

## Leading a Healthier Company: Advancing a Public Health Model of Ethics and Compliance

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*This article advances a public health model of ethics and compliance. It argues that corporate leaders should draw from the successful lessons of public health to promote ethical behavior more effectively in their companies. With its attention to data-driven risk mitigation and behaviorally cognizant processes, a public health model can move compliance from the faulty assumption on which it is based, i.e., that organizational wrongdoing can be deterred solely through appeals to the rational decision-making processes of employees, to a more accurate understanding of the situational and social influences that foster noncompliance. The article supports its thesis in three parts. It begins by explaining the evolution of compliance and its transition from overly legalistic to behaviorally aware. Next it draws on behavioral ethics and network research to make the connection between public health and compliance. Third, it explores how corporate leaders can meld the insights from these two disciplines, offering a new way of approaching ethics and compliance that is focused on behavioral ethics conduct risk and the practical application of behavioral science within the firm—the best way to improve the legal, ethical, and financial health of companies.*

### INTRODUCTION

In 1952, Virginia Apgar did something quite remarkable: she transformed the field of obstetrics by creating a simple list. Although Apgar was not an obstetrician herself and had never delivered a baby (she had been denied a surgical position because at the time it was believed “women had little chance of attracting patients”), her checklist of newborn characteristics—now known as the Apgar score—is used in virtually every hospital birth in the world.<sup>1</sup> The score works by assigning points based on indicators of a baby’s health, with higher numbers for things such as crying,

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<sup>1</sup> Atul Gawande, *The Score*, NEW YORKER (Oct. 6, 2006), <https://www.newyorker.com/magazine/2006/10/09/the-score>.

vigorous breathing, and pink complexion. A total of ten points signals perfect health; four or less means the baby requires immediate medical intervention.<sup>2</sup>

Apgar's genius was to create a simple device that allowed the intangible and subjective—the condition of a newborn—to be converted into an actionable measure. And just as important, using it meant more careful observation of babies during their most vulnerable moments. Apgar spent much of her life instructing others on how to use her scoring system, almost singlehandedly creating the field of neonatology.<sup>3</sup> It is estimated that the Apgar score, and the behaviors that it fostered, may have saved the lives of upwards of six million babies in the United States—all due to a simple list and one woman's leadership in advancing it.<sup>4</sup>

The story of Virginia Apgar is one of many in public health, whereby a simple process designed to shape individual behavior resulted in a profound benefit to the public. Hand washing and line-insertion protocols before surgery, now widely adopted, are other good examples.<sup>5</sup> When followed, they reduce infection rates substantially—infections that are fatal in up to more than a quarter of the patients who get them.<sup>6</sup> Mask wearing practices during a pandemic can have a similarly profound impact; estimates are that universal mask wearing in the U.S. during the height of the Covid-19 pandemic would have saved 130,000 lives.<sup>7</sup> These initiatives demonstrate that

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<sup>2</sup> *Id.*

<sup>3</sup> *It Happened Here: The Apgar Score*, NEW YORK-PRESBYTERIAN: HEALTH MATTERS (Feb. 23, 2021), <https://healthmatters.nyp.org/apgar-score/>.

<sup>4</sup> Gawande, *Score*, *supra* note 1 (extrapolating based on the potential of 120,000 newborn deaths in 1940).

<sup>5</sup> Line insertion protocols, sometimes called central line “bundles,” are a set of evidence-based practices that have been proven to improve patient outcomes. Erwin Ista, Ben van der Hoven, René F Kornelisse, Cynthia van der Starre, Margreet C Vos, Eric Boersma & Onno K Helder, *Effectiveness of Insertion and Maintenance Bundles to Prevent Central-Line-Associated Bloodstream Infections in Critically Ill Patients of All Ages: A Systematic Review and Meta-Analysis*, 16 LANCET INFECTIOUS DISEASES 724, 724 (2016). These bundles include educating clinicians about practices to control infection from line-related bloodstream infections, creation of a central-line cart with necessary supplies, and use of a checklist to ensure adherence to infection-control practices, among other practices. Peter Pronovost, Dale Needham, Sean Berenholtz, David Sinopoli, Haitao Chu, Sara Cosgrove, Bryan Sexton, Robert Hyzy, Robert Welsh, Gary Roth, Joseph Bander, John Kepros & Christine Goeschel, *An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU*, 355 NEW ENG. J. MED. 2725, 2726 (2006).

<sup>6</sup> See Atul Gawande, *The Checklist*, NEW YORKER (Dec. 10, 2007), <https://www.newyorker.com/magazine/2007/12/10/the-checklist> (explaining that such protocols in just one hospital prevented forty-three infections and eight deaths, and saved two million dollars in costs, in just fifteen months).

<sup>7</sup> See IHME COVID-19 Forecasting Team, Robert C. Reiner, Jr., Ryan M. Barber, James K. Collins, Peng Zheng, Christopher Adolph, James Albright, Catherine M. Antony, Aleksandr Y. Aravkin, Steven D. Bachmeier, Bree Bang-Jensen, Marlena S. Bannick, Sabina Bloom, Austin Carter, Emma Castro, Kate Causey, Suman Chakrabarti, Fiona J. Charlson, Rebecca M. Cogen, Emily Combs, Xiaochen Dai, William James Dangel, Lucas Earl, Samuel B. Ewald, Maha Ezalarab, Alize J. Ferrari, Abraham Flaxman, Joseph Jon Frostad, Nancy Fullman, Emmanuela Gakidou, John Gallagher, Scott D. Glenn, Erik A. Goosmann, Jiawei He, Nathaniel J. Henry, Erin N. Hullard, Benjamin Hurst, Casey Johanns, Parkes J. Kendrick, Apurva Khemani, Samantha Leigh Larson, Alice Lazzar-Atwood, Kate E. LeGrand, Haley Lescinski, Akiya Lindstrom, Emily Linebarger, Rafael Lozano, Rui Ma, Johan Månsson, Beatrice Magistro, Ana M. Mantilla Herrera, Laurie B. Marczak, Molly K. Miller-Petrie, Ali H. Mokdad, Julia Deryn Morgan, Paulami Naik, Christopher M. Odell, James K. O'Halloran, Aaron E. Osgood-Zimmerman, Samuel M. Ostroff, Maja Pasovic, Louise Penberthy, Geoffrey Phipps, David M. Pigott, Ian Pollock, Rebecca E. Ramshaw, Sofia Boston Redford, Grace Reinke, Sam Rolfe, Damian Francesco Santomauro, John R. Shackleton, David H. Shaw, Brittney S. Sheena, Aleksei Sholokhov, Reed J. D. Sorensen, Gianna Sparks, Emma Elizabeth Spurlock, Michelle L. Subart, Ruri Syailendrawati, Anna E. Torre, Christopher E. Troeger, Theo Vos, Alexandra Watson, Stefanie Watson, Kirsten E. Wiens, Lauren Woyczynski, Liming Xu, Jize Zhang, Simon I. Hay, Stephen S. Lim & Christopher J. L. Murray, *Modeling COVID-19 Scenarios for the United States*, 27 NAT. MED. 94, 94 (2021) (finding that universal mask use (ninety-five percent

public health has much to offer by bringing behavioral interventions and data-driven risk mitigation practices together to create societal good. They also show how strong leadership is necessary for that good to be effectuated.<sup>8</sup>

This article draws from these lessons to advance a public health model of corporate ethics and compliance.<sup>9</sup> While the field of ethics and compliance has grown dramatically over the past decades and has evolved in many respects, by-and-large it remains rooted in the past. Although it is no longer dominated by command-and-control, legalistic policies that render compliance little more than the promulgation of rules,<sup>10</sup> it still fails to recognize that employee behavior is what really drives ethical culture. Under this mindset, too little effort is spent on determining whether traditional compliance tools—such as codes of conduct, online trainings, and employee hotlines—actually result in better behavioral outcomes. Compliance’s overall lack of innovation, coupled with the most recent string of high-profile corporate scandals,<sup>11</sup> has caused prominent academics and practitioners to question whether ethics and “compliance programs are a million dollar waste of time.”<sup>12</sup>

Instead of following this outmoded approach to compliance, corporate leaders should draw from the best lessons of public health, which rely on data-driven risk mitigation practices and behaviorally cognizant processes. Good public health identifies negative health outcomes, assesses risk factors that may be causing them (both medical and ecological),<sup>13</sup> and then creates and tests mitigating interventions that are aimed at changing individual behavior so as to improve collective health.<sup>14</sup> A public health model of compliance, one organized around a similarly scientific

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use in public) could ameliorate the worst effects of epidemic resurgences and save an additional 129,574 lives over six months).

