOGY 555, 564–73 (1994) (presenting a longitudinal study supporting rationalization theory's *ex ante* sequencing).

crime, however, the question need not be answered definitively. Criminologists Shadd Maruna and Heith Copes have explained that even if white collar offenders commit criminal acts "in the absence of definitions favorable to them"; that is, without using verbalizations that minimize moral guilt, those definitions "get applied retroactively to excuse or redefine the initial deviant acts. To the extent that they successfully mitigate . . . self-punishment, they become discriminative for repetition of the deviant acts and, hence, precede the future commission of the acts."[308] In other words, a rationalization may start off as an after-the-fact excuse, but necessarily becomes the rationale that facilitates future offending. And because almost no white collar offenses are truly singular acts, but instead are made up of a number of smaller acts occurring over time, there is little concern that an offender may be employing an after-the-fact excuse that did not somehow rationalize her course of criminal conduct. Rationalizations, then, regardless of when they are expressed, reflect a white collar or corporate offender's pre- and inter-act thinking.[309]

C. How Criminalized Compliance Fuels Rationalizations, Thereby Undermining Corporate Compliance

With that understanding, the fundamental flaw of criminalized compliance becomes clear. Criminalized compliance, by delegitimizing the compliance function in the eyes of corporate employees, creates opportunities for the adoption of powerful rationalizations. These rationalizations not only limit the effectiveness of compliance, they actively facilitate the behavior compliance is intended to eliminate.

How this occurs is a product of both how rationalizations operate and from where they originate. In his study, Cressey found that the rationalizations embezzlers used to minimize the disconnect between their behavior and their self-perception were not "invented . . . on the spur of the moment" by them "or anyone else."[310] Instead, Cressey found that before a vocabulary of motive could be taken over and used by a would-be embezzler, it must "exist as [a] group definition[ ] in which the behavior in question, even crime, is in a sense *appropriate*."[311] He concluded that rationalizations are, in effect, swirling around in society, waiting to be assimilated and internalized

308 Maruna & Copes, *supra* note 17, at 271 (quoting RONALD L. AKERS, DEVIANT BEHAVIOR: A SOCIAL LEARNING APPROACH 60 (3d ed. 1985)) (internal quotation marks omitted).

309 That said, human thinking is undoubtedly complex; determining the exact moment that a thought enters a person's mind and if it changes over time is difficult, if not impossible. Because of this, the question of sequencing will likely persist for some time. *Compare* Agnew, *supra* note 307, at 555, *with* Paul Cromwell & Quint Thurman, *The Devil Made Me Do It: Use of Neutralizations by Shoplifters*, 24 DEVIANT BEHAV. 535, 547 (2003) (arguing that "[n]o one . . . has yet been able to empirically verify the existence of preevent [as opposed to post-event] neutralizations").

310 Cressey, *supra* note 249, at 15.

311 *Id.*

by individuals contemplating solving their nonshareable problems by violating a trust.[312]

Cressey further explained that rationalizations originate from "popular ideologies that sanction crime in our culture."[313] He pointed to commonplace sayings that suggest wrongdoing is acceptable in certain situations, such as "[a]ll people steal when they get in a tight spot" and "[h]onesty is the best policy, but business is business."[314] Once verbalizations such as these have been adopted by individuals, they transform into powerful, context-specific rationalizations: "I'm only going to use the money temporarily, so I am borrowing, not stealing" (denial of injury); and "I have tried to live an honest life but I've had nothing but troubles, so to hell with it" (claim of entitlement).[315]

