THE POWER FEW OF CORPORATE COMPLIANCE

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Corporate compliance in most companies is carried out under the assumption that unethical and illegal conduct occurs in a more or less predictable fashion. That is, although corporate leaders may not know precisely when, where, or how compliance failures will occur, they assume that unethical employee conduct will be sprinkled throughout the company in a roughly normal distribution, exposing the firm to compliance risk but in a controllable manner. This assumption underlies many of the common tools of compliance—standardized codes of conduct, firm-wide compliance trainings, and uniform audit and monitoring practices. Because regulators also operate under this assumption, what is deemed an “effective” compliance program often turns on the program’s breadth and consistent application. But compliance failures—lapses of ethical decision making that are the precursors to corporate crime—do not necessarily conform to this baseline assumption. As with other aspects of criminal behavior, unethical and illegal acts in business may follow a “fat-tailed” distribution that makes extreme outcomes more likely. This volatility, exhibited both in the frequency of compliance lapses and the intensity of their harm, is a function of how individual decision making interacts with the complex networks within corporations. By

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failing to recognize this phenomenon, the compliance and regulatory community has mistargeted its efforts, focusing too much on the trivial many while not paying enough attention to the “power few”—those influential individuals within companies that foster extreme compliance risk. Using the Wells Fargo fake accounts scandal as a backdrop, this Article explains how corporate compliance has failed to consider the effects of the power few, how that failure has limited compliance effectiveness, and how corporate compliance and business regulation may be properly reoriented through an increased focus on behavioral ethics risk management.
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I. INTRODUCTION

Wells Fargo has long been considered one of America’s most respected companies. This is partially a function of history. The bank survived the end of the Gold Rush, the San Francisco earthquake, and the Great Depression to become the third largest U.S. bank and the seventh largest public company in the world.\(^1\) But Wells Fargo’s reputation has had just as much to do with its ability to navigate modern banking. This was most apparent during the financial crisis, when, unlike its largest competitors, it eschewed many of the exotic mortgage products that precipitated the crisis, instead focusing on “bread-and-butter-banking.”\(^2\) Although it lost market share for years, when the mortgage crisis hit, the bank was largely unaffected.\(^3\) American Banker commented that Wells Fargo was the “big bank least tarnished by . . . scandals and reputational crises.”\(^4\) Fortune put it more bluntly, saying the bank had a “history of avoiding the rest of the industry’s dumbest mistakes.”\(^5\)

That all changed when the Consumer Financial Protection Bureau (CFBP) announced it was entering into a consent order with Wells Fargo for “the widespread illegal practice of secretly opening unauthorized deposit and credit card accounts.”\(^6\) Although details are still emerging, the outlines of the scandal are clear. From at least 2011, branch-level employees, primarily in Southern


California and Arizona, were pressured by superiors to aggressively cross-sell to existing customers; to meet sales targets, employees opened unauthorized customer accounts in violation of internal rules and, likely, criminal law. The bank’s trusted business strategy—cross-selling traditional banking products to its customers—had become a source of rampant fraud.

While any corporate scandal involving a company of Wells Fargo’s size and stature would be noteworthy, the scope of the wrongdoing is what has caught the public’s attention. The CFPB’s order revealed that over 1.5 million accounts were opened without authorization, 85,000 of which incurred some $2 million in fees. It is now believed that upwards of 3.5 million fake accounts were created. Even more alarming, thousands of employees appear to have been involved. Wells Fargo fired 5,300 employees from the community banking division for manipulating accounts. By any estimation, the scope of the wrongdoing, and the $100 billion it cost shareholders, was “staggering.”

Not surprisingly, everyone sought answers as to how something like this could happen at one of America’s most well-regarded banks. Multiple congressional committees questioned John Stumpf, Wells Fargo’s then-CEO. After hearing his testimony, lawmakers

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8 See id. at 77 (stating that employees resorted to “abusive and fraudulent tactics” to meet sales goals).
11 See Wells Fargo Bank, 2016-CFPB-0015 at 4.
12 Id.
declared that the cause of the bank’s problems was its “broken culture.”\textsuperscript{15} Although Stumpf initially fought this assessment, the bank seems to have acquiesced. According to a report issued by Wells Fargo, the firm is instituting a number of changes aimed at improving its culture, including eliminating sales goals for retail bankers, requiring employees to take ethical sales training, establishing a new “Office of Ethics” that reports to the board of directors, and hiring outside “culture experts” to identify problems.\textsuperscript{16} These steps, it is contended, will help repair the “issues that contributed to the breakdown in Wells Fargo’s . . . culture” and prevent them from happening again.\textsuperscript{17}

Unfortunately, that is unlikely. The reason is not because the bank’s corporate culture was healthy; it was most certainly deficient. And it is not because the bank’s proposed solutions are foolish; they follow what many consider to be purposeful compliance practices. Indeed, the company’s focus on incentives and culture is consistent with the ethics and compliance movement that many see as critical to effective corporate governance.\textsuperscript{18} Yet it still will not be enough to prevent a similarly staggering scandal from occurring in the future at Wells Fargo or any other company.

Why that is forms the core of this Article’s thesis. Modern corporate compliance is built on the assumption that unethical and illegal conduct occurs more or less predictably. That is, while corporate leaders may not know exactly when, where, or how compliance failures will occur, they assume that unethical or illegal conduct will happen according to a “normal distribution.”\textsuperscript{19}

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} See \textit{REPORT, supra} note 7, at 17; Alan Murray, \textit{How Many Insiders Does it Take to Change a Bank?}, \textit{FORTUNE} (Oct. 27, 2016), http://fortune.com/2016/10/27/how-many-insiders-does-it-take-to-change-a-bank/.
  \item \textsuperscript{17} \textit{REPORT, supra} note 7, at 18.
  \item \textsuperscript{19} As explained in Part I.D., \textit{infra}, the term “normal distribution” refers to the “bell curve” used widely throughout probability and statistics. \textsc{David Easley} & \textsc{Jon Kleinberg}, \textit{Networks, Crowds, and Markets: Reasoning about a Highly Connected World} 544 (2010).
\end{itemize}
will occur here and there, and in line with historical trends, but extreme and pervasive wrongdoing is unlikely. Thus, it is believed, the company will face compliance risk, but in a manner that is manageable.

This assumption underlies many of the common strategies used to effectuate compliance (for example, codes of conduct, compliance training, employee monitoring, and business process auditing), strategies that are almost always standardized across the company. That is because corporate leaders are trying to reduce compliance failures en masse, targeting wrongdoing so as to prevent the “typical” lapse, all based on the belief that extreme failures are unlikely. Regulators reinforce this assumption—indeed, they actively perpetuate it—by crediting as “effective” those compliance programs that focus primarily on wide scope and consistent application.20

The assumption, however, is wrong. As with other aspects of criminal behavior, failures of ethical decision-making within companies—the precursors to compliance lapses and corporate crime—do not necessarily follow a normal distribution. Instead, unethical employee conduct is just as likely to follow a skewed, or “fat-tailed,” distribution.21 This means there are not necessarily typical compliance failures to guard against; there are likely to be many small ones, some larger ones, and occasionally extremely large ones that destroy significant corporate and societal value. It also means that accurately predicting the probability and scope of compliance failures is more difficult than currently understood. Far from the usual way in which corporate compliance is viewed—a world consisting of routine outcomes with small variances—it should be seen as highly volatile.

The explanation for why unethical employee conduct may follow a skewed distribution brings together leading behavioral ethics research and network theory. It suggests, counterintuitively, that extreme compliance failures like those at Wells Fargo are not necessarily a product of bad culture company-wide. Extreme failures are more likely the result of small groups of individuals acting unethically or illegally, who by virtue of their social and

21 Daniel A. Farber, Uncertainty, 99 GEO. L.J. 901, 923 (2011) [hereinafter Uncertainty]. This includes a “power law” distribution, as discussed in Part II.A., infra.
organizational networks account for an outsized amount of bad conduct, and therefore harm. These individuals are the “power few” of corporate compliance, the small fraction of those within an organization able to generate significant compliance failures by fostering, amplifying, and spreading unethical behavior.22 Viewing corporate compliance through this lens, it becomes clear that business leaders and regulators intent on meaningfully reducing compliance risk and corporate crime are mistargeting their efforts, focusing too much on the “trivial many” while not paying enough attention to the “power few.”23

The implications for the theory and practice of corporate compliance are significant. As to theory, one of the primary advancements in compliance over the past fifteen years comes from the field of behavioral ethics—the study of how individuals make ethical decisions and judge the ethical decisions of others. Research shows that a host of cognitive heuristics, psychological tendencies, and social and organizational pressures make it more likely that good people will do bad things.24 This insight has led to a change in the focus of corporate compliance from the individual to the organization, as wrongdoing within companies is seen more as a product of diffuse culture than personal conduct.25 While this shift has advanced compliance in many ways, it also obscures the role of those individuals within a company whose unethical or illegal acts are greatly influencing the negative behaviors of others. This Article offers a more nuanced understanding of the application of behavioral ethics research to corporate compliance, one that places individual ethical decision-making in the proper context provided by network theory.

Practical implications follow. Companies seeking to improve compliance, and therefore corporate governance, should no longer

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23 See id.; Michael Hardy, Pareto’s Law, 32 MATHEMATICAL INTELLIGENCER 38, 38 (2010).
25 See Alison Taylor, The Five Levels of an Ethical Culture 12 (Bus. Soc. Responsibility, Working Paper, 2017), https://www.bsr.org/reports/BSR_Ethical_Corporate_Culture_Five_Levels.pdf (“The behavioral ethics field has done a great job of demonstrating that personal traits are less important than systemic and social factors in determining a propensity to behave unethically.”).
focus indiscriminately on organizational culture writ large. Instead of designing compliance programs aimed generally at promoting ethical culture as suggested by the Organizational Sentencing Guidelines and adopted by regulators and compliance professionals, compliance should be approached from a behavioral ethics risk management paradigm. Compliance efforts should target those individuals within the company whose unethical decision-making pose the greatest risk according to behavioral and organizational factors such as job task, leadership role, propensity to rationalize wrongdoing, and social and organizational networks. This risk-based approach may be consistent with current compliance efforts to improve companies’ “tone at the top,” assuming that is where the behavioral ethics risk lies. But it also recognizes that the focus of these efforts may correctly bypass the C-suite in order to lessen the significant compliance risk caused by the power few, wherever they may be within an organization.

This Article proceeds in three parts. Part II provides the current understanding of corporate compliance, highlighting the tools used by companies and promoted by regulators, all of which rest on the assumption that compliance failures occur according to a normal distribution. Part III upends this assumption. Drawing on

26 See Diana E. Murphy, The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics, 87 IOWA L. REV. 697, 703, 710–11 (2002) (noting the Organizational Guidelines’ encouragement of “good corporate citizenship” and the resulting ethics and compliance programs in many corporations).

27 Although the term “behavioral ethics risk management” originates here, behavioral compliance and behavioral ethics risk have been explored previously. See, e.g., Behavioral Ethics, supra note 18, at 1 (describing the “rapidly growing body of cognitive research” that explores why wrongdoing occurs); Todd Haugh, Nudging Corporate Compliance, 54 AM. BUS. L.J. 683, 705 (2017) [hereinafter Nudging] (stating that “behavioral ethics provides significant insights” and “lay[s] the foundation for behavioral compliance strategies”); JEFFREY M. KAPLAN, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES § 6:21, Westlaw (database updated October 2017) (stating that behavioral ethics “has potentially significant implications for many aspects of compliance and ethics programs”); Elizabeth Tippet, Charlotte S. Alexander & Zev J. Eigen, When Timekeeping Software Undermines Compliance, 19 YALE J.L. & TECH. 1, 5–6 (2017) (using behavioral ethics to explain how software can encourage cheating behavior).

28 See infra Part III.A.

29 See, e.g., Robert C. Bird & Stephen Kim Park, The Domains of Corporate Counsel in an Era of Compliance, 53 AM. BUS. L.J. 203, 228–29 (2016) (describing how a “board’s mandate to govern the corporation extends to compliance” and commenting that “directors are ultimately responsible” for compliance).

30 See infra Part IV.A.
behavioral ethics and network theory, the true picture of compliance emerges—one in which failures are potentially more volatile than previously thought, a product of individual unethical decision-making and the social and organizational networks within companies. These findings are supported by evidence from the Wells Fargo scandal, which is explored as a representative case study. Part IV offers follow-on theoretical and practical implications for corporate compliance and governance, calling for a more careful understanding of how organizational culture and compliance interact and suggesting more efficient ways companies may achieve positive gains in both.

II. THE CURRENT UNDERSTANDING OF CORPORATE COMPLIANCE

Modern corporate compliance has a roughly sixty-year history.31 What began as an era of self-regulation to avoid government intervention in business has evolved into a system of complex internal corporate structures that are driven primarily by the Organizational Sentencing Guidelines.32 During that evolution, an assumption regarding compliance failures has taken hold—corporate leaders and regulators see compliance lapses as broad failures of organizational culture.33 While this is not entirely inaccurate, it has shaped the tools of compliance into instruments aimed at widespread and uniform application. Unfortunately, the assumption underlying this approach is flawed.

32 See Criminalization, supra note 18, at 1224.
33 See, e.g., Bird & Park, supra note 29, at 232–34 (stating that firms motivated by deterrence are more likely to view penalties as an acceptable price of breaking rules and arguing that a “culture of integrity” promotes respect for the spirit of the rules).
A. THE BASICS OF COMPLIANCE

Before delving into the current understanding of compliance, it is helpful to understand the basics. Although the term can be nebulous because its subject is so expansive, “corporate compliance” can be thought of as “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 [such] violations.” More succinctly stated, compliance is a set of processes companies use to ensure that employees “do not violate applicable rules, regulations or norms.”

Embedded in these definitions is a dual focus. The first is deterring violations of law, which may be criminal or civil. On the criminal side, compliance programs are aimed at preventing violations of state and federal laws, such as mainstay white collar crimes like money laundering, insider trading, bribery, and accounting and banking fraud. This also includes related regulatory violations, which often form the basis of concurrent criminal and civil liability. In addition, compliance programs attempt to prevent tort-based violations of purely civil law. These include employees running afoul of regulations concerning workplace harassment, occupational health, privacy, and environmental protection. Compliance efforts attempt to deter all

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34 Baer, supra note 31, at 958.
36 Griffith, supra note 35, at 2082 (“Compliance establishes internal mechanisms to prevent and detect violations of law and regulation.”).
37 See id.
38 There are at least 10,000—but possibly upwards of 300,000—regulatory provisions that expose companies to overlapping civil and criminal liability. See Ellen S. Podgor, Overcriminalization: New Approaches to a Growing Problem, 102 J. CRIM. L. & CRIMINOLOGY 529, 531 n.10 (2012).
39 See Tanina Rostain, General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions, 21 GEO. J. LEGAL ETHICS 465, 467 (2008). Although civil violations often garner less public attention than criminal ones, they expose companies to significant financial and reputational penalties. See Miller, supra note 35, at 11 (discussing the effect that private litigation has on compliance programs).
aspects of illegal employee behavior. By doing so, companies reduce the risk that they will be held legally responsible under respondeat superior liability, which is expansive.

The second area of focus for compliance is norm generation. Although we tend to think of compliance only in legal terms, a core function of any compliance program is to generate positive norms within the company. This includes fostering the norm that employees will follow all applicable external laws and intracorporate rules and mores. Intracorporate norms are important because they fill the gaps left by more formal statutory and regulatory enforcement mechanisms. These norms exert reputational pressure on employees to forego unethical conduct that may not rise to the level of a legal violation but are nonetheless undesirable. Norm generation and enforcement is often considered the “ethical culture” aspect of corporate compliance, and a majority of companies see creating an ethical business culture as the supreme goal of their compliance programs.