<sup>8</sup> Compare Gawande, *Checklist*, *supra* note 6 (describing how the development of a pre-surgery checklist that ensured hand washing and other disease-reducing behaviors was championed by a critical care specialist who had to persuade hospital administrators) with Seth Cohen, *Don't Be a Ponce: What Every Leader Can Learn from Wearing a Face Mask*, FORBES (Apr. 29, 2020), <https://www.forbes.com/sites/sethcohen/2020/04/29/what-every-leader-can-learn-from-wearing-a-face-mask/?sh=7e17992d3e24> (detailing leadership lessons demonstrated by mask wearing and the failures of such leadership).

<sup>9</sup> The term “corporate ethics and compliance” will be used interchangeably with “organizational ethics and compliance” for ease of reference. In addition, “ethics and compliance” may be referred to only as “compliance.” While there are legitimate reasons to parse these terms and their definitions, doing so is beyond the scope of this article. See, e.g., LIEZL GROENEWALD & GUENDALINA DONDÉ, *ETHICS & COMPLIANCE HANDBOOK* 10 (2017) (explaining conceptual and definitional differences).

<sup>10</sup> See Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1246 (2017) (describing how command-and-control compliance models that are grounded in the criminal law gained traction in American companies) [hereinafter Haugh, *Criminalization*].

<sup>11</sup> See Pavithra Mohan, *These Are the Worst Scandals of the Past Decade*, FAST CO. (Dec. 26, 2019), <https://www.fastcompany.com/90444328/these-are-the-worst-scandals-of-the-last-decade> (detailing large public corporate scandals between approximately 2010 and 2019).

<sup>12</sup> Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV. (March–April 2018), <https://hbr.org/2018/03/why-compliance-programs-fail> (detailing corporate scandals and describing executives’ frustrations with “paying immense and growing compliance costs without seeing clear benefits”).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See, e.g., Jonathan E. Fielding, Steven Teutsch & Lester Breslow, *A Framework for Public Health in the United States*, 32 PUB. HEALTH REVS. 174, 179–84 (2010) (describing determinants of public health and traditional public health programs).

approach to changing unethical behavior, can more effectively foster ethical conduct and culture within companies and organizations.

Yet despite obvious benefits from employing such a model, its widespread adoption will require significant leadership, because it prioritizes individual ethical decision-making and behavioral conduct risk as the focus of compliance, something few companies are currently doing and regulators have only recently begun to endorse. This approach, however, is well-founded in existing research from multiple fields—psychology, criminology, behavioral ethics, and network science, to name a few. Bringing these fields together provides fresh insight into how truly effective compliance programs may be conceptualized and implemented.<sup>15</sup> As the history of the Apgar score demonstrates, sometimes important innovation comes from filtering the intractable problems of one domain through the tools of another, and then doggedly ensuring that the lessons learned are widely implemented. Applying public health-inspired practices to compliance is such an innovation, and it will require equally innovative ethical leadership to fulfill its promise.<sup>16</sup>

This article consists of three parts. Part I begins by explaining the evolution of compliance and the traditional assumptions underlying it, *i.e.*, the notion that employee wrongdoing can be deterred through training on legal rules that impose costs on rational decision makers. Despite its intuitive appeal, this assumption has proven faulty. The field of behavioral ethics, and its recognition that ethicality is bounded, provides a more complete understanding of corporate crime and compliance. Behavioral ethics research demonstrates that corporate wrongdoing is often driven by situational factors capable of overcoming individual employee morality. This is the future of compliance because it recognizes the importance of conduct risk and the realities of how it may be mitigated.

Part II draws on this behavioral theory to make the connection between public health and compliance. Public health efforts, such as those used to control a contagion, are an exercise in behavioral compliance, writ large. Thus, public health and corporate compliance are joined through behavioral science, collectively offering a better understanding of and influence over individual decision-making and behavior. At the same time, the importance and prevalence of social influence on behavior becomes apparent. Network theory, coupled with social psychology,

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<sup>15</sup> Almost twenty-five years ago, leading behavioral ethics researchers connected ethical leadership and behavioral psychology. *See, e.g.*, David M. Messick & Max. H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, SLOAN MGMT. REV. 9 (Winter 1996). A more recent review reaffirmed the connection and called for additional research regarding how behavioral ethics insights might inform leadership. *See, e.g.*, Michael E. Brown & Linda K. Treviño, *Ethical Leadership: A Review and Future Directions*, 17 LEADERSHIP Q. 595 (2006). That research, to which this article contributes through the lens of public health, is being carried out by scholars in the fields of management, law, compliance, behavioral ethics, and behavioral law and economics. *See, e.g.*, John Beshears & Francesca Gino, *Leaders as Decision Architects*, HARV. BUS. REV., May 2015; Minette Drumwright, Robert Prentice & Cara Biasucci, *Behavioral Ethics and Teaching Ethical Decision Making*, 13 DECISION SCI. J. INNOVATION EDUC. 431 (2015); YUVAL FELDMAN, THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR (2018) [hereinafter FELDMAN, GOOD PEOPLE]; Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683 (2017) [hereinafter Haugh, *Nudging*]; Elizabeth E. Umphress & John B. Bingham, *When Employees Do Bad Things for Good Reasons: Examining Unethical Pro-Organizational Behaviors*, 22 ORG. SCI. 621 (2011).

<sup>16</sup> I am unaware of significant research suggesting a public health model of compliance, although others have explored the topic more generally. *See* Hui Chen, *Compliance Assessment & Strategic Reviews*, HUI CHEN ETHICS, <https://huichenethics.com/what-we-do/> (last visited June 27, 2021) (describing “health checks” of compliance programs); Dan Brady, *It's Not Just You: A Public Health Approach to Ethics*, COSMOS (Oct. 2018), <https://compliancecosmos.org/its-not-just-you-public-health-approach-ethics> (advocating for an applied science approach to compliance).

provides an understanding of how social influence operates in the context of behavioral contagions—from smoking, diet, and mask-wearing to committing wrongdoing in a corporation.

In Part III, the focus shifts from the theoretical to the practical, exploring how corporate leaders can use these insights to make their companies healthier from a legal and ethical standpoint. The traditional tools of compliance are reconsidered in light of new behavioral compliance strategies informed by recent public health efforts. Although public health is far from infallible, its focus on risk mitigation through behavior change can be imported into companies, offering innovative ways to abate organizational wrongdoing. This part includes a discussion of how “sensor networks,” which have been used to preemptively slow the spread of disease, can be deployed in companies to predict wrongdoing, something corporate leaders have been seeking for decades. The article concludes with a call for ethics and compliance leaders to internalize the successful lessons of public health and adopt a behavioral conduct risk approach—the best path forward to improve the legal, ethical, and financial health of companies.

## I. ETHICS AND COMPLIANCE EVOLUTION: 1.0 TO BESCI.0

Some suggest that innovative leadership is a matter of recombining past knowledge in new ways.<sup>17</sup> If that is true, then necessary to being an innovative ethical leader is understanding the evolution of the ethics and compliance field—where it has been and where it is headed. Part history, part deconstruction, this section traces the field’s progression from its rules-based, legalistic approach toward its behavioral science-driven future.<sup>18</sup>

### A. *Compliance 1.0*

In the beginning, there was Compliance 1.0.<sup>19</sup> That moniker was only given after-the-fact, of course, but it is important because it suggests a starting point or baseline. The origins of Compliance 1.0 are rooted in corporate practices going back to at least the 1960s, when companies vociferously self-regulated to avoid more onerous government regulation.<sup>20</sup> While that worked for a time, by the late 1980s the notion of self-regulation had been eroded by a series of very public corporate scandals.

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<sup>17</sup> Andrew B. Hargadon, *Brokering Knowledge: Linking, Learning, and Innovation*, 24 RES. ORG. BEHAV. 41, 41 (2002).

<sup>18</sup> For a brief historical overview of ethics and compliance, see Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 69 RUTGERS U.L. REV. 421 (2017); see also Walker, Rebecca, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, in CORPORATE COMPLIANCE AND ETHICS INSTITUTE (2015).

<sup>19</sup> See Geoffrey Parsons Miller, *Compliance 2.0*, Remarks at Compliance In Brazil and in the World Conference (Dec. 9, 2015), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Compliance%202.0.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Compliance%202.0.pdf) (explaining various approaches to compliance over time) [hereinafter Miller, *Compliance 2.0*]. It is unclear when the term was coined, but most give credit to Donna Boehme. See, e.g., Roy Snell, *Compliance 2.0*, COMPLIANCE & ETHICS BLOG (May 12, 2015), <https://complianceandethics.org/compliance-2-0/> (crediting Boehme and referencing different versions of compliance).