Building on this idea, Sykes and Matza found that rationalizations originate from an even more specific location: the criminal law itself. According to them, great flexibility exists in criminal law; despite how the public generally sees it, criminal law is variable—"it does not consist of a body of rules held to be binding under all conditions."[316] Citing defenses to criminal liability such as necessity, insanity, compulsion, and self-defense, Sykes and Matza viewed application of the criminal code as an exercise in avoidance.[317] They argued that if an individual "can prove that criminal intent was lacking," he can "avoid moral culpability for his criminal action—and thus avoid the negative sanctions of society."[318] In other words, if a would-be offender can latch on to a rationalizing "defense" to his behavior, he can "engage in delinquency without serious damage to his self image."[319] This led Sykes and Matza to one of their most important findings: that much anti-normative behavior is based on "what is essentially an unrecognized extension of [legal] defenses to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large."[320] Wrongdoers find space within the criminal law that allows for their rationalizations.[321]

If rationalizations are drawn from an offender's environment, which includes from the criminal law itself, then criminalized compliance regimes that import the delegitimizing features of the criminal law into corporations play a significant role in fostering unethical and criminal behavior within those corporations. Criminal law-driven compliance programs that employ command-and-control, deterrence-based strategies lack legitimacy in the view

312 *Id.*
313 *Id.*
314 *Id.*
315 *Id.*
316 Sykes & Matza, *supra* note 248, at 666 (citing ROBIN M. WILLIAMS, JR., AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION 28 (1951)).
317 *Id.*
318 *Id.*
319 *Id.* at 666–67.
320 *Id.* at 666 (emphasis omitted).
321 *Id.*; *see also* DAVID MATZA, DELINQUENCY AND DRIFT 61 (1990).

of many corporate employees.[322] This perceived illegitimacy is critical because it provides space for employees to formulate the rationalizations necessary for their bad conduct. In this space, employees find "defenses" to the internal corporate norms and external legal rules that are fundamental to the compliance function. Employees then internalize and incorporate these defenses into their own thought processes. Once this occurs, there is little stopping an employee's future unethical or even criminal conduct from going forward, regardless of the compliance regime in place. There is simply no normative "check" available to the employee because it has been rationalized away.[323]

A return to two familiar examples illustrates how this operates in practice. The NYAG's complaint against Intel quoted executives regarding their views on the company's anticompetitive business tactics. Many of these statements evidence a rationalizing construct. For example, Paul Otellini, Intel's CEO, chastised executives from Hewlett Packard (HP) and IBM for using AMD technology, which was directly competing with Intel's, in their products, reminding them of their reliance on Intel and the companies' long-term partnerships.[324] This reveals the claim-of-entitlement rationalization, whereby Ottelini believed he had a "right" to pressure Intel's partners to act against AMD because Intel's technology had helped those partners build market share.[325] Similarly, statements by Intel executives indicate they believed market pressures and the competitive environment of the tech business justified their anticompetitive tactics. Top Intel executives told their counterparts at HP that "Intel doesn't initiate aggressive price actions but merely respond[s]."[326] This statement illustrates two classic rationalizations: one is denial of responsibility, in which factors outside the executives' control are seen as relieving them of responsibility for their acts;[327] the other is denial of the victim, in which the executives deem themselves to be rightfully retaliating against the actions of competitors who no longer deserve ethical treatment.[328] Finally, Intel executives rationalized their specific anticompetitive acts by deferring to what was "necessary" to keep a competitive edge with their main equipment buyers. In one email, an Intel executive justified a payment to Dell for excluding AMD by stating, "This is really easy . . . MSD

322 *See supra* Section II.D.

323 For an example of how this occurs in the context of would-be tax offenders, see Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191, 1226–29 (2015).

324 Complaint, *supra* note 13, at 9–10 (relaying Otellini email as saying, "If we are your key partner, this is nothing but a slap at us . . . I really don't want to get in a pissing contest over this . . . . But running an ad touting 10 years with [AMD] and 'choice' is not the behavior of someone who wants to bring our two companies together." (first alteration in original)).

325 *See* COLEMAN, *supra* note 252, at 198.

326 Complaint, *supra* note 13, at 24 (alteration in original) (internal quotation marks omitted).

327 Sykes & Matza, *supra* note 248, at 667.

328 *Id.* at 668.