B. THE TOOLS OF COMPLIANCE

While the above provides a useful starting point, to fully appreciate how modern compliance operates, it is necessary to delve into its specific tools. These tools are the mechanisms companies use

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40 See Baer, supra note 31, at 958 (noting that compliance programs focus on “all types of misconduct”).
41 See 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, 1570–74 (1990) (discussing the expansion of respondeat superior liability in the twentieth century). As one article notes: “The bottom line is that a corporation is criminally, strictly, and vicariously liable for whatever crimes corporate personnel commit on company time unless they are on a frolic and detour for their own exclusive, personal benefit.” Paul J. Larkin, Jr. & John-Michael Seibler, All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability, 46 STETSON L. REV. 7, 8 (2016).
42 Id. Although norms are sometimes considered “soft” because they are not legally binding, they are at times 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).
43 Griffith, supra note 35, at 2093–94 n.73; MARTIN T. BIEGELMAN, BUILDING A WORLD-CLASS COMPLIANCE PROGRAM: BEST PRACTICES AND STRATEGIES FOR SUCCESS 3 (2008) (“[C]hief among these [legal] requirements is the idea of ethics, the concept that lies at the heart of every corporate governance requirement.”).
to reduce compliance failures.\textsuperscript{45} Interestingly, despite a compliance industry booming in size and a steady evolution of the compliance function in most companies,\textsuperscript{46} the tools companies use are almost uniformly applied and adopted within and across firms, changing little over the past twenty-five years.

The first step in any compliance program is employee education and training, and its tools are well known by anyone who has worked for a sizable company.\textsuperscript{47} The main instrument is the company code of conduct (alternatively called an employee manual or handbook) that memorializes for employees what they can and cannot do.\textsuperscript{48} Topics vary, but most codes begin with the company’s mission statement and values, and then provide rules for how employees should handle things like conflicts of interests; travel, gifts, and entertainment; confidential information; and employee health and safety.\textsuperscript{49} A company’s code of conduct is usually considered the “cornerstone” of a compliance program and is widely disseminated to employees.\textsuperscript{50}

\textsuperscript{45} This Article will use the terms “compliance failures” and “compliance lapses” interchangeably.


\textsuperscript{47} See James A. Fanto, \textit{Advising Compliance in Financial Firms: A New Mission for the Legal Academy}, 8 BROOK. J. CORP. FIN. & COM. L. 1, 9 (2013) (discussing the role of a typical compliance officer within a corporation).

\textsuperscript{48} Kimberly K. Krawiec, \textit{Cosmetic Compliance and the Failure of Negotiated Governance}, 81 WASH. U. L.Q. 487, 495–96 (2003). Company codes, policies, and procedures can take many forms depending on the company’s size and compliance “maturity,” which is a function of its industry’s regulatory environment and its past experience with compliance violations. See Griffith, supra note 35, at 2104 (discussing comparative maturity of compliance). Some companies have separate codes of conduct, policies supporting the code, and procedures setting forth how to comply with the policies. Andrew S. Boutros, T. Markus Funk & James T. O’Reilly, \textit{The ABA Compliance Officer’s Deskbook} 177-78 (2016). Because many companies will collapse all this into one document, this Article will primarily focus on codes of conduct.

\textsuperscript{49} See Pitt & Groskaufmanis, supra note 41, at 1602–03 n. 261.

\textsuperscript{50} Biegelman, supra note 44, at 171. Virtually every compliance provider suggests explaining, publicizing, and promoting the code to “all impacted parties and stakeholders.” Boutros, Funk & O’Reilly, supra note 48, at 178–79. One compliance text states: “A company that creates a code of conduct but does not make it widely available demonstrates the depth of its ethical commitment, which is to say, none at all.” Biegelman, supra note 44, at 193.
Once employees are exposed to the code of conduct, they must be trained on it. The purpose of training is to ensure that employees can apply corporate policies and procedures to their day-to-day work.51 Training takes many forms, including group sessions, one-on-one meetings, and web-based tutorials.52 Like dissemination of the code of conduct, compliance training is considered integral and conducted for “all employees from the CEO down.”53 Many companies require every employee, and even suppliers, agents, and business partners, to complete compliance training at least annually.54

After education and training, the compliance function shifts to monitoring. Monitoring is aimed at ensuring corporate policies are followed, and that any violations are quickly identified.55 Monitoring can be both direct and indirect. Direct monitoring begins at hiring, when employees are screened for past wrongdoing and company “fit.”56 On the job, all employees are subject to regular direct monitoring of their behavior through tools such as certifications, sign-off procedures, and supervisory overview.57 One of the most common indirect monitoring tools is a telephone or web-
based hotline allowing the company to receive allegations of wrongdoing from employees or others outside the company.\textsuperscript{58} Other indirect monitoring tools include the use of ombudsmen and outside auditors to review business transactions.\textsuperscript{59} The hope is that through both types of monitoring, “information concerning potential violations is quickly related to the appropriate level in the organization” where it can be properly addressed.\textsuperscript{60}

If monitoring determines there has been a compliance lapse, the company will begin the enforcement function. Enforcement is how companies hold accountable those employees who have violated the laws, rules, or corporate norms.\textsuperscript{61} What form enforcement takes varies based on the severity of the offense, but most companies recognize that a compliance program “will not be fully living and breathing unless it has teeth.”\textsuperscript{62} The most likely punishment for a significant compliance violation is termination; in fact, many compliance consultants advocate “zero tolerance” as the “standard in every organization.”\textsuperscript{63} For serious employee wrongdoing, being terminated is just the beginning—cooperation by the company with

\textsuperscript{58} See Biegelman, supra note 44, at 201 (“Hotlines are an excellent way to receive allegations of fraud and other wrongdoing.”). These are often called whistleblower hotlines, although they may provide prospective guidance as well as be a conduit for reporting violations. See Soltes, supra note 52, at 983.

\textsuperscript{59} See Behavioral Ethics, supra note 18, at 14-15. Technology can enhance this compliance tool. Big data and analytics allow the identification of “red flags” indicative of compliance violations based on electronic data. Miller, supra note 35, at 14; see also Soltes, supra note 52, at 983 (“[S]ystems increasingly include analytics software that proactively identifies risks, which can then be targeted for further investigation.”).

\textsuperscript{60} Griffith, supra note 35, at 2095.

\textsuperscript{61} See Soltes, supra note 52, at 987 (discussing how firms can hold employees accountable for their misconduct).

\textsuperscript{62} Winter & Simon, supra note 51, at 85. Companies also understand that discipline must be fair, balanced, and consistently applied. See Biegelman, supra note 44, at 205; see also Tom Tyler, John Dienhart & Terry Thomas, The Ethical Commitment to Compliance: Building Value-Based Cultures, CAL. MGMT. REV., Winter 2008, at 31, 33 (demonstrating that procedural fairness is critical in promoting employee commitment and compliance).

\textsuperscript{63} See Miller, supra note 35, at 15 (noting that “employees found to have committed a compliance violation will often be summarily terminated”); Griffith, supra note 35, at 2097 (suggesting that when a “firm’s monitoring efforts uncover potential wrongdoing,” an employee must “submit to interrogation or face termination”); Biegelman, supra note 44, at 205 (suggesting that companies have “zero tolerance” and take steps to ensure an employee, once removed, will not be allowed to return in another capacity).
law enforcement exposes employees to fines, licensure issues, debarment, and even prison.64

Two things are important to note regarding modern compliance tools. One is that at each step, these tools are applied more or less uniformly across the company. For example, codes of conduct are provided to every employee regardless of his or her position.65 This necessitates codes being written in a way that sets out “high-level priorities and aspirations” coupled with standardized explanations of how to follow the law.66 While there may be some variation in supplemental policy manuals depending on job duties, the guidance every employee receives as to applicable laws and norms is essentially universal.67 The same is true of trainings. Many large companies schedule trainings by topic based on years with the company.68 Although training is undoubtedly getting more sophisticated in its presentation methods, its substance varies little across a company.69 As one commentator put it, uniform mandatory compliance trainings are “as accepted . . . a part of office life as stale coffee and bad conference-call connections.”70

64 See Biegelman, supra note 44, at 205 (urging organizations to “refer[] criminal violations by employees and others to law enforcement for possible prosecution”).
65 See id. at 193 (“Code of conduct certification programs ensure that all employees have read and understand what the code requires of them.”). This most often occurs as part of the onboarding process. See Janine Yancey, How to Improve Your Employee Onboarding in 2016, EMTRAIN BLOG (Jan. 5, 2016), http://blog.emtrain.com/4-key-benefits-of-onboarding-with-a-code-of-conduct-course (arguing that a “new employee’s first impression” about a company and its culture can be improved by “comprehensive onboarding, including a Code of Conduct course”).
66 BOUTROS, PUNK & O’REILLY, supra note 48, at 177; see also Pitt & Groskaufmanis, supra note 41, at 1604 (finding that “rarely are codes specific or detailed”).
67 Cf., Veronica Root, The Outsized Influence of the FCPA, 2018 U. ILL. L. REV. (forthcoming 2018) (questioning whether there is an overemphasis on compliance regarding Foreign Corrupt Practices Act to the firm’s detriment as it would otherwise spend money on other compliance areas that need more resources).
68 For example, companies often say, “it’s year two of our training program, so [everyone] gets assigned anti-corruption basics and privacy,” RICARDO PELLAFONE, WHY MOST COMPLIANCE TRAINING FAILS AND HOW TO FIX IT 17 (2017) (on file with author).
69 This is particularly true of web-based trainings. Uniformity of content is highest for compliance topics, such as discrimination and harassment, that affect all members of an organization. Privacy and data security likely fall in that same realm. The more mature a compliance program, often the more uniform it is in its application. See id. at 17–20 (providing examples of compliance training uniform in content and delivery).
70 L.V. Anderson, Ethics Trainings Are Even Dumber Than You Think, SLATE (May 19, 2016, 5:55 AM), http://www.slate.com/articles/business/the_ladder/2016/05/ethics_compliance_training_is_a_waste_of_time_here_s_why_you_have_to_do.html.
Monitoring follows in a similar vein. Whistleblower hotlines are accessible to all—in many ways, that is the point—and the complaint process is highly systemized.71 Certifications and sign-off procedures are applied uniformly to anyone requesting reimbursement for travel, gifts, or entertainment.72 Audits of these and other business processes are also largely uniform. Compliance officers and outside auditors spot check for violations of company policies, usually by sampling from a company-wide pool of data.73 If any anomalies are found, an investigation takes place, often ending when any culprits are identified and terminated—again, according to uniformly applied procedures.74

The second noteworthy aspect regarding compliance tools is that they are surprisingly uniform across all companies. Each of the tools described above are likely to be found in every sizable company in America.75 One recent guidance document written for individuals serving on corporate boards states that directors “should expect to


72 There, of course, can be different levels of approval for different requests. For example, larger requests for reimbursements may require more levels of approval than smaller ones; certain classes of travel or use of company equipment may require different sign-off. But within these categories, which focus almost exclusively on the dollar amount at issue, the review is standardized and uniformly applied. See PELLAFONE, supra note 69, at 57–58 (describing auditing function whereby travel and expense reports with line items over $1,000 are uniformly flagged for review).

73 See id.

74 BIEGELMAN, supra note 44, at 187. Uniformity diminishes greatly when enforcement includes outsiders such as regulators and prosecutors. The company’s punishment of an employee is often standardized based on contract, but legal exposure becomes highly fact-specific and depends on individual prosecutorial discretion. See J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 1.05 (4th ed. 2017) (“Perhaps more than in any other area of criminal law, prosecutors in white collar matters have enormous discretion in deciding whether to bring a criminal case, and in deciding what charges to bring if they do decide to seek an indictment.”).

75 See, e.g., Pitt & Groskaufmanis, supra note 41, at 1585–86 (suggesting that by the early 1980s, a written code of conduct “effectively had become [a] mandatory part of every corporate compliance program); Maria J. Armstrong, Five Reasons to Adopt an Effective Corporate Ethics and Compliance Program, BRICKER & ECKLER ATTORNEYS AT LAW (Jan. 12, 2015), http://www.bricker.com/insights-resources/publications/five-reasons-to-adopt-an-effective-corporate-ethics-and-compliance-program (“[D]etailed policy manuals, a full staff of compliance professionals and rigorous training programs are the norm at most Fortune 500 companies.”).
hearn that your company uses standard compliance program tools (a Code of Conduct, processes, a hotline, etc.). This is consistent with survey data showing that most companies are employing the same basic means to combat compliance lapses. Moreover, the compliance tools of today look much like the tools of the past. Setting aside technological advances, compliance today is surprisingly similar to that of twenty-five and even fifty years ago. While it is oft-repeated that there is no “one-size-fits-all” compliance program, the reality is that most programs look very much alike—throughout individual companies and across all companies.


79 Murphy, supra note 26, at 717 n.93 (quoting The Bus. Roundtable, Statement on Corporate Governance 4 (1997)). But see John T. Boese, Do Corporate Compliance Programs Really Prevent Corporate Wrongdoing? Of Course They Do!, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 9, 13 (2016) (arguing that “good” corporate compliance programs “gear their training to the areas where the employees are most likely to face compliance issues”).
C. THE HOMOGENIZATION OF COMPLIANCE

Why are all compliance programs so similar and why does it matter? Compliance program uniformity matters because if the majority of programs use the same tools, any flaw in those tools becomes endemic to compliance. This Article contends there is such a flaw.\textsuperscript{80} But before analyzing that issue fully, this section will discuss why all compliance programs look alike. The discussion sheds light on just how entrenched that endemic flaw is in corporate compliance.

Part of the reason for the uniformity of compliance comes from companies themselves. Most companies benchmark their compliance programs.\textsuperscript{81} Benchmarking is the practice of comparing a value or process against a standard; here the standard is other companies’ compliance programs.\textsuperscript{82} Benchmarking can be formal—many compliance providers offer sophisticated survey data demonstrating so-called “best practices”—but it also happens organically as compliance officers interact with one another and read reports of each other’s programs.\textsuperscript{83} The result is that companies use similar compliance tools as other companies; as practices spread, compliance becomes increasingly homogeneous.\textsuperscript{84}

It would be unfair to say this homogeneity is all the making of companies, however. The common tools and practices of compliance have developed against the backdrop of governmental regulation.

\textsuperscript{80} See infra Part II.D. and Part III.
\textsuperscript{81} See Han-Kyun Rho, A Review of Benchmarking Studies on Anti-Corruption Compliance Programmes, 8 (Int'l Anti-Corruption Acad., Research Paper Series No. 01, 2018) (discussing the increased popularity of compliance benchmarking).
\textsuperscript{82} Jose Tabuena, Benchmarking Your Compliance Program, COMPLIANCE WEEK (June 21, 2016), https://www.complianceweek.com/blogs/jose-tabuena/benchmarking-your-compliance-program#.WlevQWV1prI.
\textsuperscript{84} Linda Klebe Treviño, et al., Managing Ethics and Legal Compliance: What Works and What Hurts, 41 CAL. MGMT. REV. 131, 131 (1999) (citing Gary R. Weaver, Linda Klebe Treviño & Philip L. Cochran, Corporate Ethics Practices in the Mid-1990’s: An Empirical Study of the Fortune 1000, 18 J. BUS. ETHICS 283, 285 (1999) (reporting that almost eighty percent of responding Fortune 1000 firms had the same basic tools of compliance). This is exacerbated by companies not understanding whether their compliance program is effective or not. See Soltes, supra note 52, at 1001.
and enforcement. While governmental influence was limited in the early eras of corporate compliance, by the mid-1990s compliance practices were being driven by a singular influence: the Organizational Sentencing Guidelines.

It is difficult to overstate the impact the Guidelines have had on compliance. The Guidelines moved compliance into the mainstream, helping companies to see it not just as a set of rules specific to a particular industry or regulation, but rather as “a broad issue . . . worthy of substantial attention.” The Guidelines accomplished this feat by creating a framework that allowed all companies to lessen their culpability for the illegal acts of employees, thereby mitigating the risks of vicarious liability. Under the Guidelines, if a company takes steps to prevent and detect criminal conduct and to “promote an organizational culture that encourages ethical conduct,” the company can reduce its potential fine by up to ninety-five percent.

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85 See Criminalization, supra note 18, at 1225 (“[C]ompliance has always included a balance between government- and industry-initiated regulation.”).

86 This is not to say that the Guidelines were the only influence on compliance, but they are the place from which modern compliance originates. See id. at 1224–33 (describing the history of compliance and the Guidelines’ role).