<sup>20</sup> 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, 1576 (1990).

First was the electrical equipment cases in the early 1960s, in which almost thirty companies (including trusted firms such as General Electric and Westinghouse) were indicted for price fixing and bid rigging.<sup>21</sup> All told, forty-five executives pleaded guilty or no contest to criminal antitrust charges, shaking America's trust in its largest companies.<sup>22</sup> Next were the corporate bribery scandals of the 1970s that led to the passage of the Foreign Corrupt Practices Act (FCPA).<sup>23</sup> Flowing out of the Watergate investigation, corporate disclosures revealed that approximately 400 companies had made \$300 million in payments to foreign governments to secure corporate benefits,<sup>24</sup> causing Congress to criminalize foreign bribery under the theory that the law would "act as a self-enforcing, preventative mechanism."<sup>25</sup>

Similar scandals occurred in the 1980s. After a series of insider trading prosecutions at prominent banks, Congress passed the Insider Trading and Securities Fraud Enforcement Act, which amended criminal and civil securities laws to require broker-dealers (like Ivan Boesky and Michael Milken, who had become infamous for their insider trading schemes) to prevent the misuse of material, nonpublic information.<sup>26</sup> Finally, during this same time, a series of government contracting scandals highlighted fraud and abuse in the military procurement process.<sup>27</sup> This led then-President Reagan to appoint what became known as the Packard Commission to review the federal government's procurement system.<sup>28</sup>

As these scandals unfolded, the public's tolerance for corporate self-regulation lessened. This had two related effects: increased legislation and regulation of corporate and white-collar crime, and a heightened affinity for corporate compliance.<sup>29</sup> In fact, each decade of scandal added to the thousands of laws and regulations aimed at businesses, which in turn drove more compliance

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<sup>21</sup> Jed S. Rakoff & Jonathan S. Sack, *Federal Corporate Sentencing: Compliance and Mitigation* § 5.02[1][a] (10th ed. 2012).

<sup>22</sup> *Id.* at n.7. See also Richard Smith, *The Incredible Electrical Conspiracy (Part I)*, *Fortune*, Apr. 1961, at 133 (reporting on case in depth).

<sup>23</sup> See Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 422 (2012) (providing history and analysis of the FCPA).

<sup>24</sup> Pitt & Groskaufmanis, *supra* note 20, at 1582–87.

<sup>25</sup> *Id.* at 1585 (quoting S. Rep. No. 95-114, at 10 (1977)); see also Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, 41 SEC. REG. L.J. 241, 243 (2013) (providing update on FCPA enforcement).

<sup>26</sup> *Id.* at 1587–90; 15 U.S.C.A. §§ 78o(g), 80b-4(a).

<sup>27</sup> See Sharon A. Donaldson, *Section Six of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?*, 20 CUMB. L. REV. 421, 438–40 (1989) (describing frequently recurring problems in the government procurement process that led to public scrutiny, including spare parts overpricing, failure to take advantage of commercially available alternative products with lower prices than custom products, orders for spare parts after the close of the production line that resulted in expensive hand tooling, buying of spare parts in uneconomically small quantities, and exercises of poor judgment by acquisition personnel).

<sup>28</sup> See Paul E. Fiorelli, *In Defense of Ethics: New Considerations after the Packard Commission*, 34 CATH. LAW. 157, 158 (1991) (providing a history and overview of the ethics process in the defense industry). Interestingly, the Packard Commission found that inefficiency was the main culprit, but sensationalized reports of expenditures on items like \$1900 toilet seat covers dominated the headlines. *Id.*

<sup>29</sup> See Haugh, *Criminalization*, *supra* note 10, at 1220–21, 1233 (showing an increase of criminal and quasi-criminal laws and regulations aimed at business also increased compliance efforts within firms).

efforts within companies.<sup>30</sup> For example, when executives were sent to jail for price-fixing in the 1960s, which was mostly unheard of at the time, the business community took notice. Antitrust compliance programs spread quickly among large firms, spurred on by regulators’ suggestions that “closely supervised and honestly carried out” compliance programs would go a “long way toward” proving that wrongdoing was not endemic to the company.<sup>31</sup> The passage of the FCPA had a similar effect.<sup>32</sup> And the Packard Commission’s report recommending that defense contractors “promulgate and vigilantly enforce codes of ethics” resulted in the formation of the Defense Industry Initiative, one of the first compliance organizations.<sup>33</sup>

But what would ultimately have the biggest impact on shaping Compliance 1.0 (and all of compliance, for that matter) was just around the corner. In 1991, the U.S. Sentencing Commission promulgated the Organizational Sentencing Guidelines.<sup>34</sup> The Guidelines were a watershed moment for many reasons,<sup>35</sup> but primarily because of how they addressed the conundrum of vicarious corporate liability.<sup>36</sup> It had been long-established in the United States that when individuals commit crimes in their capacity as employees, the entities for which they work are also liable.<sup>37</sup> The Guidelines accepted that baseline of corporate liability but created a mechanism to mediate its effects—after all, no company can prevent *all* employee wrongdoing, and innocent corporate stakeholders are often hurt the most when corporate crime occurs.<sup>38</sup> The Guidelines’ compromise was to impose liability but lessen the resulting fine if the company had an “effective” compliance program operating prior to the employee’s illegal acts.<sup>39</sup> This carrot and stick approach

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<sup>30</sup> *Id.*; see also Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007) (describing power of federal prosecutors in corporate prosecutions and corporate compliance); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2092 (2016) (arguing that the government, specifically federal prosecutors, have been “the leading force in the development of compliance”).

<sup>31</sup> Pitt & Groskaufmanis, *supra* note 20, at 1581 n.130.

<sup>32</sup> See Bernard J. White & B. Ruth Montgomery, *Corporate Codes of Conduct*, 23 CAL. MGMT. REV. 80, 80 (1980) (finding that many companies expanded or modified their codes of conduct to demonstrate compliance with the spirit and letter of the FCPA).

<sup>33</sup> Fiorelli, *supra* note 28, at 158–59.

<sup>34</sup> See Ketanji Brown Jackson & Kathleen Cooper Grilli, “Carrot and Stick” Philosophy: The History of the Organizational Sentencing Guidelines and the Emergence of Effective Compliance and Ethics Programs, at 1.28-1.60 (describing how Organizational Guidelines came to be) (on file with author); United States Sentencing Guidelines Manual § 8B2.1 (2018).

<sup>35</sup> Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 212 (2016).

<sup>36</sup> See, e.g., Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697 (2002) (describing theory behind and operation of the guidelines).

<sup>37</sup> See, e.g., *New York Central & H.R.R. Co. v. United States*, 212 U.S. 481 (1909).

<sup>38</sup> See Nicole Leeper Piquero, Stephen G. Tibbetts & Michael B. Blankenship, *Examining the Role of Differential Association and Techniques of Neutralization in Explaining Corporate Crime*, 26 DEVIANT BEHAV. 159, 188 (2005) (discussing possible repercussions from corporate prosecution, including reduction of shareholders’ profits and reduction in labor). *But see*, Speech of Commissioner Caroline A. Crenshaw, *Moving Forward Together—Enforcement for Everyone*, U.S. Securities and Exchange Commission (March 9, 2021), <https://www.sec.gov/news/speech/crenshaw-moving-forward-together> (suggesting that the Commission has historically placed too much emphasis on factors beyond actual company misconduct when imposing penalties).

<sup>39</sup> § 8B2.1(a)–(b) (2020). What is necessary to demonstrate an “effective” program has always been the central question, particularly given that the program has obviously failed on some dimension because an employee committed

incentivizes the preemptive policing of employees by their employers, in theory converting companies from “passive bystanders . . . hop[ing] their employees would behave well to active advocates for ethical conduct.”<sup>40</sup>

To say the Organizational Guidelines had a significant impact on companies and their compliance efforts is an understatement. Overnight, the Guidelines applied to “every corporation in the nation”<sup>41</sup> in a way that moved compliance front and center no matter the industry.<sup>42</sup> Prior to the enactment of the Guidelines, companies largely understood compliance as it applied to their specific business practices—compliance was mostly ad hoc.<sup>43</sup> But after the Guidelines were enacted, compliance was broadly applicable and “worthy of substantial attention” by everyone.<sup>44</sup> Around the same time, a key opinion by the Delaware Chancery Court indicated that having a Guidelines-style compliance program was necessary if corporate board members were to avoid personal liability from derivative suits founded on allegations of corporate wrongdoing.<sup>45</sup> The best way to preemptively lessen company sanctions, as well avoid personal ones, was for corporate leaders to insist on compliance programs as laid out in the Guidelines.<sup>46</sup>

While this led to a boom in corporate compliance, the ways in which compliance was fashioned within firms are what really created the contours of Compliance 1.0. Because compliance was driven by the Organizational Guidelines, which were derived from and situated in criminal law and sentencing, it is no surprise that lawyers had a prominent role in implementing the expansion of compliance. From the beginning, attorneys and those with regulatory backgrounds were the most sought-after hires tasked with developing and leading corporate compliance programs.<sup>47</sup> Even more in demand were former high-ranking prosecutors and regulatory agency heads who could be called upon to negotiate with their former colleagues if their companies found themselves under scrutiny.<sup>48</sup> The focus on legal acumen, and frankly just adding

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a crime. Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 500–02 (2005).