[Michael Dell] wants $400M [million] more."[329] By viewing the payment as required because a major buyer wanted it, the executive denied his own responsibility for the anticompetitive behavior.[330]

Critically, these and other rationalizations were fostered by Intel's criminalized compliance regime. In addition to the mock raids and staged cross-examinations—now accepted tactics of criminal law-driven compliance programs[331]—executives received seemingly instantaneous admonitions when they communicated in ways that raised potential antitrust concerns.[332] Very quickly executives were trained to limit mention of topics that would "make [them] squirm" or "come back to haunt [them]."[333] The company's "active approach" to compliance left employees with the impression that anticompetitive behavior was part of doing business—that it was not a substantive wrong, but merely a legal concern that could be managed by intensive training. Whether he intended it or not, Intel's General Counsel, Tom Dunlap, communicated to employees that the goal of antitrust compliance was to limit mention of antitrust behavior, rather than to eliminate the behavior itself.[334]

This is problematic because if compliance is seen as only a legal requirement, and one that can be obviated by shrewd communication strategies, then employees may view the underlying conduct as harmless. This facilitates the denial-of-injury and the denial-of-the-victim rationalizations. In addition, if anticompetitive tactics are seen as part of doing business, employees may more easily deny their responsibility when using such tactics. Moreover, Intel's approach more generally delegitimized compliance, and possibly the company as a whole, in the eyes of its employees, which creates space for all rationalizations to take hold. When the "world's best antitrust compliance program" is seen by employees as nothing more than a hedge against government intervention, and possibly as a means of shielding the company from liability at the expense of employee well-being, it calls into question the legitimacy of the full scope of Intel's rules and norms.[335]

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329 Complaint, *supra* note 13, at 17 (second and third alterations in original) (internal quotation marks omitted).

330 Maruna & Copes, *supra* note 17, at 232.

331 *See* Press Release, *supra* note 222.

332 *See* Complaint, *supra* note 13, at 19 (describing an email warning an executive against drafting documents asking customers for specific market share targets and suggesting alternate wording that would "implicitly build that idea in").

333 Yoffie & Kwak, *supra* note 1, at 122.

334 A more extreme version of this may have occurred at General Motors, exacerbating the company's ignition switch crisis. *See* Marianne Jennings & Lawrence J. Trautman, *Ethical Culture and Legal Liability: The GM Switch Crisis and Lessons in Governance*, 22 B.U. J. SCI. & TECH. L. 188, 220–21 (2016) (discussing policy of not taking notes and avoiding phrases in reports to limit legal liability).

335 Yoffie & Kwak, *supra* note 1, at 120 (internal quotation marks omitted); *see also* Lambsdorff, *supra* note 213, at 10 (discussing the lack of trust that develops when compliance is seen as a means of "collecting . . . pieces of evidence, [so that] companies can shift the responsibility of a criminal act to their employees").

The Morgan Stanley case offers an even more direct example. In his interview, Garth Peterson explained why he secretly invested in the suspect real estate deal and funneled an investment to his Chinese government contact. Peterson insisted that he was recouping the investment he and the official had made in the real estate development, which predated his employment at Morgan Stanley.[336] He claimed that he was angry when the bank required him to divest his interest in the deal, so he "found a way to buy back in at the same price that [he]'d been forced out at."[337] As misguided as Peterson's thinking is, it demonstrates an obvious rationalization. He denied Morgan Stanley as the victim by viewing the bank's actions as inappropriate, which in his mind made it deserving of the harm caused by his wrongdoing.[338] In addition, Peterson employed the condemning-the-condemners rationalization when he criticized both Morgan Stanley's and the government's enforcement of the FCPA.[339] By shifting attention away from his conduct and onto the motives of others, Peterson was able to "more easily repress[ ]" the wrongfulness of his actions.[340] Finally, Peterson appears to have rationalized his conduct through claims of entitlement and relative acceptability. In recalling his time in the "wild and wooly Asian property business" of the early 2000s, Peterson explained how he grew Morgan Stanley's portfolio "exponentially."[341] He also explained that the "go-go atmosphere" during the Chinese real estate boom and the expectations of a relationship-driven culture "left compliance on the sidelines."[342] How Peterson verbalized the reasons for his behavior demonstrates that he believed he deserved at least some of the fruits of his unethical behavior,[343] and that everyone else was acting similarly at the time.[344] Both rationalizations allow for the minimization of moral guilt, thereby keeping Peterson's perception of himself as an honest citizen intact despite his illegal acts.[345]