87 Bird & Park, supra note 29, at 212. Before the promulgation of the guidelines in 1991, companies adopted ad hoc compliance practices in response to laws targeting their industries. See Cristie Ford & David Hess, Can Corporate Monitorships Improve Corporate Compliance?, 34 J. CORP. L. 679, 690 (2009) (noting companies’ adoption of compliance programs in response to government initiatives prior to 1991). For example, in the mid-1970s, Congress passed the Foreign Corrupt Practices Act (“FCPA”) in response to disclosures by approximately 400 companies that had secured corporate benefits by bribing foreign officials. See Criminalization, supra note 18, at 1226 n.68. The FCPA criminalized such payments, prompting corporations operating overseas to revamp their codes of conduct and training programs. See Pitt & Groskaufmanis, supra note 41, at 1585 n.157 (citing U.S. GENERAL ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 6 (1981)) (discussing a government survey taken in the early 1980s that found 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). Thus, while overall compliance increased, it did so in a manner localized to industry or business practice. See Pitt & Groskaufmanis, supra note 41, at 1586–90 (describing the rise of industry specific scandals and penalties in the 1980s).


89 U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8C2.5(f)–(g), C2.6. (U.S. SENTENCING COMM’N 2016).
from “passive bystanders who hoped their employees would behave well to active advocates for ethical conduct on the job.”90

Just as important as the overall framework, the Guidelines provided practical guidance on how companies could structure culture-building compliance programs.91 Section 8B2.1 set forth what was minimally required of a company to have an “effective” compliance program:

(1) creating “standards and procedures to prevent and detect criminal conduct”;
(2) having responsibility at all levels of the program, together with adequate program resources and authority for its managers;
(3) engaging in “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-retalatory internal guidance/reporting systems, including periodic evaluation of program effectiveness;
(6) promoting and enforcing compliance and ethical conduct; and
(7) taking reasonable steps to respond appropriately and prevent further misconduct upon detecting a violation.92

Armed with this articulation of the “hallmarks” of an effective program, companies went on a compliance binge.93 The result was a

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90 ETHICS RES. CTR., supra note 88, at 16, 22.
91 The framework 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. Baer, supra note 31, at 964 (citing Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. REV. 687, 726–30 (1997)).
92 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)–(b) (U.S. SENTENCING COMM’N 2016).
93 Murphy, supra note 26, at 703; see also Philip A. Wellner, Comment, Effective Compliance Programs and Corporate Criminal Prosecutions, 27 CARDOZO L. REV. 497, 500–02 (2005) (describing the merits of an “effective” compliance program).
“watershed” moment, the beginning of a sustained “increase in the size and scope of corporate compliance activities and ultimately the creation of vast compliance bureaucracies within the organization,” all aimed at creating ethical culture.

While the Guidelines fostered incredible growth in compliance, it also solidified compliance homogeneity. The drafters of the Guidelines were interested in codifying existing compliance practices and incentivizing companies to follow them, not critically evaluating or rethinking compliance. Thus, what ultimately became the hallmarks of an effective compliance program were adopted from what companies were already doing. For example, the Guidelines require an effective program to establish “standards and procedures,” which is further defined as “standards of conduct and internal controls.” This is a nonspecific way of saying companies need codes of conduct, a widely used compliance tool at

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94 Bird & Park, supra note 29, at 212; see also Ford & Hess, supra note 88, at 690 (calling the Guidelines “the most important influence” in compliance).


96 See Murphy, supra note 26, at 703 (discussing the impact of sentences on the culture of organizational defendants). This is not a critique of the United States Sentencing Commission. Devising a workable organizational sentencing scheme from scratch is immensely difficult, a task postponed for four years “due to the complexity of the subject matter. Id. at 700 (citations omitted). Also, basing sentencing provisions on past practice is consistent with how the Commission views its mandate. See U.S. SENTENCING GUIDELINES MANUAL § 4 (U.S. SENTENCING COMM’N 2016) (establishing sentencing ranges based on past practices); Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 6–8 (1988).

97 See Murphy, supra note 26, at 700–02, 704 (explaining that an effective compliance program is based partly on industry practice derived from historical standards).

the time.\textsuperscript{99} The Guidelines also require companies to “take reasonable steps to communicate periodically . . . [their] standards and procedures”\textsuperscript{100}, again, this is a nonspecific way of saying that training on the code of conduct is required. Other common compliance tools in effect at the time of the Guidelines’ adoption are also referenced in its provisions and application notes.\textsuperscript{101}

Even if companies did not have these tools in place prior to the promulgation of the Guidelines, they do now. While the risk of a company being convicted of a crime and finding itself formally subject to the Guidelines is exceedingly low, companies encounter the Guidelines’ influence in numerous areas of corporate life.\textsuperscript{102} All corporate criminal investigations and charging decisions—even those that do not end in a conviction—heavily depend on whether a company has an effective compliance program.\textsuperscript{103} Investigation and

\textsuperscript{99} See Benson, supra note 78, at 306. In 2002, the Sarbanes-Oxley Act was passed, which made adoption of codes compulsory for public companies. Rakoff & Sack, supra note 95, § 5.02(1)(f).

\textsuperscript{100} U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(4)(A) (U.S. SENTENCING COMM’N 2016).

\textsuperscript{101} The Guidelines require a “system” available to employees to report wrongdoing—a hotline—as well as regular audits to detect criminal conduct. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (U.S. SENTENCING COMM’N 2016). The application notes reference “training employees through informal staff meetings, and monitoring through regular ‘walk-arounds’ or continuous observation.” Id. § 8B2.1 cmt. (n.2)(C)(iii). Finally, the notes highlight that companies compare their programs against “industry practice.” Id. § 8B2.1(b)(1) cmt. 2 (A)-(B).


enforcement action decisions by civil regulators also depend on whether the company has an effective program.\textsuperscript{104} Even self-regulated organizations and trade groups issue guidance referencing Guidelines-based compliance practices.\textsuperscript{105} Some commentators even suggest that the basic role of corporate governance “has been overtaken by compliance.”\textsuperscript{106} There is little doubt that the Guidelines have become central to the life of most companies, and so too have its prescribed compliance tools.

The impact of the Guidelines can be seen not only in the compliance tools companies use, but in how they use them. It is no coincidence that companies have opted for a compliance approach that is aimed at broad and uniform application to all employees, because that is the approach mandated by the Guidelines and adopted by the agencies applying them. The Guidelines stress that compliance programs “shall be promoted and enforced consistently throughout the organization.”\textsuperscript{107} Training on compliance policies is required of “members of the governing authority, high-level personnel, substantial authority personnel, the organization’s employees, and, as appropriate, the organization’s agents”\textsuperscript{108}—basically everyone in and around the company. Monitoring must also include a publicized “system” available widely to all the “organization’s employees and agents” so they may report wrongdoing.\textsuperscript{109}

The Department of Justice (DOJ) and other agencies have expounded on these provisions. Most notably, the DOJ has signaled in at least three influential guidance documents that comprehensive application is critical to an effective compliance

\textsuperscript{104} For example, the Office of Federal Procurement Policy considers whether a company had a Guidelines-style compliance program in federal debarment proceedings. See Murphy, supra note 26, at 713 (quoting H. Lowell Brown, The Corporate Director’s Compliance Oversight Responsibility in the Post-Caremark Era, 26 Del. J. Corp. L. 1, 26 (2001)).


\textsuperscript{106} See Griffith, supra note 35, at 2077.

\textsuperscript{107} U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(6) (U.S. SENTENCING COMM’N 2016).

\textsuperscript{108} Id. at § 8B2.1(b)(4).

\textsuperscript{109} Id. at § 8B2.1(b)(5).
For example, in its resource guide regarding the Foreign Corrupt Practices Act, a significant source of compliance risk for companies operating overseas, the DOJ makes clear that communication and training should apply to “all personnel at all levels of the company.” The agency then highlights a declination decision based in part on a company’s “comprehensive” compliance program that required frequent training of its employees. It is clear that this program was designed to achieve maximum frequency of training with less concern for efficacy. The Securities and Exchange Commission’s (SEC) “Seaboard Report,” which sets forth criteria that the agency considers during enforcement actions, largely tracks the Guidelines and also describes crediting companies that institute comprehensive training and monitoring applied consistently to “personnel at all levels of the company.”


111 RESOURCE GUIDE, supra note 110, at 58.

112 Id. A declination decision is when the DOJ determines not to charge a company with a crime; usually these decisions are not made public, but they may be for illustrative purposes. See, e.g., Karen E. Woody, “Declinations with Disgorgement” in FCPA Enforcement, 51 U. Mich. J.L. REFORM 269, 289–91 (2018).

113 See Scott Cohn, Ex-MS Banker in China Bribery Case: My Side of Story, CNBC (Aug. 16, 2012, 8:13 PM), http://www.cnbc.com/id/48895573 (describing FCPA compliance program at Morgan Stanley’s Asia offices where an executive received personal emails regarding training on the FCPA seven times and was reminded about it 35 times, but there was no check to determine whether he was actually reviewing material; emails were deleted and teleconference trainings were listened to on mute).

companies and compliance providers and incorporated into existing programs.\textsuperscript{115}

In summary, the Guidelines have set the parameters of corporate compliance, and companies have reacted by implementing policies focused on satisfying those parameters. While compliance has expanded, it has also become an echo chamber. The result is a highly homogenized state of compliance—the same tools being used the same way by all the same companies. And that use is one of broad and uniform application across the company with the goal of “promot[ing] organizational culture.”\textsuperscript{116}

D. THE FLAWED ASSUMPTION UNDERLYING COMPLIANCE

If the above is an accurate description of modern corporate compliance, it suggests that the vast majority of compliance programs are built upon an assumption. The assumption is that compliance failures occur according to a normal distribution.\textsuperscript{117} That is, companies believe bad employee conduct will transpire in their organizations in a manner that conforms to a recognizable, and ultimately manageable, pattern. The pattern is one in which typically low-level compliance violations occur throughout the company, but none vary much from the “typical” violation. Based on this assumption, companies and regulators believe that the best approach to increase overall compliance is by broadly and uniformly directing compliance efforts toward thwarting those typical lapses,

\textsuperscript{115} See Miller,\textit{ supra} note 35, at 11 (describing how companies “establish or upgrade compliance programs as a result of regulatory agency” guidance and enforcement actions).

\textsuperscript{116} U.S. Sentencing Guidelines Manual § 8B2.1(a)(2) (U.S. Sentencing Comm’n 2016); see also Paul E. McGreal,\textit{ Caremark} in the Arc of Compliance History: Evolution of a Corporate Director’s Fiduciary Duty to Oversee Compliance and the Law at 30–32 (Jan. 21, 2018) (unpublished manuscript) (on file with the author) (describing Guidelines’ shift in focus toward creating ethical cultures within companies). That is not to say that differentiation is not mentioned in the Guidelines or by those agencies applying them; in fact, many guidance documents refer to risk-based approaches. See, e.g., Resource Guide,\textit{ supra} note 110, at 57; Evaluation,\textit{ supra} note 110, at 4–5. However, these are almost all focused on business practices rather than behavioral-ethics risk.

\textsuperscript{117} It is important to note that companies may be, and in fact likely are, operating under this assumption unknowingly. Both corporate leaders and the regulators influencing their behavior have paid little attention to the underlying assumptions embodied in the Organizational Sentencing Guidelines, the wellspring of all things corporate compliance. See Criminalization,\textit{ supra} note 18, at 1224.
ones that are consistent with lapses of the past. This approach, it is further believed, will foster a positive corporate culture, thereby improving corporate compliance en masse.118

Unpacking this assumption and its implications takes a bit of doing. Whether companies and regulators realize it or not, they have built compliance around a very specific statistical concept, the normal distribution. The term “normal distribution” denotes a series of events clustered around a mean, or average, with extreme events “fading away” quickly.119 Representing this graphically presents the picture of the classic bell curve from an introductory statistics class. Under this type of distribution, a small number of data points show up on the left side of the curve, a small number on the right side, with the bulk of the points situated in the middle near an average.120 Normal distributions are ubiquitous in the natural sciences and have been observed in everything from the height of humans to the weight of housecats.121

Just as important as charting observed data, however, is how a normal distribution can be used to make predictions. Normal distributions are widely used in probability and statistics because they are characterized by an average value and a “standard deviation,” or how much dispersion there is from that average.122 And a “basic fact” about normal distributions is that the probability of observing a new value that exceeds the average by multiple deviations drops exponentially.123 In other words, once we have an idea of the average value of an event, we can use the characteristics

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119 Uncertainty, supra note 21, at 923. This is also known as a Gaussian distribution or Gaussian curve. See Robert Matthews, Who Really Discovered the Bell Curve?, SCI. FOCUS (July 28, 2017), http://www.sciencefocus.com/article/maths/who-really-discovered-bell-curve.

120 Uncertainty, supra note 21, at 923. See also infra fig. 1.

121 Uncertainty, supra note 21, at 923; EASLEY & KLEINBERG, supra note 19, at 480.

122 EASLEY & KLEINBERG, supra note 19, at 480.

123 More accurately, “[t]he basic fact about normal distributions is that the probability of observing a value that exceeds the average by more than c times the standard deviation decreases exponentially in c.” Id.
of a normal distribution to estimate the probabilities of a new event’s value (in essence, where it might fall on the bell curve).¹²⁴ We can make a prediction about the size of the next housecat we come across based on observations from the past—that it will be within a few pounds of the average.¹²⁵ While some cats will be skinnier and some will be heavier, there is little risk of “a two-hundred-pound Siamese.”¹²⁶ The ability to make probability assessments using a normal distribution is the critical point—it allows us to more accurately predict future events when making uncertain decisions.¹²⁷

Because of its ubiquity in the natural sciences and its predictive power, a normal distribution is often presumed. In fact, “[t]he bell-curve assumption has become so much a part of our mental architecture that we tend to use it to organize experience automatically.”¹²⁸ This seems to be the case with corporate compliance. With little justification, companies and regulators have adopted compliance tools designed to combat compliance failures that occur according to a normal distribution. Corporate leaders assume bad employee conduct will occur here and there, but that extreme and pervasive wrongdoing is unlikely because future compliance lapses will cluster closely around some average lapse.¹²⁹ Thus, the aim of a compliance program becomes to lessen these “typical” lapses in the aggregate. And the best way to do compliance

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¹²⁴ This is the case because if a dataset conforms to a normal distribution, then approximately 68% of the observations will fall within one standard deviation of the average; about 95% of the observations will fall within two standard deviations. See Normal Distribution, MATH IS FUN, https://www.mathsisfun.com/data/standard-normal-distribution.html (last visited Aug. 21, 2018).

¹²⁵ Uncertainty, supra note 21, at 923.

¹²⁶ Id. The reason is that such a value would be many standard deviations larger than the average, a virtual impossibility if feline weight follows a normal distribution. Id.

¹²⁷ Id.

¹²⁸ Malcolm Gladwell, Million-Dollar Murray, NEW YORKER (Feb. 13, 2006), https://www.newyorker.com/magazine/2006/02/13/million-dollar-murray. This assumption appears to be of particularly dubious value when applied to finance. See Benoît Mandelbrot & Nassim Nicholas Taleb, How the Finance Gurus Get Risk All Wrong, FORTUNE (July 11, 2005), http://archive.fortune.com/magazines/fortune/fortune_archive/2005/07/11/8265256/index.htm (“The professors who live by the bell curve adopted it for mathematical convenience, not realism . . . . [Its] focus on averages works well with everyday physical variables such as height and weight, but not when it comes to finance.”).

¹²⁹ See Uncertainty, supra note 21, at 923 (“When probabilities form a bell curve (normal distribution), most events are bunched near the average and extreme outcomes fade away quickly.”).
in the aggregate is to standardize it, making it widely applicable across the company. An “effective” compliance program in the world of normal distributions is one that demonstrates its broad focus, wide scope, and consistent application—the precise type of compliance program that regulators credit.

This is also, of course, the type of program that Wells Fargo had in place at the time of its massive fake accounts scandal. Like almost every large American company, Wells Fargo had a robust, Guidelines-based compliance program with all of the “expected” tools aimed at eliminating typical compliance lapses. Yet the company was unable to foresee, let alone prevent, an extreme compliance failure that was looming, because it was operating under an incorrect assumption that a normal distribution was the right predictive model on which to build a compliance program. While this has created obvious problems for Wells Fargo, the bank’s story is emblematic of a larger concern—an endemic flaw in corporate compliance.