<sup>40</sup> ETHICS RES. CTR., THE FEDERAL SENTENCING GUIDELINES FOR ORGANIZATIONS AT TWENTY YEARS 16, 22 (2012), <https://www.theagc.org/docs/f12.10.pdf>; see also Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 964 (2009) (explaining the Organizational Guidelines’ liability regime); Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997) (same).

<sup>41</sup> Jackson & Grilli, *supra* note 4, at 1.47.

<sup>42</sup> Bird & Park, *supra* note 35, at 212.

<sup>43</sup> See Murphy, *supra* note 18, at 427 (describing siloed compliance efforts).

<sup>44</sup> Bird & Park, *supra* note 35, at 212.

<sup>45</sup> In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996); see also Todd Haugh, *Caremark’s Behavioral Legacy*, 90 TEMP. L. REV. 611, 612 (2018) (detailing Caremark’s role in expanding compliance).

<sup>46</sup> Haugh, *Caremark’s Legacy*, *supra* note 45, at 619.

<sup>47</sup> See Anthony Effinger, *The Rise of the Compliance Guru—and Banker Ire*, BLOOMBERG (June 25, 2015), <http://www.bloomberg.com/news/features/2015-06-25/compliance-is-now-calling-the-shots-and-bankers-are-bristling> (describing compliance departments’ dramatic expansion after the financial crisis); Aruna Viswanatha & Brett Wolf, *Wall Street’s Hot Hire: Anti-Money Laundering Compliance Officers*, REUTERS (Oct. 14, 2013), <http://blogs.reuters.com/financial-regulatory-forum/2013/10/14/wall-streets-hot-hire-anti-money-laundering-compliance-officers/> (same).

<sup>48</sup> See Nicole Sandford, *Building World-Class Ethics and Compliance Programs: Making a Good Program Great*, DELOITTE (2015), <https://www2.deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics->

bodies to growing compliance departments, only increased after well-known corporate scandals and the inevitable cycle of legislation and regulation that followed.<sup>49</sup>

While building compliance programs based on a legalistic model made some sense at the time, it also meant that compliance departments within companies took on the “sheen of the agencies from whence they came,”<sup>50</sup> with compliance officers tending to act as “cop[s] or legal lieutenant[s].”<sup>51</sup> Compliance was most often set up as an adjunct of legal and reported to the general counsel.<sup>52</sup> This meant there were usually no subject matter experts in compliance in the compliance department. Instead, “relatively low-level, low-paid, and low-status” compliance officers—sometimes with legal training, sometimes not—were the ones administering the “rule-based” programs conceived of by their former regulator bosses.<sup>53</sup>

As a result, the aim of early compliance programs seemed to be imposing a lot of new rules on employees and then documenting that they had been trained on those new rules, all under the assumption that simply explaining the penalties of illegal behavior to employees would be enough to ensure they did not commit it. And at a minimum, these programs would serve as a prophylactic.<sup>54</sup> Rather than promoting ethical behavior, the ostensible goal was to “generate a lot of compliance records on the assumption that the compliance program [would] fail.”<sup>55</sup> If any risk

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and-compliance-programs.pdf (“Because a visible number of the CCO roles originated in response to enforcement activities . . . many of the first CCOs came from legal backgrounds.”). The trend continues today. See Miriam H. Baer, *Compliance Elites*, 88 *FORDHAM L. REV.* 1599, 1613–14 (2020) (survey results showing at least a third of high-level compliance officers have law degrees) [hereinafter Baer, *Elites*].

<sup>49</sup> This was evidenced by companies hiring thousands of compliance personnel at a time shortly after the financial crisis. Dov Seidman, *Why Companies Shouldn't 'Do' Compliance*, *FORBES* (May 4, 2012), <http://www.forbes.com/sites/dovseidman/2012/05/04/why-ceos-shouldnt-do-compliance/>. Although things have leveled out since, the compliance industry is expected to reach \$65 billion by 2025, up from \$30 billion in 2012. ENTERPRISE GOVERNANCE, RISK & COMPLIANCE MARKET WORTH \$64.62 BILLION BY 2025, GRAND VIEW RESEARCH (May 2019), <https://www.grandviewresearch.com/press-release/global-enterprise-governance-risk-compliance-egrc-market/>; see also William S. Laufer, *A Very Special Regulatory Milestone*, 20 *U. PA. J. BUS. L.* 392, 393 (2018) (predicting that the number of compliance-related employees will soon exceed the number of police officers). And even now, more than three quarters of compliance officers have a law degree. Markus Jüttner, *Corporate Compliance and Business Ethics Between Claim and Reality—Why Academic-Bureaucratic Compliance Programs Fail*, in *THE SILENCE OF ORGANIZATIONS 200* (Sebastian Starystach & Kristina Höly, eds. 2021) (citing Deloitte, *The Future of Compliance 2019*, <https://www2.deloitte.com/de/de/pages/audit/articles/future-of-compliance.html>).

<sup>50</sup> Todd Haugh, *Criminalized Compliance*, in *CAMBRIDGE HANDBOOK OF COMPLIANCE* (Daniel Sokol & Benjamin van Rooij eds., forthcoming 2021).

<sup>51</sup> Donna Boehme, *What Is Compliance SME?*, *CORP. COMPLIANCE INSIGHTS* (April 11, 2019), <https://www.corporatecomplianceinsights.com/what-is-compliance-sme/>.

<sup>52</sup> Miller, *Compliance 2.0*, *supra* note 19, at 6.

<sup>53</sup> *Id.*

<sup>54</sup> See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *VAND. L. REV.* 1343, 1410–15 (1999) (discussion of compliance programs as insurance against criminal prosecution, even if ineffective and created solely to appease external stakeholders).

<sup>55</sup> Compliance Training: What Does the DOJ Look For?: Interview with Hui Chen, the U.S. Department of Justice’s Compliance Counsel Expert, 2015–2017, *BROADCAT* (2021) (on file with author) [hereinafter, *Chen Interview*].

assessment was taking place, it was related almost solely to defensibility—“checking the box” of compliance so that legal counsel could later argue the company was following the Guidelines.<sup>56</sup>

This approach has some obvious conceptual problems,<sup>57</sup> but the more pressing concern for Compliance 1.0 was that it did not work. The approach neither stopped the illegal behavior at the core of prominent corporate scandals nor provided a shield against regulators. A few notable scandals identified as Compliance 1.0 “train wrecks” demonstrate the failure.<sup>58</sup>

For almost ten years, General Motors’ compliance program failed to detect or correct the connection between the company’s faulty ignition switches and a series of deadly automobile accidents.<sup>59</sup> This failure delayed a recall that could have prevented some of the 124 deaths that occurred.<sup>60</sup> Instead of immediately recalling the vehicles, GM’s legal counsel trained employees to stop taking notes at meetings on the topic and stop using certain “naughty words” (such as deathtrap, explosion, and defect) that might expose GM to legal liability.<sup>61</sup> What would have cost GM a few dollars per car to fix ultimately led to thirty million cars being recalled, almost \$3.5 billion in direct costs, a corporate deferred prosecution agreement, and untold costs in terms of human life lost.<sup>62</sup>

Similarly, Volkswagen’s compliance program, which was designed and managed by a “labor law partner-turned-CCO,”<sup>63</sup> failed to prevent company engineers from creating and installing a computer algorithm to cheat emissions testing on over eleven million automobiles.<sup>64</sup> Despite warnings from multiple employees and an outside vendor that engineers were building in cheats to emissions software, the compliance function did not alert the proper senior managers<sup>65</sup>—

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<sup>56</sup> *Id.* Check-the-box compliance, a characteristic of Compliance 1.0, is focused on documenting “how many times [the company] trained, how much money they spend, and how many records of training activity they created.” *Id.*; see also Geoffrey Parsons Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 437 (2017) (“Compliance officers . . . performed a sort of glorified bookkeeping task, making sure that forms were filled out and boxes checked.”).