Peterson's statements also indicate that Morgan Stanley's criminalized compliance approach fostered some of his rationalizations. For one, Peterson's anger stemmed from the bank's disallowance of his continued participation in the real estate deal. While that may have been proper from a corporate risk management standpoint, Peterson suggested it was more aggressive than the industry norm at the time.[346] Further, it conflicted with

336 Cohn, *supra* note 217.

337 *Id.* (internal quotation marks omitted).

338 Maruna & Copes, *supra* note 17, at 232.

339 Cohn, *supra* note 217 (describing how Peterson stated that what he "fe[lt] bad about is the government lying to the public and saying that they (Morgan Stanley) had this wonderful compliance program, when in fact the government knows that it wasn't getting into people's heads" (internal quotation marks omitted)).

340 Sykes & Matza, *supra* note 248, at 668.

341 Cohn, *supra* note 217 (internal quotation marks omitted).

342 *Id.*

343 *See* COLEMAN, *supra* note 252, at 198.

344 *See* Klenowski, *supra* note 298, at 67, 209–10.

345 Cressey, *supra* note 249, at 15.

346 Cohn, *supra* note 217.

how the bank approached compliance in other areas. Both Peterson and another executive explained that there was "very little" FCPA compliance prior to 2008.[347] From the employees' standpoint, Morgan Stanley's compliance program was inconsistent and arbitrary—lax in some areas, strict in others. This led to Peterson's overall perception that the program lacked coherence, which created space for the adoption of his rationalizations.[348]

Further, like with Intel, the aggressive nature of Morgan Stanley's monitoring efforts seemed to motivate some of Peterson's rationalizations. After being frozen out of the real estate deal, Peterson knew that the bank would conduct additional background checks, make pretextual calls, and investigate the various companies receiving payouts. Accordingly, Peterson used his compliance "training" to be a better wrongdoer, funneling his secret investment through only pre-approved channels.[349] As he saw it, this was not much different than deleting emailed compliance reminders or muting compliance training videos while doing other work—the company's FCPA compliance program was a technical requirement to be navigated around.[350] Again, while this thinking is clearly wrong, it demonstrates that the compliance program lacked true legitimacy, which created opportunities for Peterson to rationalize his eventual illegal behavior. This illegitimacy was a product of a criminal law-driven compliance program concerned more with aggressive enforcement than building substantive, positive employee norms.

While it is fascinating how the employees of Intel and Morgan Stanley rationalized their conduct, it is by no means unexpected. Rationalization theory dictates that white collar and corporate employees must use rationalizations in order to commit an unethical or illegal act.[351] But what is unexpected—and what demonstrates the inherent flaw of criminalized compliance—is that many of the rationalizations were fueled by the delegitimizing features of the criminal law as imported into the corporation. This insight provides a new way of conceptualizing compliance and of identifying the limitations implicit in its increasingly criminalized nature.

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347 *Id.* (internal quotation marks omitted).

348 While it is likely true that not every one of Peterson's rationalizations can be directly tied to a specific criminalized compliance measure, the delegitimization of the compliance program as a whole in Peterson's mind is clear. *Id.* This creates an environment ripe for the assimilation of rationalizations into the potential offender's thought process. *See* CRESSEY, *supra* note 249, at 96–97 (discussing how specific rationalizations emerge from the adoption of "rather general criminal ideologies").

349 Information at 6, United States v. Peterson, 859 F. Supp. 2d 477 (E.D.N.Y. 2012) (No. 12-224), http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/04/26/petersong-information.pdf.