III. THE REALITY OF CORPORATE COMPLIANCE FAILURES

Compliance failures—those lapses of ethical decision-making that lead to violations of laws and norms—do not necessarily follow a normal distribution. Instead, unethical employee decision-making and the harms flowing from it are just as likely to follow a skewed

130 See Pellafone, supra note 76, at 8 (“You should expect to hear that your company uses standard compliance program tools (a Code of Conduct, processes, a hotline, etc.).”).

131 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (U.S. SENTENCING COMM’N 2016); see also RESOURCE GUIDE, supra note 110, at 61; SEABOARD REPORT, supra note 114, at 1–2.

132 Pellafone, supra note 76; see Rachel Witkowski, Before the Scandal: Wells Fargo CEO’s Warm Welcome from Regulator, WALL ST. J. (Nov. 17, 2016), http://www.4-traders.com/WELLS-FARGO.CO-14861/news/Before-the-Scandal-Wells-Fargo-CEO-s-Warm-Welcome-From-Regulator-23606242/ (stating that regulators believed the bank was “one of the better-run and more-reliable megabanks” at the time of the scandal); Janine Yancey, What We Learned from Wells Fargo About Checks and Balances, EMTRAIN (Sept. 28, 2016), http://blog.emtrain.com/wells-fargo-checks-and-balances (“Like any other bank, Wells Fargo has a robust compliance training program and compliance team.”).

133 See Mandelbrot & Taleb, supra note 128. Gladwell puts it this way: “If you made the mistake of assuming that [a population of events] fell into a normal distribution, you’d propose solutions that would raise the performance of the middle . . . when the middle didn’t need help.” Gladwell, supra note 128. Whether the assumption was made knowingly or not matters little to the outcome.

134 Yancey, supra note 132, (“Perhaps if the Wells Fargo compliance team had the power to check its executive team, Wells Fargo may have been able to avoid this current scandal.”).
distribution characterized by imbalance and volatility.\textsuperscript{135} This type of distribution, particularly its “power law” variant, is widely seen in other aspects of criminal behavior, and its causes can be explained by merging behavioral ethics and network theory. Bringing these ideas together provides a more accurate understanding of the processes underlying extreme compliance failures, like those occurring at Wells Fargo.

A. FAT-TAILED DISTRIBUTIONS, POWER LAWS, AND NETWORK THEORY

Although ubiquitous, the normal distribution is far from the only statistical model available to predict future events. In many areas, scientific thought “has moved away from the idea of equilibrium” embodied by the bell curve toward what are called “fat-tail” distributions.\textsuperscript{136} These distributions, which are often found in complex systems, represent an important alternative way of understanding probabilities.\textsuperscript{137}

It is easiest to grasp the features of a fat-tailed distribution by comparing it to those of a normal distribution. As discussed above, the two defining elements of a normal distribution are that its average is “stable and meaningful” and its variance is finite.\textsuperscript{138} If one’s knowledge of housecats is limited, consider human height. The average height of a male in the U.S. is about 5’9”, and millions of American men are either at, or very close to, that average.\textsuperscript{139} At the same time, “the shortest living man is 2’5” and the tallest is 7’10”, both of which are within half a magnitude of the average.\textsuperscript{140} Thus, because average male height is not likely to change appreciably (it is stable), and its variance is low (deviation from the average is

\textsuperscript{135} Uncertainty, supra note 21, at 924; Easley & Kleinberg, supra note 19, at 545.
\textsuperscript{136} Daniel A. Farber, Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty, 27 ENVIRONS: ENVT'L. L. & POL'Y J. 145, 152, 15 (2003) [hereinafter Probabilities]. The symmetry of the bell curve is undoubtedly part of the reason it has become such an accepted way of viewing the world and predicting events. See Nassim N. Taleb, Fooled by Randomness: The Hidden Role of Chance in Life and in the Markets 95, 99–100 (2004) (positing that because most education focuses on “symmetric environments,” individuals “have found universal use in society” for the bell curve).
\textsuperscript{137} Probabilities, supra note 136, at 153 (stating that the “unusual statistical distribution [of fat tail systems] is the most significant feature of complexity”).
\textsuperscript{138} Pierpaolo Andriani & Bill McKelvey, From Gaussian to Paretoian Thinking: Causes and Implications of Power Laws in Organizations, 20 ORG. SCI. 1053, 1063 (2009).
\textsuperscript{139} Id.
\textsuperscript{140} Id.
relatively small), we can confidently predict that any man we encounter in the future will be within a fairly narrow height range around 5’9”. We may have a rare run-in with an NBA center or the descendant of a Pygmy, but we will never come across a 100’ man or his 10” cousin.

A fat-tailed distribution does not follow the same rules. In fact, for power-law distributions, a common type of fat-tailed distribution, the opposite is true. Instead of the classic bell curve with its “exponentially decaying tail,” a power-law curve’s tail drops at a much slower rate the farther an event’s size moves away from the average. This creates a “paradoxical aspect” when using the power-law curve to make probability estimates. For one, there really is no typical or average event to speak of—there are “many small events,” a number of larger events, and, occasionally, “some extremely large” events that fall at the very end of the tail. If a new event occurs and it happens to fall at the extreme, which is easily possible, it creates a “shift in system conditions.” This shift is why power-law distributions are considered to be “scale-free”; any new event may completely disrupt the average. When a population of events operates under a power law, it is necessary to “give up the view of the world as consisting of typical events with

141 Ernest O’Boyle, Jr. & Herman Aguinis, The Best and the Rest: Revisiting the Norm of Normality of Individual Performance, 65 Pers. Psychol. 79, 80 (2012); Uncertainty, supra note 21, at 923. A power-law distribution is also called a Paretoian distribution after Vilfredo Pareto, who applied to distributions of wealth the concept that “in any population that contributes to common effect, a relative few of the contributors account for the bulk of the effect.” Joseph M. Juran, The Non-Pareto Principle—Mea Culpa, in JURAN, QUALITY, AND A CENTURY OF IMPROVEMENT 185 (Kenneth S. Stephens, ed. 2005). However, Joseph Juran, an influential scholar on management quality, misattributed the concept to Pareto; he contends it was Pareto’s concept, but the distribution curve came from Max Lorenz, an American economist. Id. at 188. To make matters worse, the terms Pareto distribution, power law distribution, Pareto principle, Zipf’s principle, and the 80/20 rule are often interchanged depending on whether the audience is primarily economists, management scholars, or business executives. See, e.g., RICHARD KOCH, THE 80/20 PRINCIPLE: THE SECRET OF ACHIEVING MORE WITH LESS 6–8 (1998) (describing, and also partially misattributing, the origins of these concepts).

142 Probabilities, supra note 136, at 154. This is sometimes called a “hockey stick” graph because the tail—the long handle of the hockey stick—decreases very slowly.

143 Id.

144 Id.

145 Id. at 153.

146 Id. at 154.
infrequent random variations.”¹⁴⁷ Unlike with normal distributions, the world of power laws is one of “unstable means, infinite variance, and a greater proportion of extreme events.”¹⁴⁸ Figure 1 provides a graphical comparison of a normal and power-law distribution.

**Figure 1. Normal and Power-law Distributions**

To make this more concrete, consider again the height of American men. As the power-law graph on the right shows, many events with small values can coexist with a few events of extremely large values (which is why the average is both unstable and virtually meaningless).¹⁴⁹ If height followed a power-law distribution, it would be highly volatile. While most folks would be short, “nobody would be surprised to see occasionally a hundred-[foot]-tall monster walking down the street.”¹⁵⁰ And among the “billion[s] [of] inhabitants [on Earth,] there would be at least one over 8,000 feet tall.”¹⁵¹ This would be impossible under the normal distribution graph on the left because its tails go to zero very quickly as events move away from the average. But with power-law

¹⁴⁷ Id.
¹⁴⁸ O’Boyle, Jr. & Aguinis, supra note 141, at 80. While variance is potentially infinite, it is limited by physical barriers. See, e.g., Uncertainty, supra note 21, at 926 (providing that “the physical limit” to the amount of environmental harm humans can impose on Earth is limited to the destruction of the planet itself).
¹⁵⁰ Id. at 67.
¹⁵¹ Id.
distributions, outliers and extreme events should not only be considered, they should be expected.\textsuperscript{152}

Moreover, power-law distributions are not rare occurrences. They have been observed in numerous settings, from the distribution of wealth to global terrorism events to aggressive behavior among juveniles.\textsuperscript{153} It appears these distributions are characteristic of complicated networks and “seem to dominate in cases where the quantity being measured can be viewed as a type of popularity.”\textsuperscript{154} The classic example is city size. When the frequency of cities by population is charted, it evidences a power law—there are a few extremely large cities, a lot of moderately sized cities, and very many small towns.\textsuperscript{155} If city size followed a normal distribution, most of us would live in cities of about the same population.\textsuperscript{156} But that is not the case; a few megacities continue to attract residents and grow with seemingly no end in sight.\textsuperscript{157}

\textsuperscript{152} Daniel Farber provides another good example: the expected time to complete a task. If time to complete a task follows a power law distribution, it is essentially meaningless that the average completion time is three days and the task has already taken five. If it followed a normal distribution, we could expect the task to be completed in the next day or two. \textit{Uncertainty}, supra note 21, at 925 (“As the task has already taken five days, we have moved beyond the part of the curve where completion time declines rapidly and moved into a zone where probabilities drop off much more slowly.”). Following a power-law distribution, the task could take fifteen days or more. \textit{Id.}

\textsuperscript{153} See Andriani & McKelvey, \textit{ supra} note 138, at 1057 (cataloging 101 examples of social and organizational power law phenomena); M.E.J. Newman, \textit{Power Laws, Pareto Distributions and Zipf’s Law}, 46 CONTEMPORARY PHYSICS 323, 330 (2005) (“[O]ne can, without stretching the interpretation of the data unreasonably, claim that power-law distributions have been observed in language, demography, commerce, information and computer sciences, geology, physics and astronomy. . . . [T]his is an extraordinary statement.”). \textit{But see} Michael P.H. Stumpf & Mason A. Porter, \textit{Critical Truths About Power Laws}, 335 SCI. 665, 666 (2012) (urging caution when claiming a system fits a power law and suggesting some have “imbu[ed] them with a vague and mistakenly mystical sense of universality”).


\textsuperscript{155} William J. Reed, \textit{The Pareto, Zipf and other power laws}, 74 ECON. LETTERS 15, 16–17 (2001).

\textsuperscript{156} See Newman, \textit{ supra} note 153, at 323.

\textsuperscript{157} In 1975, there were just three cities in the world with more than ten million people—Tokyo, New York, and Mexico City. Now, seven percent of the world’s population lives in cities with more than ten million people. \textit{See} Tanza Loudenback, \textit{Here’s How Much It Would Cost You to Live in the 10 Largest Megacities Around the World}, \textbf{BUS. INSIDER} (Oct. 20, 2017, 11:30
Another example is the structure of the Internet. Like city size, the Internet is characterized by extreme imbalance. The vast majority of the more than one billion websites go unnoticed, but there are some with incredible visibility. This is because certain sites—Google, YouTube, Facebook, Wikipedia—link to many, many others through a “hub” and “node” structure. In fact, some sites have so many connections that “80 to 90 percent of the [Internet’s] total number of links feed into [them].” This creates a power-law distribution “dominated by especially well-connected hubs,” and it predicts that as new websites are created they will also link to those hubs, growing them even more. Thus, a website’s popularity grows at a rate proportional to its current value, “and hence exponentially with time.” Researchers studying the Internet have dubbed this the “rich-get-richer” phenomena, or more broadly “network effects.”

Network effects, and network theory more generally, help explain how power-law distributions emerge. A network effect driven power law can occur anytime there is “feedback introduced by correlated decisions across a population.” This includes social

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160 Id. at 84.
161 Id. at 85. This makes sense. If you were a new website operator and wanted your site to get noticed, you would link it to the page with the most existing links. Linking this way makes the vast Internet smaller, allowing users to find individual webpages out of the trillions available. Id. at 85–86 (describing research finding that it takes approximately twenty clicks to navigate across the entire “diameter” of the Internet).
162 Easley & Kleinberg, supra note 19, at 548.
164 Easley & Kleinberg, supra note 19, at 547.
165 Id.
and organizational networks. As individuals come in contact with one another, they “preferential[ly] attach[]”; they come together with those that already have “high popularity” of one sort or another. And because “people have a tendency to copy the decisions of people who act before them,” the rich get richer—those who become a hub of influence continue to gain new connections faster than others in the network. This means that certain individuals in complex networks possess increasingly outsized influence over the entire network because they connect to so many others. These are the power few, those individuals that are the catalysts and purveyors of power-law effects.

**Figure 2. Simple and Complex Networks**

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166 See Borgatti et al., supra note 163, at 893 (discussing the general theory of social capital).
167 Easley & Kleinberg, supra note 19, at 548. Popularity need not be the affinity-based social kind; instead, it might be created by organizational hierarchy. For a deeper understanding of social networks and how links between members operate, see seminal articles by Mark Granovetter and Steven Strogatz. See generally Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360 (1973); Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOC. THEORY 201 (1983); Steven H. Strogatz, *Exploring Complex Networks*, NATURE, MARCH 2001, at 268.
168 Easley & Kleinberg, supra note 19, at 547; see also Buchanan, supra note 159, at 115 (linking ideas to the well-known concept of groupthink).
169 See Buchanan, supra note 159, at 114 (suggesting such people could be considered “connectors,” those “socially prolific few who tie an entire social network together” (citation omitted)).
170 Id. at 115–18. The term “power few” comes from Juran’s term “vital few.” See generally Joseph M. Juran, *Universals in Management Planning and Controlling*, 43 MGMT. REV. 748 (1954).
Figure 2 shows these concepts graphically.\textsuperscript{171} On the left is a simple social network representing individuals who have made business connections. Any person entering the network with the resources to establish just a single connection would likely choose person four or five because each has three other connections and are no more than two connections away from any person in the network.\textsuperscript{172} For one reason or another, persons four and five are already “popular,” which invites additional preferential attachment.\textsuperscript{173} As more people enter the network, we can predict they will do the same, and the influence of persons four and five will grow.\textsuperscript{174} The image on the right shows a more mature network evidencing a power-law structure. Here the difference between the power few—the large hubs in the center—and the trivial many—those tiny nodes on the periphery—is apparent.

Thus, when considering populations, particularly complex ones with a social or organizational component, our default predictive model should not necessarily be the normal distribution. Network-effect power laws, with their hub and node structure and inherent imbalance, must factor into our thinking.

B. THE ROLE OF POWER LAWS AND NETWORK EFFECTS IN UNETHICAL DECISION-MAKING AND CRIMINAL BEHAVIOR

Two areas in which power-law distributions and network effects appear to be occurring are criminal behavior and unethical decision-making.\textsuperscript{175} Research in these areas has been relatively siloed,\

\textsuperscript{171} Martin Grandjean, Social Network Analysis Visualization, WIKIMEDIA COMMONS (Nov. 2, 2013, 10:02 PM), https://commons.wikimedia.org/w/index.php?curid=29364647; Burke, supra note 134.

\textsuperscript{172} See Burke, supra note 134 (explaining that choosing node one, and especially node six, would be problematic because they have less connections and are farther removed from others in the network). While node two also has three connections, it is more than two connections away from node six.

\textsuperscript{173} See id. (“This process tends to enrich nodes that already have a large number of links.”).

\textsuperscript{174} See id. (“Once the decision is made to link to either #4 or #5, that node would now be even more attractive to subsequent entrants.”). But cf., EASLEY & KLEINBERG, supra note 19, at 559 (stating that even though this phenomenon is predictable in well-established networks, the initial stages of a node’s rise to popularity are relatively fragile).

\textsuperscript{175} See, e.g., Sherman, supra note 22, at 301–02 (identifying power-law phenomenon in numerous criminological studies); Sally S. Simpson, Making Sense of White-Collar Crime: Theory and Research, 8 OHIO ST. J. CRIM. L. 481, 500 (2011) (describing the usefulness of network analysis in criminological research, including as to social contagion theory); Francesca Gino, Shahar Ayal & Dan Ariely, Contagion and Differentiation in Unethical
however, with criminologists focused on empirical evidence of crime-related power-law distributions, and behavioral ethics researchers focused on the influence that social and organizational networks have on ethicality. Bringing these areas together provides a more complete understanding of how wrongdoing occurs in complex networks and the unpredictable harm it may cause.