<sup>57</sup> In addition to problems associated with check-box compliance, this approach creates other concerns. See Baer, *Elites*, *supra* note 48, at 1617 (arguing compliance elitism, one feature of Compliance 1.0, creates performance blind spots); Haugh, *Criminalization*, *supra* note 10, at 1218–19 (arguing criminalized compliance, another feature, fosters criminogenic rationalizations).

<sup>58</sup> Boehme, *supra* note 51.

<sup>59</sup> *Id.*; Chris Isidore, *Death Toll for GM Ignition Switch: 124*, CNNMONEY (Dec. 10, 2015), <https://money.cnn.com/2015/12/10/news/companies/gm-recall-ignition-switch-death-toll/index.html>.

<sup>60</sup> *Id.*

<sup>61</sup> Sam Frizell, *These Are the 69 Words GM Employees Were Forbidden from Using*, TIME (May 17, 2014), <https://time.com/103737/gm-words-nhtsa-general-motors/>; Boehme, *supra* note 51.

<sup>62</sup> Brad Plumer, *The GM Recall Scandal of 2014*, VOX (May 11, 2015), <https://www.vox.com/2014/10/3/18073458/gm-car-recall>; David Shepardson, *U.S. Judge Dismisses GM Ignition Switch Criminal Case*, REUTERS (Sept. 19, 2018), <https://www.reuters.com/article/us-gm-ignition/u-s-judge-dismisses-gm-ignition-switch-criminal-case-idUSKCN1LZ2U0>; see also Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 215–16 (2019) (using ignition switch scandal to explain compliance process).

<sup>63</sup> Boehme, *supra* note 51.

<sup>64</sup> Russell Hotten, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), <https://www.bbc.com/news/business-34324772>.

<sup>65</sup> Boehme, *supra* note 51.

possibly because the focus of the compliance program was on training above all else.<sup>66</sup> The resulting scandal caused an immediate thirty percent drop in Volkswagen's stock price,<sup>67</sup> and the company is only now recovering.<sup>68</sup> Nine employees have been charged with crimes, and the company pleaded guilty to three criminal felony counts.<sup>69</sup> The costs to individual and public health resulting from increased emissions will be much higher.<sup>70</sup>

But the scandal that arguably best epitomizes Compliance 1.0 is Morgan Stanley's FCPA compliance failure. In the early 2010's, Garth Peterson, a former-vice president and star Asian-market banker, was convicted of evading FCPA accounting controls when he attempted to mask his joint ownership stake with a Chinese government official in a multimillion-dollar real estate deal.<sup>71</sup> The scandal made headlines both because of Peterson's actions and Morgan Stanley's compliance program. Run by a former prosecutor-turned-head of the bank's anti-corruption group, the program might as well have been a standing surveillance operation—it included regular surveillance of client-employee transactions, random audits of selected personnel, pretextual phone calls to verify transactions, and criminal background checks of deal partners.<sup>72</sup> However, despite this aggressive level of surveillance, Morgan Stanley's compliance program was actually built upon a foundation of high-quantity, low-quality training. Between 2002 and 2008, Morgan Stanley trained its Asia-based personnel fifty-four times on anti-corruption policies, and Peterson

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<sup>66</sup> See Richard Hardyment, *CSR After the Volkswagen Scandal*, TRIPLEPUNDIT (Oct. 28, 2015), <http://www.triplepundit.com/2015/10/csr-volkswagen-scandal> (reporting that more than 185,000 employees received training on compliance topics in 2014).

<sup>67</sup> Paul R. La Monica, *Volkswagen Has Plunged 50%. Will It Ever Recover?*, CNN MONEY (Sept. 25, 2015), <https://money.cnn.com/2015/09/24/investing/volkswagen-vw-emissions-scandal-stock/>. The scandal cost Volkswagen \$7.3 billion in the third quarter of 2015. Sue Reisinger, *Scandal-Plagued VW, GM and Deutsche Bank Take Big Hits to Bottom Line*, CORP. COUNSEL (Nov. 5, 2015), <http://www.corpcounsel.com/id=1202741772940/ScandalPlagued-VW-GM-and-Deutsche-Bank-Take-Big-Hits-to-Bottom-Line?slreturn=20160924164431>.

<sup>68</sup> Jack Ewing, *Volkswagen Settles Emissions Charges Against 2 Managers*, N.Y. TIMES (May 20, 2020), <https://www.nytimes.com/2020/05/20/business/volkswagen-emissions-charges.html> (describing corporate fines and guilty pleas, concluding that “Volkswagen is still recovering from the financial damage that occurred” in 2015).

<sup>69</sup> David Shepardson & Joern Poltz, *U.S. Judge Approves Transfer of Jailed Former VW Executive to Germany*, REUTERS (July 16, 2020), <https://www.reuters.com/article/us-volkswagen-emissions/u-s-judge-approves-transfer-of-jailed-former-vw-executive-to-germany-idUSKCN24H367>; Press Release, U.S. Dep't Just., Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties (Jan. 11, 2017), <https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six>.

<sup>70</sup> See Josie Cox, *Volkswagen's Diesel Emissions Scandal to Cause More than a Thousand Premature Deaths*, INDEPENDENT (Mar. 3, 2017), <https://www.independent.co.uk/climate-change/news/volkswagen-s-diesel-emissions-scandal-premature-deaths-car-vw-mit-study-thousands-killed-a7609061.html> (describing report by MIT researchers estimating that 1200 people will lose as much as a decade of their lives because of excess emissions generated by cars with defeat devices installed).

<sup>71</sup> See Scott Cohn, *Ex-MS Banker in China Bribery Case: My Side of Story*, CNBC (Aug. 16, 2012), <http://www.cnbc.com/id/48693573> (reporting that the payments were intended to secure a real estate deal benefiting Morgan Stanley and Peterson).

<sup>72</sup> Information at 5–6, 9–10, *United States v. Peterson*, 859 F. Supp. 2d 477 (E.D.N.Y. 2012) (No. 12-224).

was individually reminded to comply with the FCPA at least thirty-five times.<sup>73</sup> According to those at the bank, however, trainings were focused almost entirely on documentation.

You can have programs and e-mails, but if people just delete them; if people have to do teleconferences but instead of actually listening, all you have to do is say, ‘[the employee’s] on the phone,’ and they check the box that says, he’s complied . . . . And then you either quietly hang up, or you just put your phone aside and you do your other work. That was the culture.<sup>74</sup>

Despite Morgan Stanley securing a declination by the Department of Justice (DOJ) in its corporate FCPA case, the compliance program has been pilloried as epitomizing the major flaw of Compliance 1.0—an overly formalistic approach to compliance focused on avoiding legal liability rather than helping employees avoid committing wrongdoing in the first place.<sup>75</sup>

### B. Compliance 2.0

As examples of failed compliance efforts mounted, individuals in both corporate compliance and government saw the need for a new iteration of compliance. Compliance 2.0 most likely began sometime prior to 2014, but the term was officially coined that year by a group of compliance professionals.<sup>76</sup> The “Algonquin group” had come together to discuss the problem of recent corporate scandals being blamed on compliance officers who were saddled with the structural limitations inherent under Compliance 1.0’s legalistic approach.<sup>77</sup> The group partnered with the RAND Center for Corporate Ethics and Governance to host a symposium, which led to a report aimed at creating “a paradigm shift in the [compliance] field over the coming decade.”<sup>78</sup>

The RAND report is wide-ranging but it coalesces around a few common themes that form Compliance 2.0’s tenets: the professionalization of compliance and its breakaway from legal,<sup>79</sup> the

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<sup>73</sup> Press Release, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA, U.S. DEP’T JUST. (Apr. 25, 2012), <https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required>.

<sup>74</sup> Cohn, *supra* note 71.

<sup>75</sup> Boehme, *supra* note 51. The government’s decision to grant a declination for such a program only solidified Compliance 1.0’s focus on a check-the-box mentality. Phillip Winterburn, *How the Department of Justice Ruined Compliance*, CONVERCENT (June 6, 2018), <https://www.convercent.com/blog/how-the-department-of-justice-ruined-compliance>.

<sup>76</sup> See Snell, *supra* note 19 (stating he first started seeing the term “Compliance 2.0” in approximately May 2014).

<sup>77</sup> Michael Scher, *Mike Scher to Donna Boehme: Show Us Compliance 2.0*, FCPA BLOG (Aug. 22, 2016), <https://fcpablog.com/2016/08/22/mike-scher-to-donna-boehme-show-us-compliance-20/> (interviewing Boehme about her role in creating Compliance 2.0). The Algonquin group was named after the hotel where they met.