350 Cohn, *supra* note 217 (describing common practices by employees).

351 *See supra* Section III.A. Indeed, some suggest that rationalizing bad behavior is part of the human condition. *See* Maruna & Copes, *supra* note 17, at 285.

Conclusion

This Article began with the question of how to understand the failure of Intel's "active approach" to compliance, a method that seemed to everyone at the time—its creators, the company, academics surveying the program—to be highly effective. The simple answer, as demonstrated by this Article, is that Intel's approach failed because it ignored the most important aspect of any compliance program: the impact it has on those it seeks to influence. Intel employees saw their compliance training not as a means of generating positive and lasting norms for the collective organizational good, but as an aggressive tool employed to shield the company from liability while leaving them "shaken."[352] The program ultimately "school[ed] . . . executives in cover-up, rather than compliance" because it taught them the former was more important than the latter.[353]

A more complex answer, however, is that the failure of Intel's compliance program is emblematic of a larger failing of modern corporate compliance. It is a failing driven by successive eras of compliance in which the criminal law has become a lodestar of increasing intensity. The result is that many compliance regimes are becoming criminalized—they are motivated by and mimic the criminal law, using its precepts to advance compliance goals.

The problem with this evolution is that criminalized compliance is inherently unsound; it can never be fully effective in abating corporate wrongdoing. Its inherent ineffectiveness is a product of the behavioral consequences imposed on corporate employees. Criminalized compliance imports into the corporation many of the criminal law's delegitimizing features, which creates a compliance environment that fosters employee rationalizations. Once rationalizations take hold, as they did with employees at Intel and Morgan Stanley, there is little stopping the resulting illegality. Thus, criminalized compliance is not only inherently ineffective, it actively thwarts the efforts of corporate compliance.

So what is to be done? Both the evolution toward criminalized compliance and its various consequences stem from expansive white collar and corporate criminal law. Deep and broad white collar criminal statutes and regulations, coupled with *respondeat superior* corporate liability, consolidate power in government agents, who use that power to enter corporations through the compliance function. This triggers a series of responses leading to the delegitimization of compliance and the behavioral impacts discussed above. The fix, then, resides in limiting and reversing the criminal law's expansive depth and breadth, at least in the white collar and corporate context. Termed differently, the fix is to reverse overcriminalization. As might

352 Yoffie & Kwok, *supra* note 1, at 122.
353 Complaint, *supra* note 13, at 19.

be imagined, this is not an easy task,[354] nor is it one corporations are well equipped to perform.[355]

Instead of attacking the root of the problem, then, maybe attacking the stalk is enough. Corporations are equipped to alter their compliance programs to make them more legitimate in the eyes of employees, which would lessen the opportunity for rationalized wrongdoing. Fortunately, how companies can increase internal legitimacy has been studied extensively. Tom Tyler, the leading scholar working in the area, has conducted decades of research demonstrating that organizational legitimacy is created primarily by providing employees with procedural justice.[356] This includes ensuring the fairness of decisions made by the organization, as embodied by the CEO and the board, as well as decisions made by workgroup supervisors and coworkers.[357] It also includes ensuring the fairness of interpersonal treatment of employees at both levels.[358] As Tyler explains, "[t]he ideal is to have a result . . . where procedural aspects of decision making and interpersonal fairness dominate the organization and its workgroups."[359]

Crucial to cultivating a procedurally just compliance program are the values by which that program operates. Tyler suggests the key values for any company are voice, dignity, objectivity, and concern,[360] but Lynn Paine's research argues for an "integrity-based approach" that combines concern for

354 The problems of overcriminalization were identified almost fifty years ago, and likely before. *See* Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, 18 (1968) (commenting that unless overcriminalization was addressed, "some of the most besetting problems of criminal-law administration are bound to continue"). The concerns have gotten worse since. *See* Haugh, *supra* note 323, at 1197–1201 (defining overcriminalization and identifying the main approaches to understanding its harms). Those most closely studying the phenomenon regard it as a vexing problem of the criminal justice system, and some say it is the most pressing problem in criminal law today. *See, e.g.*, Smith, *supra* note 234, at 537–38 (citing leading scholars studying overcriminalization, including DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008)).