As an initial matter, criminologists have long-observed that power laws are pervasive in crime data. This can be seen in studies of crime location—a few street addresses experience the majority of crimes in a city, a small percentage of city blocks consume a massive amount of resources related to incarcerating city residents, and a small proportion of places experience a very large proportion of particular types of crimes. Power laws are also evidenced in offender and victim statistics. Research shows that a few offenders commit most of the crimes and reap most of the illegal gains. This is true across populations, everyone from juvenile

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Behavior: The Effect of One Bad Apple on the Barrel, 20 PSYCHOLOGICAL SCI. 393, 397 (2009) (finding unethical behavior by individuals depends on social norms of others within small social networks).

176 But see BUCHANAN, supra note 159, at 107, 110–112, 159 (bringing together crime research and power-law distributions through the concept of network theory).

177 Sherman, supra note 22, at 302 (citing Lawrence W. Sherman, Patrick R. Gartin & Michael E. Buerger, Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place, 27 CRIMINOLOGY 27 (1989)). But see Andrew D. Selbst, Disparate Impact in Big Data Policing, 52 GA. L. REV. 109, 130 (2018) (arguing that although a majority of arrests occur in a particular location, the amount of crime is not necessarily higher in that location because of racial discrimination and police discretion).


delinquents,\textsuperscript{181} mobsters,\textsuperscript{182} and crooked police officers.\textsuperscript{183} A small percentage of crime victims also account for a large percentage of total victimizations.\textsuperscript{184} “In fact, most crime related data appears to follow a power-law distribution,”\textsuperscript{185} including data for white collar and corporate crime.\textsuperscript{186}

In addition, behavioral ethics researchers have found that social and organizational ties can impact ethical behavior. One group of researchers, coalescing around Harvard Business School Professor Francesca Gino, has studied whether one’s dishonesty increases after being exposed to the unethical behavior of others with whom one has an association.\textsuperscript{187} Gino and her colleagues determined that social influence is a critical factor in ethical behavior; they found that student participants were much more likely to cheat after observing other students from the same school cheat on a task.\textsuperscript{188} This was not the case when the participants observed cheating from non-affiliated students.\textsuperscript{189} Another study found that student participants cheated in higher numbers themselves and viewed selfish behavior as “less unethical or wrong” when the participants felt “psychologically close” to students who were cheating.\textsuperscript{190} Taken together, these and other studies suggest that people often “copy the


\textsuperscript{182} Charles Z. Marshak et al., Growth and Containment of Hierarchical Criminal Network, 93 PHYSICAL REV. 022308-1, 022308-2 (2016).

\textsuperscript{183} Sherman, supra note 22, at 302.

\textsuperscript{184} Graham Farrell, Preventing Repeat Victimization, 19 CRIME & JUST. 469, 469 (1995) (“Small percentages of the population, and of victims, suffer large percentages of all criminal victimizations.”).

\textsuperscript{185} Liu & Eck, supra note 180, at xv.

\textsuperscript{186} See Michael L. Benson & Elizabeth Moore, Are White-Collar and Common Offenders the Same? An Empirical and Theoretical Critique of a Recently Proposed General Theory of Crime, 29 J. RES. CRIME & DELINQ. 251, 264 (1992) (showing recidivism rates of white collar offenders and finding that a “select group of white-collar offenders . . . is much like common criminals in its involvement in deviant activities”); Simpson, supra note 175, at 500 (suggesting mortgage fraud may be clustered in “hotspots” fitting a power law).

\textsuperscript{187} See, e.g., Gino, Ayal & Ariely, supra note 175, at 393; Francesca Gino & Adam D. Galinsky, Vicarious Dishonesty: When Psychological Closeness Creates Distance from One’s Moral Compass, 119 ORG. BEHAV. & HUM. DECISION PROCESSES 15, 23 (2012) (finding that a person is more likely to behave unethically when that person is exposed to unethical behavior of another person to whom they feel psychologically close).

\textsuperscript{188} Gino, Ayal & Ariely, supra note 175, at 396.

\textsuperscript{189} Id. at 397 (“[O]bserving an out-group peer engaging in unethical behavior reduced participants' likelihood of acting unethically themselves.”).

\textsuperscript{190} Gino & Galinsky, supra note 187, at 23.
behavior of in-group members,” using that behavior to justify and rationalize their own unethical conduct.191

Network theory provides a bridge between the empirical evidence of power-law distributions found in aggregated crime data and the individual-level insights into ethical decision-making provided by behavioral ethics research. If close connections and in-group dynamics influence unethical behavior, it is no stretch to suggest it also influences illegal behavior. After all, unethical decision-making is the precursor to transgressions of both norms and law.192 This means that individuals who are joined by psychological closeness, even slight, may be more prone to commit violations of laws or norms if others around them are doing so.193 And when these individuals are linked in a network, the number and harm of those violations increases.194 If that network is one of preferential attachment—the hub and node structure discussed

191 Celia Moore & Francesca Gino, Ethically Adrift: How Others Pull Our Moral Compass from True North, and How We Can Fix It, 33 RES. ORG. BEHAV. 53, 57 (2013); see also Jonathon Haidt, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, 108 PSYCHOL. REV. 814, 820 (2001) (describing the “I agree with people I like heuristic,” which suggests “the mere fact that your friend has made a judgment affects your own intuitions directly”) (citation omitted). All of this behavior is related to how we rationalize our unethical conduct so as to preserve our positive self-image while committing an unethical act. See Scott S. Wiltermuth, Cheating More When the Spoils Are Split, 115 ORG. BEHAV. & HUM. DECISION PROCESSES 157, 166–67 (2011) (showing that people may be more likely to cheat when acting for others because it allows for a positive view of the self); Criminalization, supra note 18, at 1252–59 (exploring rationalization theory and applying it to white collar crime and corporate compliance).


194 The frequency of events does not necessarily correlate to the harm caused; nor is a power law necessary for there to be extreme harm. However, in the compliance context, harm is often evaluated by the amount of remedial efforts (time, money) required to address employee wrongdoing. See Criminalization, supra note 18, at 1240–46 (describing the costs of compliance failures as a function of government intervention).
above—it can develop into a power law in which extreme levels of wrongdoing are facilitated by the outsized influence of a small number of unethical individuals.\footnote{Borgatti et al., supra note 163, at 894; Easley & Kleinberg, supra note 19, at 548.}

Stanford sociologist and network theorist Mark Granovetter’s classic study of how riots occur supports this proposition. Granovetter posited that potential rioters—those persons in a crowd milling around and witnessing the group’s actions—have a “threshold” for joining.\footnote{Mark Granovetter, \textit{Threshold Models of Collective Behavior}, 83 Am. J. SOC. 1420, 1422 (1978) [hereinafter \textit{Threshold}]; see also Mark Granovetter, \textit{The Social Construction of Corruption}, in \textit{ON CAPITALISM} 152 (Victor Nee & Richard Swedberg eds. 2007) (applying these principles to bribery and corruption in business and politics); Owen Gallupe et al., \textit{An Experimental Test of Deviant Modeling}, 53 J. Res. Crime & Delinq. 482, 495 (2016) (citing Granovetter’s work in a study finding that an individual is more likely to model deviant behavior when more of their peers take the action).} This threshold, which differs for each participant based on their own personality and decision-making, is met when the personal benefits of joining the riot outweigh the costs.\footnote{\textit{Threshold}, supra note 196, at 1422.} Granovetter found these thresholds greatly affect the complexity and unpredictability of the group’s behavior.\footnote{Id. at 1424–25.}

Granovetter began with a thought experiment. He assigned numbers to the thresholds of each person in a 100-person group, ranging from zero to ninety-nine.\footnote{Id. at 1426.} The person with the zero threshold would begin rioting all on his own, the person with the one threshold would see that and join in, and on and on until the last person joined.\footnote{Buchanan, supra note 159, at 107.} Under these circumstances, the riot would “grow like wildfire, eventually sucking in even those with very high thresholds.”\footnote{Threshold, supra note 196, at 1425; Buchanan, supra note 159, at 108 (“With no one willing to be the second person to riot, there would be no chain reaction.”). Of course, multiple potential participants could have the same thresholds, complicating the model.} But if just one person early on had a slightly higher threshold, say a two instead of a one, the riot would end before it got going.\footnote{Buchanan, supra note 159, at 108; see also Threshold, supra note 196, at 1425 (“Even this simple-minded example makes the main point suggested earlier: it is hazardous to infer individual dispositions from aggregate outcomes.”). For an interesting take on how}
Granovetter used this simple example to create a mathematical model of how individual relationships within a group impact collective action.\textsuperscript{204} After setting basic assumptions about the average thresholds of the participants, Granovetter found that the “equilibrium number of rioters” did not build uniformly as expected, but jumped up drastically at a critical point.\textsuperscript{205} The model showed the riot’s size multiplying by a factor of seven immediately after crossing a seemingly arbitrary point—an explosion more than a wildfire.\textsuperscript{206}

Although Granovetter described this effect as “striking,” it becomes less so in light of the behavioral ethics and network theory discussed above. Granovetter believed that the relationships between the active and potential rioters could explain the drastic increase in participation—that friendship lowered an individual’s threshold to joining the riot.\textsuperscript{207} His modeling demonstrated that if just a small number of people in the crowd were friends with those rioting, the number of overall participants skyrocketed, along with the harm caused.\textsuperscript{208} Granovetter called this the “bandwagon” effect,\textsuperscript{209} but that simple name belies its significance. What he modeled was how individual ethical decision-making, as influenced by relationships, creates power-law effects.\textsuperscript{210} When there is an in-group relationship between a wrongdoer and others in a network, the others’ threshold for committing bad behavior is lowered. And if

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\textsuperscript{204} See Threshold, supra note 196, at 1427.
\textsuperscript{205} Id. at 1428, fig. 2.
\textsuperscript{206} Id. at 1427 (modeling that the equilibrium number of rioters goes from roughly 12 to 100 as it crosses a deviation threshold).
\textsuperscript{207} Id. at 1429.
\textsuperscript{208} Id. (describing two factors that have a role in changing the effects of threshold distributions, including “social structure”); see also John H. Miller & Scott E. Page, The Standing Ovation Problem, COMPLEXITY, Apr. 2004, at 9 (describing the “standing ovation” problem in complexity studies and how it applies to a range of phenomena in which “people are socially influenced, they have varying degrees of sophistication, and information flows over a network”).
\textsuperscript{209} Threshold, supra note 196, at 1435.
\textsuperscript{210} Id. Granovetter references a study of the behavior of delinquent boys to support his theory. Most of the boys did not feel it was right (nor did they want) to commit illegal acts, but they did anyway, because the "group interaction was such that none could admit this without loss of status[,]" Id. (citing DAVID MATZA, DELINQUENCY AND DRIFT 33–67 (2d ed. 1964)).
one or more of the wrongdoers is a “hub,” they possess an outsized ability to lower many thresholds all at once. This spreads wrongdoing in an unpredictable and highly volatile manner. And as wrongdoing spreads, so does its potential harm. Accordingly, those power few in a network can greatly impact the ethicality of the entire organization.211

C. CORPORATE COMPLIANCE FAILURES AND THE POWER FEW AT WELLS FARGO

This Article contends that the same behavioral ethics and network effects creating power-law dynamics in unethical and criminal behavior are operating in corporate compliance. While the above offers theoretical support, a case study of the Wells Fargo scandal provides a compliance-specific example.212

The broad strokes of the Wells Fargo case are fairly well known at this point. As mentioned at the Article’s outset, after the CFPB announced its record $185 million settlement agreement with the bank over the widespread illegal practice of opening unauthorized accounts, public ire was directed at primarily two issues.213 The first was placing blame. Then-CEO John Stumpf, who made a series of inartful appearances before Congress, shouldered much of it until his abrupt retirement.214 To a lesser degree, so did Carrie Tolsted,

211 This phenomenon appears to be just as prevalent in white collar criminal behavior as it is in the riots Granovetter modeled. See, e.g., Gino, Ayal & Ariely, supra note 175, at 397 (suggesting unethical behaviors such as cheating, stealing, and dishonesty are “contagious” within business organizations and “[h]ealthy” work environments depend on role models to spread ethical norms); Marshak et. al., supra note 182, at 022308-2 (using network theory to study criminal networks as they expand, including white collar networks); Simpson, supra note 175, at 500 (suggesting that network analysis can be used to understand and disrupt economic fraud); see also Wayne E. Baker & Robert R. Faulkner, The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry, 58 AM. SOC. REV. 837, 851 (1993) (providing an early use of network analysis in the criminological analysis of antitrust behavior).

212 The case study offered here is not intended to serve as a substitute for a more robust qualitative or quantitative analysis. Instead, it serves as a “plausibility probe” to demonstrate a concept. See Jack S. Levy, Case Studies: Types, Designs, and Logics of Inference, 25 CONFLICT MGMT. & PEACE SCI. 1, 6–7 (2008) (defining and explaining the utility of plausibility probes, which are akin to illustrative case studies and “quite common in the international relations field and in the social sciences more generally”).


the now-former head of Wells Fargo’s community banking division.\textsuperscript{215} What appeared to anger people the most was that Stumpf and Tolsted retired with hundreds of millions of dollars in stock options while the bank faulted (and fired) branch-level employees.\textsuperscript{216} As one commentator put it, the scandal offered an “illustration . . . of rage at the establishment and the injustices wrought by the inequities in the modern, globalized economy.”\textsuperscript{217}

That rage was channeled toward the second, and more consequential, issue: locating the cause of the wrongdoing.\textsuperscript{218} Almost everyone—lawmakers, pundits, bank employees, and Wells Fargo’s board—quickly agreed that the bank’s bad culture was the culprit.\textsuperscript{219} An internal investigation commissioned by Wells Fargo’s independent directors furthered this narrative by finding that the bank’s “sales-oriented” and “decentralized” culture “failed dramatically” by “fostering an atmosphere that prompted . . .


\textsuperscript{216} Retail branch employees made up the majority of the 5,300 people fired. See Emily Glazer & Christina Rexrode, \textit{Wells Fargo CEO Defends Bank Culture, Lays Blame with Bad Employees}, WALL ST. J. (Sept. 13, 2016), https://www.wsj.com/articles/wells-fargo-ceo-defends-bank-culture-lays-blame-with-bad-employees-1473784452 (reporting that Stumpf said that fired employees did not “honor the bank’s culture”); Cowley & Kingson, supra note 215 (explaining that Wells Fargo clawed back $69 million of Stumpf’s $137 million in stock options and $67 million of Tolsted’s stock options).


\textsuperscript{218} The scope of that wrongdoing had grown substantially since the CFPB settlement was announced and investigation of the bank widened to other areas. See Keller, supra note 10 (reporting 3.5 million fake accounts dating back to 2009); James R. Koren, \textit{Wells Fargo to pay $1 billion in fines over auto, mortgage lending abuses}, L.A. TIMES (Apr. 20, 2018, 2:45 PM), http://www.latimes.com/business/la-fi-wells-fargo-penalty-20180420-story.html (discussing the CFPB settlement and Wells Fargo’s acknowledgments of more recently discovered “improper practices”).

\textsuperscript{219} See, e.g., Geoff Colvin, \textit{Inside Wells Fargo’s Plan to Fix Its Culture Post-Scandal}, FORTUNE (June 11, 2017), http://fortune.com/2017/06/11/wells-fargo-scandal-culture/ (“Every tale of corporate scandal begins with culture—and Wells Fargo’s culture . . . made it the kind of place where frontline employees could feel ungoverned and libertine enough to fabricate millions of customer accounts.”).
improper and unethical behavior.” The response from the bank came in the form of a house cleaning—a new CEO and termination of five senior executives—as well as reorganization of the board, the elimination of sales goals, and increased compliance efforts. These actions were intended to address the “root causes” of the bank’s problems by fixing the “breakdown in Wells Fargo’s sales culture.”

While these efforts may have helped staunch public outrage and are consistent with regulators’ wishes, they are unlikely to prevent a significant future compliance lapse at the bank because of the faulty assumption at their core. To demonstrate why, it is necessary to look more closely at Wells Fargo’s compliance program before the scandal, as well as how the conduct causing that scandal grew to such extremes.