<sup>78</sup> MICHAEL D. GREENBERG, TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARDS, MANAGEMENT, COMPLIANCE OFFICERS, AND GOVERNMENT 2 (RAND Corp. 2014), [file:///Users/though/Downloads/RAND\\_CF322.pdf](file:///Users/though/Downloads/RAND_CF322.pdf). Additional symposia and reports followed.

<sup>79</sup> See Joseph Murphy, *Compliance & Ethics as a Profession—In the Public Interest*, in GREENBERG, *supra* note 78, at 46 (arguing for professionalization of compliance); Michael Volkov, *Redefining the Relationship of the General Counsel and Chief Compliance Officer*, in GREENBERG, *supra* note 78, at 65 (arguing for elevation of Chief Compliance Officer position to board level and separation of compliance from legal).

incorporation of risk-based approaches to compliance,<sup>80</sup> and the increased reliance on data in compliance.<sup>81</sup> In this way, Compliance 2.0 sought to actively abandon the “old legacy model” of traditionally legalistic compliance programs and develop itself as a standalone profession with specialized skills.<sup>82</sup> Rather than simply being a “process integrator” under legal, compliance would be its own value-adding function in the organization.<sup>83</sup> The question remained, though, as to exactly what that function would entail.

The answer came, at least in part, from another development occurring a few years earlier. Since the adoption of the Organizational Guidelines, companies actively credited them with having a “profound influence on corporate behavior” and “galvanizing [and] inspiring” the creation of compliance programs.<sup>84</sup> But proponents (and critics alike) also recognized that the Guidelines were limited in their direction to companies regarding how to operate an effective program, as well as the proper role for ethics within compliance.<sup>85</sup> In 2004, the Sentencing Commission amended the Guidelines to elaborate on and add rigor to companies’ obligations to develop effective programs, which included requiring periodic risk assessments and stressing the importance of ethical conduct in business.<sup>86</sup>

When taking the thrust of the amendments to the Guidelines together with the goals outlined in the RAND report, the scope and function of Compliance 2.0 becomes clearer. Undoubtedly, its leading feature is enhanced power and responsibility of the internal control functions within companies.<sup>87</sup> Compliance, audit, and risk management are elevated from low-status jobs aimed at making sure employees follow rules to well-resourced departments with C-suite level leadership positions.<sup>88</sup> This means compliance is out from under legal and has direct reporting lines to the CEO or appropriate board committees, and may even participate in strategic firm policy making.<sup>89</sup> This access to company leadership brings with it an expectation that ethics and compliance will permeate the organization, fostered by a tone at the top and positive corporate

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<sup>80</sup> See GREENBERG, *supra* note 78, at ix (highlighting “business risk and compliance risk [as] the same thing in today’s marketplace”); Peter Jaffe, *Learning the Hard Way: Ethics and Compliance Program Lessons Gleaned from Recent U.S. Resolution Agreements*, in GREENBERG, *supra* note 78, at 70–71 (discussing “analytical approach to identifying, measuring, and addressing key compliance risks”).

<sup>81</sup> Jaffe, *supra* note 80, at 70–71 (questioning data necessary for evidence of effective compliance).

<sup>82</sup> Scher, *supra* note 77.

<sup>83</sup> Boehme, *supra* note 51.

<sup>84</sup> Brown & Grilli, *supra* note 34, at 1.69.

<sup>85</sup> *Id.* at 1.71.

<sup>86</sup> *Id.* at 1.73. Additional amendments in 2010 encouraged preemptive detection and reporting of wrongdoing to the government. *Id.* at 1.81–1.82.

<sup>87</sup> Miller, *Compliance 2.0*, *supra* note 19, at 6.

<sup>88</sup> *Id.* at 6–7; see also Baer, *Elites*, *supra* note 48, at 1612–13 (reporting compliance budgets in the millions per year and CCO compensation averaging more than \$300,000 at large companies).

<sup>89</sup> Miller, *Compliance 2.0*, *supra* note 19, at 7–8; see also Peter Robau, *Compliance After Crises: The Post-Covid Compliance Trilemma*, at 2-3 (discussing potential downsides of compliance’s new role) (on file with author).

culture—all of which tracks the Guidelines’ increasing emphasis on ethics within compliance.<sup>90</sup> Also, Compliance 2.0 places an emphasis on risk analysis and reporting, requiring more data-driven practices.<sup>91</sup> Finally, the approach is principles based, emphasizing function over form and results over quantity of efforts.<sup>92</sup>

While it is debatable whether Compliance 2.0 has fully overtaken its predecessor in corporate America,<sup>93</sup> regulators clearly favor its approach. This is evidenced by the DOJ’s 2019 guidance document, the Evaluation of Corporate Compliance Programs.<sup>94</sup> The Evaluation consists of roughly one hundred questions that prosecutors are told to consider when conducting a criminal investigation of a company.<sup>95</sup> The questions are organized by subtopic, which in turn are organized under three broad categories, also posed as questions.<sup>96</sup> More important than the individual questions, though, are their focus—specifically on the design of the compliance program under scrutiny and how it is implemented and effectuated.<sup>97</sup> All the sub-questions under the “well designed” category are aimed at understanding whether the company properly evaluated its own risks and designed a compliance program to match; the implementation category questions focus on leadership commitment and resources; and the effectuation category questions are about analysis, testing, and continuous improvement.<sup>98</sup>

In other words, the Evaluation embodies much of Compliance 2.0’s call for an empowered compliance regime that is results-oriented and data-driven, rather than an exercise in

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<sup>90</sup> Miller, *Compliance 2.0*, *supra* note 19, at 8; *see also* Hon. Patti B. Saris, U.S. Sentencing Commission at the 12<sup>th</sup> Annual Compliance & Ethics Institute (Oct. 2013) (stating that “[i]f there is ‘Tone at the top,’ there must also be ‘Mood in the middle’ and a ‘Buzz at the bottom’ that reflects and reinforce the tone at the top”).

<sup>91</sup> *See* Miller, *Compliance 2.0*, *supra* note 19, at 8–9 (stating that “Compliance 2.0 utilizes a risk-based approach” and is “data-driven,” especially as it relates to FCPA, money-laundering, and securities violations).

<sup>92</sup> *Id.* at 10.

<sup>93</sup> Even those advocating for the transformation of compliance understood that achieving it would be a challenge. As a young profession that grew in the shadow of Compliance 1.0, many compliance personnel were “plagued by a lack of understanding,” hindering Compliance 2.0’s wide adoption. Snell, *supra* note 19; *see also* Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129, 154 (2018) (calling into question the assumptions on which even ideal compliance programs operate) [hereinafter Haugh, *Power Few*].

<sup>94</sup> Although the guidance drew on a set of questions posed roughly two years earlier, this was considered the first “fresh” set of directives since 2010 on how prosecutors should evaluate corporate compliance programs. Matt Kelly, *New Compliance Evaluation Guidelines*, RADICAL COMPLIANCE (April 30, 2019), <http://www.radicalcompliance.com/2019/04/30/new-compliance-evaluation-guidelines/>.

<sup>95</sup> EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, U.S. DEPT. OF JUST., CRIM. DIV., (Apr. 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>. The guidance was somewhat revised in June 2020.

<sup>96</sup> *Id.* The three categories are as follows: (1) program design—whether the program includes risk assessment elements, comprehensive policies and procedures, appropriately tailored training and communications, confidential reporting and investigation processes, third party management, and due diligence of acquisition targets; (2) program implementation—whether the program is committed to by all levels of management, is autonomous and well-resourced, and includes clear incentives and disincentives for non-compliance; and (3) program effectiveness in practice—whether the program is being continuously evaluated and improved through testing, the investigation of misconduct is well-functioning, and root cause analysis of misconduct is occurring.