355 *But see* Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, ATLANTIC (Mar. 3, 2015), http://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/ (describing the Koch brothers' and Koch Industries' role in fighting criminal justice reform).

356 *See, e.g.*, Tyler et al., *supra* note 247, at 33 (demonstrating that procedural fairness is critical in promoting employee commitment and compliance).

357 *Id.* at 37.

358 *Id.*

359 *Id.* While there are many ways to achieve this ideal (and likely many more ways to miss the mark), a procedurally just compliance program should ask whether: employees have an opportunity to provide input before decisions are made; decisions are made following clear and transparent rules; decisionmaking bodies act without biases; rules are applied consistently across "people and over time"; employees' rights are respected; employees' needs are considered; supervisors follow the same rules as required for employees; and decisionmakers provide honest explanations about their conclusions. *Id.* at 38.

360 *Id.* at 40.

the law with an emphasis on managerial responsibility for ethical behavior.[361] Although she suggests that "integrity strategies" will vary among companies, "all strive to define . . . guiding values, aspirations, and patterns of thought and conduct."[362] The idea is that employees will adopt the values of the company as their own, choosing compliance behavior not because it conforms to a rule, but because "they believe it to be the best way to act."[363] Compliance ceases to be a constraint and becomes "the governing ethos of an organization," fostering legitimacy organization-wide.[364] Companies that make these ideas a reality will go a long way toward compliance effectiveness.

Amplifying Tyler's and Paine's work and discussing its interplay with rationalization theory in any meaningful way is unfortunately beyond the scope of this Article, as is addressing the practical considerations of how to implement legitimacy-focused, integrity-based compliance in companies long-operating under criminalized compliance regimes. But a fitting conclusion requires at least some discussion of how compliance programs might be altered so as to minimize employee rationalizations.

First off, compliance officers must understand the role of rationalizations in white collar crime and how employees will use them to assuage moral guilt. A review of the more accessible criminological and behavioral ethics literature on rationalizations is a good start.[365] Second, companies must take affirmative steps to limit the adoption of rationalizations by employees. As Joseph Heath puts it, "The best way [for companies] to get people to behave ethically is to put them in a situation in which ethical conduct is expected of them and self-serving excuses are not tolerated."[366] While it is too simplistic to characterize rationalizations as merely self-serving excuses, they do allow bad behavior to proceed by fostering self-serving mental constructs. Thus, in order to combat rationalizations, companies must "create an environment in which the standard techniques of [rationalization] used to excuse criminal and unethical behavior are not accepted."[367]

The best way to do this without reverting to command-and-control tactics that destroy legitimacy is to simply let employees talk about rationalizations. Although this approach is not easily quantifiable in terms of impact, and thus may be difficult for compliance professionals to justify to higher-

361 Paine, *supra* note 16, at 106; *see also* Treviño et al., *supra* note 216, at 135 (explaining the first large-scale study testing and finding support for Paine's hypothesis). Certainly, the works of Tyler and Paine overlap considerably.

362 Paine, *supra* note 16, at 107.

363 Tyler et al., *supra* note 247, at 32.

364 Paine, *supra* note 16, at 107; *see also* Weaver & Treviño, *supra* note 247, at 327 (discussing Paine's research and finding empirical support for her thesis).

365 *See* Anand et al., *supra* note 17; Cressey, *supra* note 249, at 15–16; Heath, *supra* note 17; *see also* Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 FORDHAM L. REV. 3143, 3185 (2014) (discussing the role of rationalizations in sentencing and how judges can best be educated about them).