1. Pre-scandal Compliance Program.

Despite public perception, Wells Fargo’s compliance program was a reputable one by all appreciable standards. While that may sound odd (even heretical) given what happened, a critical look demonstrates that it was largely efficacious according to accepted metrics. For instance, it contained all the “hallmark[s]” of an effective program according to the Guidelines and relevant agency directives.

There was a code of conduct widely available to employees, which set forth the bank’s vision and values, and instructed employees on relevant topics such as avoiding conflicts of interest, reporting business expenses, and complying with various

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220 REPORT, supra note 7, at 4.
221 Id. at 17, 51. A new Office of Ethics, Oversight and Integrity was created to oversee additional ethical sales training for employees and the hiring of outside “culture experts” to identify future problems. Murray, supra note 16.
222 REPORT, supra note 7, at 4, 18.
223 Part of this story is increased regulatory scrutiny, which leads to increased remedial efforts as the public becomes aware of wrongdoing. Unethical behavior and wrongdoing in one area invites scrutiny in another, which leads to evidence of more unethical behavior, creating a cycle that grows business scandals. See Peter Eavis, Wells Fargo Continues to Test Regulators: DealBook Briefing, N.Y. TIMES (May 17, 2018), https://www.nytimes.com/2018/05/17/business/dealbook/cbs-shari-redstone.html (describing additional compliance violations at Wells Fargo and the regulators’ response).
224 U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)–(b) (U.S. SENTENCING COMM’N 2016); Murphy, supra note 26, at 703.
The code was clearly written, simple to understand, and contained the unavoidable message that the customer was the bank’s priority, both as to long-term business goals and employee ethicality.226 Moreover, this was no “paper Code’ . . . sitting there for all to see but never trained upon.”227 Wells Fargo had multiple controls in place to prevent wrongdoing that were broadly and uniformly applied.228 For example, consistent with a robust training and monitoring program,

The company maintained an ethics program to instruct bank employees on spotting and addressing conflicts of interest. It also maintained a whistleblower hotline to notify senior management of violations. Furthermore, the senior management incentive system had protections consistent with best practices . . . including bonuses tied to instilling the company’s vision and values in its culture, bonuses tied to risk management, prohibitions against hedging or pledging equity awards, hold-past retirement provisions for equity awards, and numerous triggers for clawbacks and recoupment of bonuses in cases where they were inappropriately earned[.]229

In addition, there were a number of specific compliance efforts related to cross-selling and maintaining customer accounts. The

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226 See CODE OF ETHICS, supra note 225, at 6 (describing “what’s right for customers” and directing employees confronted with an ethical dilemma to ask questions and to not engage in unethical conduct).

227 Fox, supra note 225.

228 See Yancey, supra note 132. In fact, some have questioned whether there was “compliance overkill” at Wells Fargo. See Compliance Overkill at Wells Fargo?, WEALTHMANAGEMENT.COM (Oct. 1, 2000), http://www.wealthmanagement.com/practice-management/compliance-overkill-wells-fargo (describing firings at the bank for seemingly small compliance violations).

229 Tayan, supra note 3, at 2 (internal quotations and citation omitted).
employee handbook “explicitly stated that ‘splitting a customer deposit and opening multiple accounts . . . is considered a sales integrity violation.’”\textsuperscript{230} Employees also received additional trainings on this issue after the internal investigations group first noticed increasing sales integrity cases in 2002.\textsuperscript{231} For example, during a two-day ethics workshop in mid-2014, retail bankers in at least two regions were told “loud and clear: [d]o not create fake bank accounts in the name of unsuspecting clients.”\textsuperscript{232} Across all retail locations, “risk professionals” were deployed to identify and report any illegal activity related to sham accounts.\textsuperscript{233} Over 5,300 employees that violated the account misconduct rules were fired over a five-year period.\textsuperscript{234} Thus, at all three steps of compliance—training, monitoring, and enforcement—Wells Fargo’s program appeared to be doing its job. And until the CFPB settlement was announced, regulators familiar with Wells Fargo thought that it was.\textsuperscript{235}

Yet, just a short time later, the enormity of the compliance failure became clear. How is it that a compliance program could be effective in the eyes of the company and its regulators (all of whom were focused on culture building), while at the same time fail to prevent such extreme compliance failures? The short answer is that Wells Fargo’s compliance program was operating, but it was incorrectly targeted based on a flawed assumption of how compliance lapses occur. This was the bank’s true compliance failure.

\textsuperscript{231} REPORT, supra note 7, at 88–90.
\textsuperscript{233} Id.
\textsuperscript{235} See James Rufus Koren, U.S. Bank Regulator Was Suspicious About Wells Fargo’s Sales Practices but did Little About It, L.A. TIMES (Apr. 19, 2017), http://www.latimes.com/business/la-fi-occ-wells-fargo-20170419-story.html (reporting that bank examiners met with Carrie Tolstedt in early 2010, when she disclosed 700 whistle-blower complaints regarding workers “gaming” the bank’s sales goal system); Tayan, supra note 3, at 1 (describing Wells Fargo’s “reputation” for sound management, awards received by its managers, and high rankings based on customer and public surveys).

To explain this failure, it is first important to understand that the conduct that occurred at Wells Fargo was not the “standard story in most bank scandals,” in which senior executives conspire to rip-off customers and make themselves and their bank rich in the process.236 No one at Wells Fargo wanted retail bankers faking accounts.237 The reason is simple: banks do not make money on products their customers do not know about.238 In fact, employee creation of fake accounts undermines the bank’s short and long-term profit goals in at least two ways: (1) brand loyalty, which is the purpose of cross-selling, is not created through a hidden product; and (2) employees waste time maintaining fake accounts rather than selling real banking products that generate actual revenue.239

Moreover, senior managers’ bonuses were not tied to cross selling or products-per-household, so there were no direct compensation incentives for encouraging fake accounts.240 As one commentator put it, “it’s hard to believe that any actual human in senior management wanted” lower level employees to engage in this type of unethical behavior; they “wanted employees to open lots of real

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237 Id.
238 Id. While it is true that $2.4 million in fees were generated from fake accounts, that was incidental to the wrongful behavior. Id. The fees generated work out to approximately $450 per employee; it costs Wells Fargo approximately twenty percent of an employee’s salary to replace them after being fired. Id. Moreover, $2.4 million in fees over a multi-year period is infinitesimal when compared to the bank’s quarterly profits, which were $6.2 billion in the fourth quarter of 2017 alone. Wells Fargo Reports Fourth Quarter 2017 Net Income of $6.2 Billion; Diluted EPS of $1.16, BUSINESSWIRE (Jan. 12, 2018), https://www.businesswire.com/news/home/20180112005127/en/Wells-Fargo-Reports-Fourth-Quarter-2017-Net. Of course, any fraudulent fee does not feel incidental to customers.
239 Levine, supra note 236. This differs from a smaller, yet more troubling, practice taking place at the bank—bankers improperly adding on costly legal and insurance services to customer accounts without their knowledge. See Emily Glazer, Wells Fargo’s Latest Challenge: Refunds for Pet Insurance, Legal Services, WALL ST. J. (July 19, 2018), https://www.wsj.com/articles/wells-fargos-latest-challenge-refunds-for-pet-insurance-legal-services-1532009933. In August 2017, Wells Fargo disclosed in its securities filings that it was reviewing such add-on products and had begun remediation efforts for “impacted customers.” Id.
240 Tayan, supra note 3, at 2 (only branch-level employees’ compensation was tied to account creation).
accounts . . . [b]ut they designed it badly, and ended up . . . encouraging employees to open a lot of fake accounts.”

Instead of willful wrongdoing, Wells Fargo is a case study in “management pushing for something profitable but difficult, and the workers pushing back with something worthless but easy.” In many ways, this is why the scandal is so interesting from a compliance perspective—it is more about managing employee ethicality than incentivized law breaking. Nonetheless, an effective compliance program should be able to address wrongdoing regardless of its motivation. Which leads to the real shortcoming of Wells Fargo’s program—it failed to identify the extreme compliance risk that was developing around a small group of managers who had the capability of spreading that risk throughout the organization.

This becomes apparent when looking at where the creation of fake accounts was clustered and how the practice spread. Like the criminological data showing “hotspots” of crime, two regions—Los Angeles and Arizona—“led the way in fake-account generation.” In fact, California and Arizona were consistently ranked among the top states for sales practice violations. Both regions followed the same pattern. They began with a low “motivator ranking,” a ranking of the region’s sales goals and outputs compared to other regions. A star regional manager was then brought in to turn things around, and through “both effective and appropriate management techniques but also through intense sales pressure,” the region’s rankings improved—for example, Arizona went from last to first place within two years. However, sales integrity violations also rose during that time as retail bankers began falsifying accounts.

Critically, these practices spread through and across regions via individual managers. The best example is Shelly Freeman, who was a regional president overseeing branches in Los Angeles until

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241 Levine, supra note 210.
242 Id. (calling this “less a conspiracy” by the workers and “more a spontaneous revolt”).
243 Simpson, supra note 175, at 500.
245 REPORT, supra note 7, at 22.
246 Id. at 20, 22–25 (at one point, Los Angeles was ranked fifteenth and Arizona was ranked last).
247 Id.
248 Id. at 25.
2009. She initiated the region’s turnaround, partly through high pressure tactics such as shaming district managers who failed to hit their sales numbers. Freeman was next asked to oversee the Florida region. Shortly after she arrived, the quality of accounts in that region dropped, just like they had in Los Angeles, as she “strongly emphasized the importance of hitting sales goals.”

The Arizona region’s leader, Pam Conboy, also used a number of high pressure sales tactics. These included multiple daily calls to branch managers to discuss sales results, regular “rally” days that would extend bank-wide sales campaigns, and constant reminders of the opportunity costs of missing sales. To meet Conboy’s expectations, the managers under her devised a number of unethical strategies. These tactics spread not only across Arizona branches, but to other locations as the region’s managers were recruited elsewhere. According to one former Wells Fargo employee, this caused questionable practices to “spread through the nation like cancer.”

If the regional managers in Arizona and California were the epicenter of the false accounts scandal, its hypocenter appears to have been Carrie Tolstedt. When Stumpf took over as CEO in 2007, he made Tolstedt—whom he called the “most brilliant” banker

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249 Id. at 22.
250 Id. at 23 (describing how Freeman had managers under her “run[] the gauntlet” to report sales numbers publically).
251 Id.
252 Id. When the new Los Angeles regional manager took over, sales integrity numbers improved. Id. at 24.
253 Id. at 25.
254 Id.
255 One was called the “double pack”—opening two checking accounts for each customer—which 100 managers in the region were then trained to employ. Id.
256 Weinberger, supra note 244.
258 REPORT, supra note 7, at 27. 45-48 (detailing Carrie Tolstedt’s controlling leadership style, the group of people she influenced within the Community Bank, and her understating of the problems at the bank). A hypocenter is the underground focal point of an earthquake—its “focus.” Earthquake Glossary, U.S. GEOLOGICAL SURVEY — EARTHQUAKE HAZARDS PROGRAM, https://earthquake.usgs.gov/learn/glossary/?term=hypocenter.
he had ever met—he was the head of the community banking division.\textsuperscript{259} She became the hub through which most of the high pressure regional managers passed, including Conboy and Stevens.\textsuperscript{260} For example, Tolstedt praised Conboy’s “high pressure tactics” and “held [her] up as a model for others to emulate.”\textsuperscript{261} Another of Tolstedt’s reports, Matthew Raphaelson, a senior leader of the community banking division, received numerous complaints that the sales goals he set were too high and were leading to improperly opened accounts.\textsuperscript{262} Claudia Russ Anderson, a senior risk officer who also reported to Tolstedt, was supposed to be the “first line of defense” in identifying compliance risk, but she was seen as mainly “running interference” for her boss.\textsuperscript{263}

Although Tolstedt was undoubtedly a talented banker, she was also responsible for installing a team of managers who spread unethical banking practices throughout Wells Fargo.\textsuperscript{264} As visualized in Figure 2 above, unethical account practices emanated out from Tolstedt, through the managers close to her, and on to branch-level bankers—the peripheral “nodes” in the Wells Fargo network.\textsuperscript{265}

As the unethical conduct spread, the harm increased dramatically. The proof is in the numbers. During Tolstedt’s tenure as head of the Community Bank, reports of sales practice misconduct tripled.\textsuperscript{266} This resulted in the 3.5 million fake accounts,

\textsuperscript{259} \textit{Report}, supra note 7, at 45–46.

\textsuperscript{260} \textit{Id.} at 24–25 (noting that Lisa Stevens and Pam Conboy reported to Tolstedt).

\textsuperscript{261} \textit{Id.} at 46.

\textsuperscript{262} \textit{Id.} at 48 (“Raphaelson was aware that excessive sales goals and pressures led to employee misconduct” and he “received repeated complaints that his sales goals were too high[,]”).

\textsuperscript{263} \textit{Id.} at 49–50.

\textsuperscript{264} McLean, supra note 257. Stumpf deserves blame too; he was Tolstedt’s champion and had difficulty seeing her shortcomings. \textit{Id.}

\textsuperscript{265} See supra Part III.A.; Report, supra note 7, at 7–8. This phenomena can also be understood in terms of problematic micro-cultures in organizations. “For example, a firm with 60,000 employees and a 99.9 percent record of compliance with behavior rules might still have up to 60 employees whose misbehavior could inflict severe harm on the firm . . . . [T]his risk [becomes] especially grave if many of these 60 employees [are] housed within a single business unit . . . .” \textit{Workshop on Reforming Culture and Behavior in the Financial Services Industry}, Fed. Res. Bank of N.Y. (Oct. 28, 2014), https://www.newyorkfed.org/medialibrary/media/newsevents/events/banking/2014/Summary-Culture-Workshop.pdf.

\textsuperscript{266} See \textit{Report}, supra note 7, at 33 (finding that the misconduct tripled on a per-employee basis). In addition, turnover of retail bankers hit worryingly high proportions, peaking at 41% through much of 2012, a product of the relentless sales pressure. Michael Hiltzik, \textit{At United
the record-breaking CFPB fine, and the lost potential of $100 billion in shareholder gain—an extreme compliance failure if there ever was one.\textsuperscript{267}

3. The Power Few Explanation.

While it is convenient to place the blame on a broken sales culture, that does not accurately explain what happened at Wells Fargo. The story above is not one of typical compliance violations that pervaded the entire bank, and thus suggest a firm-wide culture of cheating customers. For a time, the unethical conduct at Wells Fargo was localized to two regions, and it was identified and addressed, albeit imperfectly, by the bank’s existing compliance program.\textsuperscript{268} After all, the program’s monitoring function flagged the increasing number of sales integrity cases, which prompted trainings and employee terminations.\textsuperscript{269} If there truly was a deep-seated culture of cheating customers at Wells Fargo, unethical and illegal conduct would have occurred in thousands of the bank’s branches, and it would have been reflected in customer surveys, reputation, and share price.\textsuperscript{270}

What was broken at the bank, however, was the assumption underlying the compliance program. What Stumpf and other leaders at Wells Fargo failed to understand is that unethical acts in complex organizations do not necessarily pop up one-by-one in a typical and predictable manner, so that they may be easily managed.


\textsuperscript{267} Keller, supra note 10 (tallying the fake accounts to 3.5 million and stating that the CFPB mandated $5 million for Wells Fargo to set aside for harmed customers); Maxfield, supra note 13 (finding that without the scandal, Wells Fargo would likely have added nearly $100 billion in market value). Whether Tolstedt is also the “node” most directly responsible for the bank’s other areas of wrongdoing remains to be seen. That may be the case for unethicality related to retail banking, but it may not be for wrongdoing in other divisions. See Glazer, supra note 239 (noting problems around add-on products); Koren, supra note 235 (noting mortgage lending and wealth-management issues).

\textsuperscript{268} See Report, supra note 7, at 15–16, 22 (stating that California and Arizona continuously had sales practice problems, starting in the mid-2000s, that Wells Fargo tried to address).

\textsuperscript{269} Id. at 16.