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *Id.* at 2, 9, 13.

indiscriminate training.<sup>99</sup> Dispelling any doubts about whether this guidance signaled a break from the past, the Acting Assistant U.S. Attorney General in 2019 made clear that a compliance program that “looks great on paper [but] isn’t effectively implemented is . . . not going to be something that carries great weight with the [DOJ]. We need hard evidence that a program is both well-designed but also effectively implemented.”<sup>100</sup> This may have been the final nail in the coffin of Compliance 1.0.<sup>101</sup>

### C. *Compliance BeSci.0*

Compliance has come a long way since its modern origins. Yet a nagging question remains, one that the Organizational Guidelines, even filtered through this new evaluative guidance from the DOJ, still does not squarely address: if compliance is about effective implementation and working in practice,<sup>102</sup> how *exactly* does a company do that? After all, the Evaluation consists mostly of questions—it does not give many concrete answers. Luckily, the drafter of the first version of the Evaluation, former DOJ Compliance Counsel Hui Chen, provides a clear voice on how companies should interpret the guidance and what compliance must do to be effective. Chen’s recent comments reveal that compliance’s future is largely based on a behavioral science-driven risk mitigation approach—call it Compliance BeSci.0.<sup>103</sup>

According to Chen, compliance programs will only be successful when they focus on “behavior and process: why and how employees do what they do, and how training [and other compliance tools] [are] designed to address those why’s and how’s.”<sup>104</sup> Prevention must be the primary focus instead of after-the-fact defensibility that assumes a program’s failure.<sup>105</sup> So rather than educating employees on legal topics, compliance programs should train employees on

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<sup>99</sup> *Chen Interview*, *supra* note 55 (explaining that the Evaluation replaces indiscriminate training by its “thoughtful” use “as a tool to prevent corporate crime”).

<sup>100</sup> Jaelyn Jaeger, *Advice for Compliance from New DOJ Criminal Division Head*, COMPLIANCE WK. (Aug. 3, 2020), <https://www.complianceweek.com/regulatory-policy/advice-for-compliance-from-new-doj-criminal-division-head/29265.article> (interview with Brian Rabbitt, who continued by saying that “part of an effective compliance program is testing”).

<sup>101</sup> Some suggest that occurred years earlier. See Donna Boehme, *3 Nails in the Coffin of ‘Compliance 1.0’*, CORP. COUNS. (Mar. 17, 2015), <http://compliancestrategists.com/csblog/wp-content/uploads/2015/03/3-Nails.pdf> (arguing in 2015 for the demise of “the failed ‘Compliance 1.0’ model . . . and the rise of ‘Compliance 2.0’”). *But see*, Michael W. Peregrine, *‘Compliance 1.0’ Ain’t Dead Yet*, LAW.COM (Mar. 31, 2015), <https://www.law.com/corpcounsel/almID/1202722059342/Compliance-10-Aint-Dead-Yet/?et=editorial&slreturn=20210203145338> (arguing compliance could be properly organized under legal and companies should be free to choose appropriate structures).

<sup>102</sup> EVALUATION, *supra* note 95, at 13.

<sup>103</sup> Others have suggested that the next iteration of compliance is already here. See Dmytro Foremnyi, *Compliance 3.0: Where Are We Heading?*, COMPLIANCE AND LAW PERISCOPE (Nov. 29, 2018), <https://complianceperiscope.com/home/2018/11/29/compliance-30-where-are-we-heading> (seeing Compliance 3.0 as the further integration of compliance into software); Neha Gupta, Lana D. Radchenko, Luiza Wilson & Vinca Russell, *Compliance 3.0: The Data Driven Compliance Program*, SCCE’S COMPLIANCE & ETHICS INSTITUTE (Aug. 29, 2017), [https://assets.corporatecompliance.org/Portals/1/PDF/Resources/past\\_handouts/CEI/2017/W8gupta-radchenko-russell-wilson\\_2.pdf](https://assets.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2017/W8gupta-radchenko-russell-wilson_2.pdf) (suggesting that behavioral analytics are the foundation of Compliance 3.0).

<sup>104</sup> *Chen Interview*, *supra* note 55, at 3.

<sup>105</sup> *Id.* at 4.

application—how to do their actual job tasks compliantly.<sup>106</sup> She contrasts this to the check-the-box approach that focuses on how many times employees have been trained on the law, how much money a company has spent on compliance, and how many records of training activity have been created.<sup>107</sup> “Compliance is about behavior,” Chen explains, so compliance tools should not be aimed at abstract concepts, but instead should tie directly to specific behaviors and the essentials of what employees need to know to do their jobs.<sup>108</sup>

Implicit in this behavioral approach is the concept of conduct risk; that is, risk created by employees’ conduct or behavior as part of their day-to-day work functions.<sup>109</sup> Compliance programs can mitigate conduct risk best by working “backwards from what is most likely to get [employees] in trouble,” prioritizing the riskiest behavior and then “moving on to the next-riskiest and so on.”<sup>110</sup> According to Chen, companies should “prioritize, make a plan, and . . . demonstrate [that] a thoughtful [compliance] approach” is being employed.<sup>111</sup> This includes careful analysis and measurement of outcomes—not of the compliance department’s efforts, but of employee behavioral change that reduces risk. Programs conceptualized this way will be able to prove they are effective based on data that shows decreasing risk after compliance interventions.<sup>112</sup> They also have the added benefit of being more likely to convince prosecutors and regulators that any violations that do occur are aberrations.<sup>113</sup> To impress prosecutors, Chen says, compliance trainings must be “truly integrated into the day-to-day operations of the company, and training programs [must] demonstrate changes in behavior or reduction of violations.”<sup>114</sup> This type of validated behavioral change is what Chen calls “next generation compliance.”<sup>115</sup>

## II. A PUBLIC HEALTH MODEL OF ETHICS AND COMPLIANCE

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<sup>106</sup> *Id.* at 7.

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *Id.* at 8 (companies should be able “to demonstrate how their Code of Conduct training or e-learning courses have changed behaviors—that is, the specific things the businesspeople do,” such as “approving an expense, talking to a competitor, dealing with a customer, setting up an account, running a quality control test, or whatever[.]”).

<sup>109</sup> Conduct risk can be defined as “unethical business practices, individual behaviors, and organizational behaviors that have led to outcomes that have harmed either individual players or the financial system.” Deloitte, *Conduct Risk: Improving Culture Across the Enterprise*, WALL ST. J. (May 14, 2018), <http://deloitte.wsj.com/riskandcompliance/2018/05/14/conduct-risk-improving-cultureacross-the-enterprise/>.

<sup>110</sup> *Chen Interview*, *supra* note 55, at 6.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*; EVALUATION, *supra* note 95, at 14–15.

<sup>113</sup> *Id.* (a program that can only “recit[e] how much time and money you have spent on training people . . . [t]hat makes prosecutors roll their eyes.”).

<sup>114</sup> *Id.*

<sup>115</sup> Keynote Address of Hui Chen, Ethics Section Annual Meeting, Academy of Legal Studies in Business Annual Conference (Aug. 9, 2019) (on file with author). Chen points out that the DOJ Fraud Section has been “pretty clear over the past few years” about its expectation regarding risk mitigation, testing, and continuous improvement. *Chen Interview*, *supra* note 55, at 3; *see also* EVALUATION, *supra* note 95, at 14 (explaining that a “hallmark of an effective compliance program is its capacity to improve and evolve”).

Whether it is labeled next generation or Compliance BeSci.0, the future of compliance appears to be a behavioral one—corporate compliance programs continuing to evolve from legalistic to risk-based to focusing on validated behavioral change. While that future is underway through the work of Chen and others, it is still very much in its infancy.<sup>116</sup> However, the notion of applying behavioral concepts and research to issues of corporate ethics is quite well-developed. In fact, the field of behavioral ethics has been applying behavioral science to individual and corporate ethics for roughly the past twenty years, identifying the limitations of traditional economic and legal mechanisms to alter moral behavior and seeking new ways to increase ethicality.<sup>117</sup>

During this same time, behavioral theory and research was also being applied in the public health arena, and having significant positive impacts. Hand washing and line-insertion protocols are prime examples, but understanding and harnessing behavior has been a key component of public health initiatives for generations.<sup>118</sup> This is even more prominent now as we navigate a global pandemic.<sup>119</sup> In other words, behavioral interventions in public health and ethics and compliance rely on similar theoretical footing, but public health has employed such interventions more widely and more successfully.<sup>120</sup> Thus, now is an opportune time for compliance to draw from the innovative lessons of public health.

#### A. *Behavioral Science Applied to Ethics and Compliance*

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<sup>116</sup> See, e.g., Hui Chen, *INSIGHT: Monitoring Outsized Risk Elements in Your Organization*, BLOOMBERG (Dec. 12, 2019), <https://news.bloomberglaw.com/business-and-practice/insight-monitoring-outsized-risk-elements-in-your-organization> (endorsing a proposal whereby compliance efforts target individuals whose unethical decision-making poses the greatest risk according to behavioral and organizational factors); Haugh, *Nudging*, *supra* note 15, at 685 (explaining how the use of behavioral compliance tools can foster prosocial behavior in organizations); Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING [1] (Jennifer Arlen ed., 2016) (tying education and monitoring functions of compliance to behavior); Robert Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) to Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 80 (2015) (surveying behavioral ethics research and applying it to firms' efforts to increase employee ethicality); Ricardo Pellafone, *A Practical Way to Measure Corporate Compliance Efforts*, in CAMBRIDGE HANDBOOK OF MEASURING COMPLIANCE [1] (Benjamin van Rooij & Melissa Rorie eds., 2020) (defining compliance in terms of measured behavioral change).