366 Heath, *supra* note 17, at 611.

367 *Id.*

ups, it is the best way to demonstrate the inadequacy of rationalizations.[368] For example, all compliance programs should enable periodic employee meetings wherein the employees, as opposed to human resources or compliance personnel, trace out the harms of embezzlement, articulate the logic of an industry regulation, or explain how market failures such as monopolies produce inferior products.[369] When rationalizations arise, they should be drawn out and explored. The goal is to raise "conscious awareness [of] certain patterns of self-exculpatory reasoning, and to flag them as suspicious," so that employees will be less likely to internalize that reasoning when presented with an opportunity to do so.[370]

Some companies have employed these strategies to strengthen their compliance programs. BestBuy recently hosted a public website where its chief ethics officer related emerging ethical dilemmas within the company.[371] The web posts discussed how anonymous employees considered ethics and compliance issues, sought advice from superiors and coworkers, possibly took a wrong turn or two, but ultimately resolved the issue positively.[372] Aside from conveying company rules and norms, what made BestBuy's approach so compelling was its incorporation of behavioral insights. Instead of lecturing employees or creating more rules to govern their conduct, the posts wove in "accessible commentaries on recent research in the behavioral science of ethics," offering brief lessons on reoccurring ethical traps, including the dangers of the "everyone does it" rationalization.[373] BestBuy replaced the tools of criminalized compliance with ones focused on the behavioral realities of its employees.[374]

368 *See* Lambsdorff, *supra* note 213, at 10 (discussing the difficulty companies have adopting behavioral-driven compliance measures because they are less easily quantifiable).

369 Heath, *supra* note 17, at 611. The size of the employee discussion groups is important. "If businesses want to develop cultures of trust where people are habitually being honest and habitually keeping promises, they need to put employees into small 'mediating structures' within the company that matches with their neurobiology." TIMOTHY L. FORT, THE VISION OF THE FIRM: ITS GOVERNANCE, OBLIGATIONS, AND ASPIRATIONS 231, 233 (2014) (emphasis omitted) (discussing research suggesting we are hardwired to tell ethical stories and build trust in small groups of four to six).

370 Heath, *supra* note 17, at 611. *But see* Murphy, *supra* note 22, at 23–28 (raising the concern that statements made as part of compliance training and investigation could be used against the company in litigation and citing Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 330 (N.D. Cal. 1992) (using compliance training notes against company to determine punitive damages)).

371 Killingsworth, supra note 238, at 983.

372 *Id.*

373 *Id.* (internal quotation marks omitted). This describes the claim-of-relative-acceptability rationalization in layman's terms. *See* COLEMAN, *supra* note 252, at 197.

374 Parsons Corporation, an international engineering and construction firm, uses a slightly different yet equally effective strategy, publishing "Ethics Challenges" on its internal website. The company solicits employee votes on how an ethics hypothetical should be resolved, publishes the narrative comments anonymously, and then follows up with a detailed analysis by the company's ethics committee, which includes behavioral analyses. *Id.*

When a company facilitates the preemptive "reversing" of rationalizations by its employees, the compliance regime not only combats the psychological mechanisms that allow white collar and corporate crime, but it also builds *genuine* legitimacy with those subject to it. While this compliance strategy is admittedly modest, it has the great strength of being focused on employee impact as opposed to the precepts of the criminal law. As such, it provides a compliance program the chance of becoming more than just words on a page or a list of company rules—it provides an opportunity for that program to truly become "the world's best."[375]

375 Yoffie & Kwak, *supra* note 1, at 120. This, of course, does not mean that the traditional tools of compliance, including monitoring and enforcement, should be ignored. Understanding the limits of criminalized compliance and the benefits of "behavioral compliance" strategies is not about eliminating necessary controls, but about doing compliance better—a goal all should share. *See* Jeff Kaplan, *Behavioral Anti-Corruption Compliance and Its Limits*, CONFLICT OF INT. BLOG (Jan. 16, 2016), http://conflictofinterestblog.com/2016/01/behavioral-anti-corruption-compliance-and-its-limits.html.