\textsuperscript{270} See id. at 22 (explaining the localized nature of fake accounts); Matt Egan, Wells Fargo Plans to Close 800 More Branches by 2020, CNN (Jan. 12, 2018, 1:48 PM), http://money.cnn.com/2018/01/12/investing/wells-fargo-shutting-branches/index.html (reporting Wells Fargo currently has 5,800 branches).
by standard compliance tools. 271 Instead, they are likely to follow a network-driven power law that is heavily influenced by the relationships between network participants. 272 Thus, the frequency and size of unethical acts, and the harm they cause, is highly volatile and subject to dramatic jumps depending on the “popularity” of the wrongdoers. 273 By virtue of their social and organizational status, Tolstedt and her senior managers were highly influential. As they exposed branch-level employees to high-pressure sales environments and gave them means to alleviate that pressure through unethical sales practices, wrongdoing increased. 274 After seeing their friends and co-workers manipulate accounts, individual employees lowered their own thresholds to unethical behavior, creating a “riot” of wrongdoing at the bank. 275 Wells Fargo was simply unequipped to handle this type of extreme compliance failure, one that grew “exponentially” through the bank’s power few. 276

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271 This misunderstanding is reflected in Stumpf “react[ing] positively” that roughly 1,000 employees per year had been fired for sales integrity violations over a five-year period. REPORT, supra note 7, at 55. To him, it signaled that the bank’s compliance program was working and that only one percent of the organization’s employees were doing their jobs improperly. Id.

272 Id. at 39 (“Inappropriate coaching techniques spread between branches as employees relocated . . . . Within branches, employees learned to manipulate customer information from former or fellow managers, resulting in a high number of violations in particular branches.”).

273 See id. (noting that many investigated upper level employees relocated to different branches many times).

274 See REPORT, supra note 7, at 7 (stating that senior bankers, especially in certain regions, “explicitly encouraged their subordinates to sell unnecessary products to their customers in an effort to meet the Community Bank’s sales goals”).

275 Id. at 37; Gino, Ayal & Ariely, supra note 175, at 396; Thresholds, supra note 196, at 1435. Ultimately, in some regions committing compliance violations became commonplace. Corkery & Cowley, supra note 232. One former retail banker explained that creating fake accounts “was like jaywalking”—everyone did it. Id. See also Aharon Mohliver, How Misconduct Spreads: Auditor’s Role in the Diffusion of Stock-option Backdating, ADMIN. SCI. Q. 1, 11 (2018) (finding evidence of network spread options backdating activity among auditors); Stephen G. Dimmock, William C. Gerkan & Nathaniel P. Graham, Is Fraud Contagious? Coworker Influence on Misconduct by Financial Advisors, 73 J. FIN. 1417, 1447 (2018) (finding that the probability of a financial advisor committing misconduct increases if coworkers have a history of misconduct).

276 EASLEY & KLEINBERG, supra note 19, at 484. The disconnect between Wells Fargo’s perception of its compliance problem and the reality is demonstrated by the repeated missteps the bank has taken to address fake accounts. For example, Stumpf has expressed that he “really feel[s] for Carrie [Tolstedt] and her team [because] . . . [w]e do such a good job in this area.” REPORT, supra note 7, at 55.
IV. Power Few Implications for Corporate Compliance

The Wells Fargo scandal highlights the reality of corporate compliance failures—they are just as likely to follow a power-law distribution caused by network effects as a normal distribution assumed by most company leaders and regulators. This understanding has significant implications for both the theory and practice of compliance, which in turn impacts corporate governance and regulation.

A. THEORETICAL IMPLICATIONS—A MORE NUANCED UNDERSTANDING OF THE ROLE OF BEHAVIORAL ETHICS IN COMPLIANCE

Despite corporate compliance’s multi-decade history and its central role in corporate governance, the theory surrounding it is in a nascent stage. In fact, some have commented that compliance is a topic “incompletely conceptualized and imperfectly understood, either individually or in relation to” other aspects of corporate governance.277 One field, however, that has provided noteworthy advancements in compliance theory is behavioral ethics.

The concept of behavioral ethics has been around for a very long time, but it has existed as a distinct field of study for less than a generation.278 In that time, it has evolved into a “scientific approach for studying perceptions of how we ought to treat one another . . . and how such perceptions influence behavior.”279 On a practical

277 See Miller, supra note 35, at 1 (commenting on governance, risk management, and compliance). Notable attempts have been made to remedy this deficiency. See Baer, supra note 31, at 973 (describing an “informal adjudication” theory of corporate compliance); Griffith, supra note 35, at 2078 (discussing attributes of contemporary compliance function serving a core governance function in companies); see also Criminalization, supra note 18, at 1252 (describing a criminal law-driven theory of compliance ineffectiveness); Benjamin van Rooij & Adam Fine, Toxic Corporate Culture: Assessing Organizational Processes of Deviancy, 8 ADMIN. SCI. 1, 4 (2018) (explaining how to assess the elements of toxic corporate culture through a forensic ethnography framework and applying that framework to recent corporate scandals including Wells Fargo).


279 Folger, supra note 278, at 125.
level, behavioral ethics can be thought of as “aim[ing] to understand how even well-intentioned people can sometimes behave unethically.”

Management, organizational behavior, and behavioral psychology scholars have all contributed to this endeavor, resulting in the central finding of behavioral ethics: that “cognitive heuristics, psychological tendencies, social and organizational pressures, and even seemingly irrelevant situational factors can make it more likely that good people will do bad things.”

What is important for our purposes is how this finding has impacted corporate compliance. As behavioral ethics research has gained prominence, it has advanced compliance by providing a more complete description of ethical decision-making. This includes highlighting that organizational pressures can systematically exacerbate unethicality. While these findings have been extremely valuable, they have also resulted in a shift in the focus of compliance from the individual to the corporation. To paraphrase the title of a leading behavioral ethics study, compliance is now more about the effects of bad barrels than of bad apples.

While there would likely be much debate among academics as to when this shift began, whether it was warranted by the research, and how complete it is, the evidence of its existence is apparent.

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282 This Article draws heavily on such findings. See supra Part III.B.


284 Id.

285 See, e.g., Jennifer J. Kish-Gephart, David A. Harrison & Linda K. Trevino, Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work, 95 J. Applied Psychology 1, 17 (2010) (undertaking a meta-analysis of thirty years of studies and finding a “high degree of underlying complexity” between the interaction of individual and organizational factors in ethical choice); Christine A. Henle, Bad Apples or Bad Barrels? A Former CEO Discusses the Interplay of Person and Situation with Implications for Business Education, 5 Acad. MGMT. Learning & Educ. 346 (2006)
That evidence is drawn from the drivers of actual compliance practices in companies: the Organizational Guidelines and the agencies that apply them.\textsuperscript{286} One data point comes from 2004, when the Guidelines were amended to include the directive that companies must “promote an organizational culture that encourages ethical conduct.”\textsuperscript{287} This provision was added to reflect an emphasis on ethical conduct “incorporated into [the] recent legislative and regulatory reforms.”\textsuperscript{288} The legislation referred to is the Sarbanes-Oxley Act, which triggered a multi-year review of the Guidelines by the Sentencing Commission.\textsuperscript{289} That review, which included testimony from behavioral ethics researchers and management scholars extolling the virtues of ethical culture, resulted in a corresponding focus on organizational culture in the amended Guidelines.\textsuperscript{290}

The other data point comes from enforcement trends. As the Guidelines evolved to reflect the importance of positive culture as advocated by behavioral ethics researchers, so did the practices of prosecutors and regulators. This evolution can be seen in the increasing use of deferred prosecution and non-prosecution agreements in place of individual and corporate convictions.\textsuperscript{291}

\textsuperscript{286} See supra Part II.C.

\textsuperscript{287} \textsc{U.S. Sentencing Guidelines Manual} § 8B2.1 app. C (\textsc{U.S. Sentencing Comm’n} 2011) (issuing an amendment to § 8B2.1 in Amendment 673).

\textsuperscript{288} \textit{Id.}

\textsuperscript{289} \textit{Id.} (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 805(a)(5), 116 Stat. 745, 802 (2002)) (directing the Commission to revise the Guidelines so they “are sufficient to deter and punish organizational criminal misconduct”).


\textsuperscript{291} Corporate deferred and non-prosecution agreements were born out of the Arthur Anderson prosecution, which many believed caused the accounting firm’s demise. In what became known as the “Brooklyn Plan,” prosecutors reformulated their approach to investigating companies and holding them liable for wrongdoing. 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 not to be prosecuted. \textsc{Garrett, supra} note 102, at 55 (describing the rise of deferred and non-prosecution agreements and referring to “the risk” and its ramifications).
Between 2000 and 2016, the DOJ entered into over 450 agreements, compared with just thirteen in the nine years prior to 2001. Both sides like these agreements—companies benefit by limiting their criminal liability and collateral exposure, and prosecutors are able to dramatically “reduce the costs associated with prosecutorial action.”

But what has really driven the adoption of these agreements is that prosecutors genuinely believe they are having an impact on corporate culture. This belief is demonstrated by the terms of the agreements themselves, which often do not focus on the large fines being levied but rather on what changes a company will be required to make to its compliance practices. Most agreements contain provisions aimed at refining corporate policies and procedures, and improving employee training and monitoring—two of the three steps in compliance. While the tools that regulators and companies agree on may evidence a misunderstanding of how compliance failures occur, there is little doubt that the focus is squarely on creating comprehensive compliance reforms and less so on individual wrongdoing within the company. This is a normative shift in the theory of how compliance should be done.

292 Gibson Dunn, supra note 102.
293 Griffith, supra note 35, at 2088 (“[T]here are no trials, no risk of los[ing], and no collateral consequences” to innocent employees and stockholders); Benjamin M. Greenblum, Note, What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements, 105 COLUM. L. REV. 1863, 1864 (2005).
295 See 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 (describing the deferred prosecution agreement related to Pfizer’s illegal marketing of painkillers; the deal contained a $2.3 billion charge, yet the bulk of the agreement focused on corporate governance and compliance).
296 See Griffith, supra note 35, at 2089 (noting that some agreements call for detailed corporate governance changes, such as hiring new compliance professionals, closing a business line, or altering compensation practices).
297 See Todd Haugh, The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions, 9 VA. L. & BUS. REV. 153, 176 (2015) (noting that one of the reasons that prosecutors favor going after companies rather than individuals is because it requires less time and fewer resources); Rakoff, supra note 294 (arguing that the practice is “technically and morally suspect” because it allows culpable corporate leaders to escape prosecutions while innocent employees and shareholders are punished). Judge Rakoff is particularly
The problem with this shift is that it obscures the role of the individual in corporate wrongdoing and compliance. If organizational culture is primarily to blame for wrongdoing at companies, then the focus of compliance efforts becomes to improve that culture as a whole. And as explored above, many seem to believe that the best way to build culture quickly is to saturate the company with compliance. This is what the Guidelines, and regulators through deferred and non-prosecution agreements, suggest companies should do—focus their energy on building culture within the organization. Thus, companies have developed standardized tools of compliance to be deployed rapidly and uniformly across the firm. The goal is comprehensiveness, not necessarily identification of individual compliance risk, intervention, and mitigation.

While the actual effectiveness of this approach is questionable at best, the larger concern is that by diminishing the individual’s role in compliance we gloss over the particulars of individual ethical decision making. An individual’s decision-making is where all unethical behavior, including white collar and corporate crime, comes from—each potential offender will decide whether the bad act he is contemplating can be reconciled with his self-perception as an honest employee and an upstanding citizen. If that reconciliation

scornful of prosecutors’ heavy reliance on deferred and non-prosecution agreements, which he sees as offering “little more than window dressing” without the “future deterrent value of successfully protecting individuals.” Id.

298 See Ashlee Vance, Over-Compliance is the New Compliance, Says Former SEC Chairman, REGISTER (May 18, 2005, 8:20 PM), http://www.theregister.co.uk/2005/05/18/pitt_sec_kalorama/ (reporting how Harvey Pitt, former SEC Chairman, describes his “[m]inimal muster is for losers” approach to designing compliance programs).

299 See, e.g., Krawiec, supra note 48, at 510–515, 542 (reviewing studies regarding the efficacy of codes of conduct, Guidelines-based compliance programs, and diversity training and finding little support for their inclusion as a central feature of negotiated governance). But see Baer, supra note 31, at 996–97 (questioning assumptions on which Krawiec’s arguments are based); Donald C. Langevoort, Cultures of Compliance, 54 AM. CRIM. L. REV. 933, 941 (2017) (suggesting that practitioners believe compliance efforts decrease wrongdoing, and either way, the “data to know for sure one way or the other [is] lacking”).

300 See 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 neutralization theory and its place in criminology); Donald R. Cressey, The Respectable Criminal, CRIMINOLOGICA, May 1965, at 14–15 (1965) (describing an offender’s motivation to commit a crime as involving three “essential kinds of psychological processes,” one of which is a rationalization—“the crux of the problem of white collar crime”); Todd Haugh, Sentencing
does not occur, the unethical behavior or criminal act does not go forward.\footnote{See Haugh, supra note 300, at 3161; see also Donald R. Cressey, Other People's Money: A Study in the Social Psychology of Embezzlement 94–95 (1973) ("The rationalization is [her] motivation"—it not only justifies her behavior to others, but it makes “the behavior intelligible”, and therefore actionable, to herself.).} Therefore, individual thresholds for unethical action—the decision of each employee as to whether they will join in wrongful conduct or refrain from it—are more important than the average decision-making of the organization, what we commonly think of as organizational culture.\footnote{See Buchanan, supra note 159, at 107–08.} Granovetter's simple thought experiment regarding thresholds demonstrated this critical point.

Granovetter's work also shows that a slight change in a just a few individual thresholds can make the difference between wrongdoing that is extreme and widespread, and that which is isolated and inconsequential.\footnote{Id. at 108.} As Granovetter himself puts it, “a tiny difference in the character of just one person can have a dramatic effect on the overall group.”\footnote{Id. at 107 (“Most of us would not start a riot over nothing, but we might join in under the right circumstance . . . ”).} In the language of behavioral ethics, it may be that certain bad apples can quickly turn all others rotten, regardless of the barrel they are in.\footnote{Trevino & Youngblood, supra note 283, at 378.}

This suggests a more nuanced conceptual approach to compliance is needed. Companies and regulators should view compliance as a means to increase individual ethical decision making thresholds, which in turn will improve organizational culture—but incrementally, one decision-maker at a time.\footnote{See Hui Chen & Eugene Soltes, Why Compliance Programs Fail—and How to Fix Them, Harv. Bus. Rev., Mar.–Apr. 2018, at 117, 125 (explaining that while many firms continue to approach compliance “as a legal exercise, it is really much more a behavioral science”).} Luckily, the parameters of such a “behavioral compliance” approach have already begun to be sketched.\footnote{“Behavioral compliance” is defined as the “design and management of compliance that draws from th[e] wider range of behavioral predictions about individual and organizational behavior.” Behavioral Ethics, supra note 18, at 1–2. See also Scott Killingsworth, “C” Is for Crucible: Behavioral Ethics, Culture, and the Board’s Role in C-Suite Compliance, in RAND CORPORATION, CULTURE, COMPLIANCE, AND THE C-SUITE: HOW EXECUTIVES, BOARDS, AND POLICYMAKERS CAN BETTER SAFEGUARD AGAINST MISCONDUCT AT THE TOP 53 (Michael D.
B. PRACTICAL IMPLICATIONS—REMAKING COMPLIANCE PROGRAMS
ACCORDING TO A BEHAVIORAL ETHICS RISK MANAGEMENT PARADIGM

The current approach to corporate compliance favored by companies and government regulators does not match the realities of how compliance failures occur. Instead of taking a macro approach focused on comprehensively increasing positive organizational culture all at once, companies need to tackle individual employee decision-making on a micro level. This means identifying and mitigating compliance risk individual decision by individual decision, what this Article terms a “behavioral ethics risk management” approach. While such an approach may sound difficult, it is already being partially employed by forward-thinking companies and compliance providers. The following discussion offers some practical strategies companies can use, and regulators can foster, to adopt a paradigm of behavioral ethics risk management in compliance.

1. Identify Employee Ethics During the Hiring Stage.

Companies can begin at the place where employees first interact with the organization: the hiring process. While many companies screen for past employment history, bankruptcies, and criminal violations, this provides minimal information regarding behavioral ethics risk. Instead, companies can explicitly screen for propensity to make ethical decisions. For example, employees can be asked to take the Defining Issues Test, which questions respondents on how they would address a series of moral vignettes, providing employers with an ethicality assessment of the employee based on the deontological principle of justice. The Mach IV


308 Instead of organizing the discussion of behavioral ethics risk strategies around the three steps of compliance, this Article takes a more individual-focused approach based on a typical employee’s life cycle with the firm.

309 See Miller, supra note 35, at 13 (noting that “organization[s] may investigate a job candidate’s arrests, convictions, bankruptcies, credit scores, and employment history.”).

assessment determines a person’s propensity toward “Machiavellian-type behavior,” which is the lack of concern with conventional morality. Researchers have also recently developed a scale to measure rule orientation and behavior. This is particularly exciting for companies because it assesses how a person thinks about rules—whether rules should be followed in a rigid manner or are subject to exception. In other words, there is now a diagnostic that measures one’s feelings about rules and the propensity to rationalize rule breaking—essentially, what a person’s threshold for unethical or illegal behavior might be.

While companies must be careful how they use the information collected, what these tools offer is a baseline assessment of individual behavioral ethics risk, a critical compliance metric.

Employees can be assessed for ethical decision-making in other ways. Each year, Goldman Sachs invites analyst interns to attend a multiweek training and orientation program; the expectation is that successful interns will join the firm upon the program’s completion. Throughout the program, the interns are tested, and Goldman personnel warn “analysts repeatedly that cheating on the

311 Pope, supra note 310, at 90 (citing Richard Christie & Florence L. Geis, Studies in Machiavellianism (1970) (introducing the test)). These diagnostic tools have been around for years and are well validated, yet they are not widely used in business to identify compliance risk.


313 Id. at 314 (noting that the rule orientation scale “captures the extent to which one thinks about rules in a rigid, rule-oriented manner or in a manner that recognizes exceptions”).

314 Id. at 315 (describing “[r]ule orientation [as] distinct . . . because it assesses how willingly individuals justify illegal behavior in general” and because it “provides an integrated measure that extends . . . to legal decision making”).

315 Certainly, ethical testing at this stage creates opportunity for discriminatory hiring and other concerns. See, e.g., Manuel London & Douglas W. Bray, Ethical Issues in Testing and Evaluation for Personnel Decisions, 35 Am. Psychology 890, 890–91 (1980) (discussing ethical use of testing and data by psychologists as part of the hiring process); Miriam H. Baer, Confronting the Two Faces of Corporate Fraud, 66 Fla. L. Rev. 87, 127–28 (2014) (cautioning that screening procedures are prone to error and “might, at [their] worst, become an excuse for discriminatory employment practices”). However, the potential compliance gains from such testing warrant an effort at navigating these concerns.

tests would be not tolerated.” In one test, interns are told they cannot conduct outside research, yet they are given access to computers with internet connections. The firm recently dismissed twenty interns from the program who Googled answers. The test was really about whether a potential employee can make an ethical decision in a highly-competitive environment. International business school Insead uses alumni interviews of applicants for the same purpose; those applicants answering questions indicating that they would act unethically to get ahead are not matriculated. According to the school’s dean, this creates a “self-selection process”—the unethical avoid the school, and “[p]eople who have actually given some thought to ethical behavior and believe in it . . . will be attracted.”

2. Identify the Power Few in the Organization.

Once an employee joins a company, compliance efforts can be directed at fostering their ethical decision-making and reducing behavioral ethics risk. Companies should start by identifying the power few, those individuals in the company’s complex social and organizational network who possess outsized ethical influence. These are the people that by virtue of their position in the company’s hierarchy, their social connections with other employees, or their

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317 Id.
318 Id.
319 Id.
320 Id. (noting how cheating on the exam was not only “a clear violation of the rules, but completely inconsistent with the values” of the firm).
323 See BUCHANAN, supra note 159, at 114 (describing an experiment in which two-thirds of a chain of letters sent from various locations to one stockbroker passed through one clothing merchant, “the hub of the social world”).
personal charisma, are “connectors”—those “prolific few who tie an entire . . . network together.”\textsuperscript{324} The company’s organizational chart may help here, but it provides a limited understanding of ethical influence. As seen with Wells Fargo, the CEO was not the origin or driver of the fake accounts scandal.\textsuperscript{325} The true power few at the bank were the regional managers connected to Carrie Tolsted; they were the hubs through which extreme compliance risk spread. Accordingly, human resources and compliance personnel need to identify those in the organization who are the most “popular” pursuant to network theory—the catalysts of potential unethical action. While most of the rhetoric regarding organizational culture focuses on “tone at the top,” that may not be where the most significant behavioral ethics risk lies.\textsuperscript{326}

After determining who may be among the power few, the company should assess those individuals’ specific levels of compliance risk.\textsuperscript{327} One company taking the correct approach here is Morgan Stanley, who now asks its risk and compliance officers to evaluate “material risk-takers.”\textsuperscript{328} Once identified, these employees

\textsuperscript{324} Id.; see also Alex R. Piquero et al., Elaborating the Individual Difference Component in Deterrence Theory, 7 ANNUAL REV. L. SOC. SCI. 335, 347 (2011) (“Research in social networks has shown that we are influenced not only by those with whom we have direct contact and interaction but also by those whom they are in contact with.”).

\textsuperscript{325} In fact, many still consider Stumpf to be an ethical leader. See Mark Pastin, The Surprise Ethics Lesson of Wells Fargo, HUFFPOST (Jan 21, 2018), https://www.huffingtonpost.com/mark-pastin/the-surprise-ethics-lesson_b_14041918.html (discussing how the senior executive’s message of being ethical was lost among the managers who engaged in unethical tactics).

\textsuperscript{326} See, e.g., Hon. Patti B. Smith, Chair, U.S. Sentencing Comm’n, Remarks at the Twelfth Annual Compliance and Ethics Inst. (Oct. 7, 2013) (“[T]he guidelines emphasize the importance of a ‘tone from the top’ and the need for internal corporate monitoring and auditing as a means of deterring organizational crime.”); van Rooij & Fine, supra note 277, at 27 (“Toxic culture was not just a matter of one bad CEO, one bad set of incentives, or the tone at the top. Certainly, the fish can rot from the head, but that certainly is not the only way it rots.”).

\textsuperscript{327} This process is likely more familiar to companies that have conducted business process and enterprise risk assessments in the past, but they should not lose sight that the purpose is to identify ethical decision-making risk. For a good discussion of corporate approaches to identifying legal, regulatory, and compliance risk, see generally Robert C. Bird & Stephan Kim Park, Turning Corporate Compliance into Competitive Advantage, 39 U. PA. J. BUS. L. 285 (2017); Robert C. Bird, VUCA and the Management of Legal Risk, THE CLS BLUE SKY BLOG (Mar. 15, 2018), http://clsbluesky.law.columbia.edu/2018/03/15/vuca-and-the-management-of-legal-risk/.

are monitored for risk-taking behavior, and how they manage it factors into promotion and compensation decisions.\textsuperscript{329} “If a trader . . . frequently hits risk limits, misses compliance trainings, or doesn’t take a mandatory two-week holiday that is imposed to catch fraud,” her bonus will be reduced and she may be terminated for cause.\textsuperscript{330} In an illustration of how regulators can support such innovative compliance efforts, the Federal Reserve Bank of New York raised the idea of creating a database of bank employees who were dismissed for such behavior.\textsuperscript{331}

Companies should then allocate a disproportionate amount of compliance resources towards the employees who are the power few and indicate heightened behavioral ethics risk. These employees should receive more training, more monitoring, and be subject to more investigative inquiries. Compliance officers should be on a first-name basis with these employees, regardless of their titles, and compliance tools should be tailored to them.\textsuperscript{332} Although this type of lopsided resource allocation to address power law dynamics has been criticized in the public sphere, it should be less controversial when aimed at improving employee ethicality within the private domain.\textsuperscript{333} The additional costs of compliance efforts for the power few are not insignificant, but the net benefits are worth it.\textsuperscript{334}

\textsuperscript{329} Id.
\textsuperscript{330} Id. It should not be forgotten that much behavioral ethics risk stems from organizational factors, even ones that are seemingly arbitrary. So, any risk assessment must consider all factors to ethical decision-making, not just company rhetoric and incentives. \textit{See Jeffrey M. Kaplan, Behavioral Ethics and Compliance Risks, Compliance Programs & Corp. Sentencing Guidelines § 6:21 (2017) (describing behavioral ethics findings related to stress, depleted mental resources, and other factors).}
\textsuperscript{331} Oran, supra note 328.
\textsuperscript{332} Barry-Wehmiller, a global capital equipment and engineering consulting company, provides an example of a company that individualizes its ethics and compliance initiatives. In addition to an ethics leadership training curriculum, CEO Bob Chapman meets with each employee to understand their values, interests, and goals. \textit{See Bob Chapman & Raj Sisodia, Everybody Matters: The Extraordinary Power of Caring for Your People Like Family} 213–23 (2015) (explaining the company’s employee-centered approach to business).
\textsuperscript{333} See Sherman, supra note 22, at 308 (discussing practical and political challenges to investing resources aimed at a select few in a population); Gladwell, supra note 128 (reporting benefits and challenges of allocating resources to fix a power law dynamic in healthcare spending).
\textsuperscript{334} While multinational companies spent roughly $3.5 million per year on compliance related activities, the costs of non-compliance are much higher. One report estimated the average cost to firms of compliance failures is $9.4 million. \textit{See PONEMON INST., supra note 95, at 2.} Wells Fargo has reported that its fake accounts scandal has already cost $1 billion in litigation costs alone, and the total is likely to rise to $3.3 billion. \textit{See Sue Reisinger, Wells
Keeping the power few from committing wrongdoing will have a cascade effect that lessons the cost of non-compliance greatly.335 Of course, companies must be mindful of going overboard with compliance, which risks fostering the very conduct they are trying to prevent.336

3. Ethical Training.

Regardless of an employee’s ethical risk profile, companies should be looking for any opportunity to influence ethical decision-making through education and training. This sounds easy enough, but many companies fail to do it.337 To ensure unethical employee decision-making is properly targeted, companies “need to frame [their] training around . . . specific, risky job tasks.”338 For example, Broadcat, a start-up compliance provider, has created a series of checklists that are task specific and direct employee action.339 One titled “Going Overseas On a Business Trip?” contains check boxes for things such as getting company preapprovals for gift giving and entertainment, securing computer files before travel, and carrying an ethics helpline phone number.340 Although the checklist is simple and easy to understand, it is grounded in sophisticated behavioral

See supra Part II.C.

Ricardo Pellafone, Keeping Compliance Simple, BROADCAT, http://www.thebroadcat.com/downloads (last visited Oct. 15, 2018). Most companies train their employees on complex legal risk as part of their compliance program, and then they expect employees to recall the laws, regulations, and internal rules governing that risk and apply it at the right time. That may work for training compliance officers, but not for most other employees because it “pushes all of the ‘transfer’ work to the employee,” and transfer is the critical step in the application of learned knowledge. Id.

See id.

Id.
science—it acts as a pre-commitment device for avoiding compliance risk.\textsuperscript{341} By committing to the company’s antibribery provisions, and then being reminded of them while undertaking the task of overseas travel, employees are less likely to engage in risk-creating behavior when the temptation is highest.\textsuperscript{342} A host of these types of “behavioral ethics nudges” are available to be integrated into existing compliance programs.\textsuperscript{343}

4. Select Behavioral Compliance Ambassadors.

Finally, as ethical employees advance in the company and become hubs of influence themselves, they should be leveraged as “behavioral compliance ambassadors.”\textsuperscript{344} This can take a number of forms. One is that ethical employees are asked (and incentivized) to identify gaps in compliance and “bring those issues back to [corporate headquarters], with suggestions on how to fix them.”\textsuperscript{345} This not only helps compliance officers who cannot anticipate every possible compliance risk, but it also strengthens in-group ethical behavior—when your peers are focused on ethics and compliance, you also tend to be focused on such behavior.\textsuperscript{346}

A more direct behavioral-focused approach is to ask these ambassadors to talk about ethics and compliance with their co-workers. There are many ways a company can facilitate this, but a

\textsuperscript{341} See id. Broadcat’s approach also highlights the use of strategies optimizing adult learning theory, another often overlooked aspect of compliance education and training. See SUSAN AMBROSE ET AL., HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING 255–56 (2010) (noting the benefits of giving checklists to students).

\textsuperscript{342} See also Daniel Kahneman et al., Noise: How to Overcome the High, Hidden Cost of Inconsistent Decision Making, HARV. BUS. REV., Oct. 2016, at 43 (suggesting the use of roundtables and checklists to increase discipline and reduce noise in decision-making).

\textsuperscript{343} See Nudging, supra note 27, at 710–15 (discussing a number of nudges being used in business to increase employee ethicality). The use of behavioral ethics nudges as a compliance tool may offset the increased costs of allocating more resources to the power few; nudges are generally inexpensive to administer to employees. See id. at 686; see also John Beshears & Francesca Gino, Leaders as Decision Architects: Structure Your Organization’s Work to Encourage Wise Choices, HARV. BUS. REV., May 2015, at 52, 56 (urging business leaders to become decision “architects” by using nudges to increase employee ethically).


\textsuperscript{345} Id.

\textsuperscript{346} See Linda Klebe Trevino et al., (Un)Ethical Behavior in Organizations, 65 ANNUAL REV. PSYCHOLOGY 635, 643 (2014); Gino, Ayal & Ariely, supra note 175, at 393; Piquero et. al, supra note 324, at 347.
proven approach is to periodically ask employees to meet in small groups to discuss compliance-related topics, such as the harms of embezzlement, the logic of an industry regulation, or how foreign bribery results in inferior products and hurts local workers.\textsuperscript{347} The critical part, though, is for the compliance ambassadors—not human resources or compliance officers—to lead the discussion. When rationalizations to undertake potentially unethical conduct arise in the discussion, 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”; that way, employees will be less likely to use them to lower their ethical decision-making thresholds in the future.\textsuperscript{348}

By no means is this an exhaustive list of strategies to minimize behavioral ethics risk. But these suggestions highlight that compliance need not continue along its largely homogenous path, one dominated by the faulty assumption of there being typical compliance failures easily identified and addressed. While a question certainly remains whether regulators will credit these strategies, and therefore incentivize a new era of behavioral compliance, there does seem to be a growing recognition that past practices are inadequate and new paradigms need to be explored.\textsuperscript{349}

V. CONCLUSION

Corporate compliance, now a central feature of corporate governance, is a complex endeavor. As the Wells Fargo fake accounts scandal shows, getting it wrong can have deleterious effects on companies and their stakeholders. Unfortunately, compliance is not as effective as it could be because most programs have been operating under a faulty assumption regarding how compliance lapses, particularly extreme ones, occur. Despite what

\textsuperscript{347} See Criminalization, supra note 18, at 1268.

\textsuperscript{348} Heath, supra note 192, at 611.

\textsuperscript{349} One of the most promising developments from regulators came in the form of the recent guidance document issued by the DOJ that lists over 100 questions that those evaluating a compliance program or compliance failure should ask. See EVALUATION, supra note 110. Many of the questions focus on risk assessment, performing it and training on it. See id. Unfortunately, the document’s drafter, Hui Chen, is no longer at the DOJ, and the current administration’s stance on how compliance programs will be evaluated is unclear. See Matt Kelly, Hui Chen Breaks Silence on DOJ Exit, RADICAL COMPLIANCE (June 25, 2017), http://www.radicalcompliance.com/2017/06/25/hui-chen-breaks-silence-doj-exit/.
company leaders and regulators have come to believe, compliance failures do not happen according to a normal distribution. Instead, they are subject to power-law dynamics driven by relational networks within the complex structure of the firm. This means there are individuals in every company operating as the power few, those possessing outsized ethical influence over the entire organization. Identifying these individuals, assessing their individual compliance risk, and targeting them for innovative behavioral compliance intervention should be the focus of every behaviorally-cognizant compliance program. Only by employing this type of “power few strategy” can companies effectively address the volatility that is inherent in corporate compliance and reduce the risk of the next “staggering” corporate scandal.\footnote{See Sherman, \textit{supra} note 22, at 309; Conti-Brown, \textit{supra} note 13.}