<sup>117</sup> FELDMAN, GOOD PEOPLE, *supra* note 15, at 2, 33.

<sup>118</sup> See Jingwen Zhang & Damon Centola, *Social Network and Health: New Developments in Diffusion, Online and Offline*, 45 ANNU. REV. SOCIOLOGY 91, 99 (2019) (providing examples from “[d]ecades of research” on health psychology that behavioral contagions impact public health).

<sup>119</sup> See, e.g., Jay J. Van Bavel, Katherine Baicker, Paulo S. Boggio, Valerio Capraro, Aleksandra Cichocka, Mina Cikara, Molly J. Crockett, Alia J. Crum, Karen M. Douglas, James N. Druckman, John Drury, Oeindrila Dube, Naomi Ellemers, Eli J. Finkel, James H. Fowler, Michele Gelfand, Shihui Han, S. Alexander Haslam, Jolanda Jetten, Shinobu Kitayama, Dean Mobbs, Lucy E. Napper, Dominic J. Packer, Gordon Pennycook, Ellen Peters, Richard E. Petty, David G. Rand, Stephen D. Reicher, Simone Schnall, Azim Shariff, Linda J. Skitka, Sandra Susan Smith, Cass R. Sunstein, Nassim Tabri, Joshua A. Tucker, Sander van der Linden, Paul van Lange, Kim A. Weeden, Michael J. A. Wohl, Jamil Zaki, Sean R. Zick & Robb Willer, *Using Social and Behavioral Science to Support COVID-19 Pandemic Response*, 4 NAT. HUMAN BEHAV. 460, 460 (2020) (arguing that insights from social and behavioral sciences can be used to help align human behavior with the expert public health recommendations for Covid-19).

<sup>120</sup> Public health has had many failings, of course. See, e.g., Elizabeth Fee, *Public Health and the State: The United States*, in THE HISTORY OF PUBLIC HEALTH AND THE MODERN STATE 224 (Dorothy Porter ed., 1994) (providing a comparative history of U.S. public health). This article argues for compliance to draw from the disciplines' behavioral best practices and successes.

Although it may be lagging a bit behind public health, the ethics and compliance field is by no means starting from scratch regarding the application of behavioral science concepts. In fact, the general importance and interaction between behavior and ethical decision-making has a long history going back as far as Aristotle, who grounded the exploration of ethics in individual behavior.<sup>121</sup> Aristotle believed that we become ethical by undertaking ethical acts; thus, we build ethical character by repeatedly acting in an ethical manner.<sup>122</sup> From the beginnings of Western philosophy, then, there has been a strong relationship between ethics and behavior.

However, only over the past twenty years has there been a more formal merging of behavior (through the study of behavioral science) and morality (through the study of moral psychology) as a distinct field of inquiry<sup>123</sup>—the field of behavioral ethics.<sup>124</sup> Its aim is to understand and rectify peoples' inability to fully recognize the ethical, moral, and legal aspects of their behavior.<sup>125</sup> Applying the findings of behavioral ethics to management and business has become more prominent over the last fifteen years,<sup>126</sup> with direct application to corporate compliance—known as behavioral compliance—occurring in the past five to ten.<sup>127</sup>

While there has been some fuzziness in the past regarding how behavioral ethics and its offshoots define themselves, there now appears to be a consensus that behavioral ethics is the “scientific approach for studying perceptions of how we ought to treat one another . . . and how such perceptions influence behavior.”<sup>128</sup> This focus on understanding the how as opposed to the why of ethics, and the inherently applied aspect of the definition, is what provides the field its substantive niche. It is also likely why behavioral ethics, and particularly its behavioral compliance branch, has such resonance with the business community, which is looking for practical solutions

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<sup>121</sup> Marshall Schminke & Manuela Priesemuth, *Behavioral Business Ethics: Taking Context Seriously*, in BEHAVIORAL BUSINESS ETHICS 47, 72 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

<sup>122</sup> S. Michael Halloran, Aristotle's Concept of Ethos, or If Not His Somebody Else's, 1 RHETORIC REV. 58, 61 (1982).

<sup>123</sup> See, e.g., David M. Messick & Ann E. Tenbrunsel, *Behavioral Research into Business Ethics*, in CODES OF CONDUCT 1, 10 (David M. Messick & Ann E. Tenbrunsel eds., 1996); Linda Klebe Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601, 601–02 (1986).

<sup>124</sup> For an accessible introduction to the field, see Cara Biasucci & Robert Prentice, *Behavioral Ethics in Practice: Why We Sometimes Make the Wrong Decisions* (2021).

<sup>125</sup> FELDMAN, GOOD PEOPLE, *supra* note 15, at 2; see also, Robert Folger, *Deonance: Behavioral Ethics and Moral Obligation*, in BEHAVIORAL BUSINESS ETHICS 123, 124 n.2 (David De Cremer & Ann E. Tenbrunsel eds., 2012) (Folger is credited with introducing the term “behavioral ethics” and providing the field its early contours).

<sup>126</sup> The field, particularly its business-focused strain, has grown to a point where its findings are now used regularly in business ethics scholarship and teaching, as well as legal scholarship. See, e.g., Prentice, *Behavioral Ethics*, *supra* note 116, at 35; Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013); Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015); Elizabeth Tippet, Charlotte S. Alexander & Zev J. Eigen, *When Timekeepers Software Undermines Compliance*, 19 YALE J.L. & TECH 1 (2017).

<sup>127</sup> Behavioral compliance can be defined as the design and management of compliance programs that draw from behavioral predictions about individual and organizational acts. See Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 2 (Jennifer Arlen ed., 2016); see also Scott Killingsworth, “C” Is for Crucible: Behavioral Ethics, Culture, and the Board's Role in C-Suite Compliance, in RAND CENTER FOR CORPORATE ETHICS AND GOVERNANCE SYMPOSIUM WHITE PAPER SERIES, at 4 (2013) (explaining that compliance may turn on whether companies can foster reflective ethical decision-making within their organizations).

<sup>128</sup> Folger, *supra* note 125, at 125.

to intractable compliance problems.<sup>129</sup> While behavioral ethics formally studies the “systematic and predictable ways in which individuals make ethical decisions,”<sup>130</sup> it also, from a practical standpoint, tries to understand “how even well-intentioned people can sometimes behave unethically” and “at odds with . . . [their] intuitive expectations.”<sup>131</sup> Assuming most corporate employees are well-intentioned, the findings of behavioral ethics and compliance researchers are incredibly important for business leaders to understand when trying to run ethical companies.

Behavioral ethics and compliance research is wide-ranging, but the core of it finds 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.”<sup>132</sup> Put more simply, while most of us are moral individuals intent on doing right, we are often not as ethical as we think we are.<sup>133</sup> This idea can be placed under the concept of “bounded ethicality, which means that ethical decision-making is limited because most people will make moral decisions according to their ethical beliefs, but only up to a point.<sup>134</sup> Where that point is depends on a host of factors, including how one’s decision-making is influenced by cognitive obstacles, which can be exacerbated by external factors (such as the behavior of supervisors and peers, for example, or incentive structures of the firm).<sup>135</sup> Because our ethicality is bounded, not surprisingly, many of us are blind to our own ethical conduct; we engage in unethical acts without realizing it, acts that we would condemn upon thoughtful reflection.<sup>136</sup>

For those familiar with behavioral science, the term “bounded” should bring to mind behavioral economics, which often speaks of bounded rationality.<sup>137</sup> This association makes sense

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<sup>129</sup> See, e.g., Henry Engler, *INTERVIEW-Novartis Applies Behavioral Science to Code of Ethics, Unearthing Biases and Compliance Gaps*, Reuters (Nov. 10, 2020), <https://www.reuters.com/article/bc-finreg-novartis-behavioral-science-in/interview-novartis-applies-behavioral-science-to-code-of-ethics-unearthing-biases-and-compliance-gaps-idUSKBN27Q2MD> (reporting on increasing adoption of behavioral science-based tools in compliance among large pharmaceutical and financial services companies)

<sup>130</sup> Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. LAW SOC. SCI. 85, 90 (2012).

<sup>131</sup> Jason Dana, George Loewenstein & Roberto A. Weber, *Ethical Immunity: How People Violate Their Own Moral Standards Without Feeling They Are Doing So*, in BEHAVIORAL BUSINESS ETHICS 202 (David De Cremer & Ann E. Tenbrunsel eds., 2012).

<sup>132</sup> Prentice, *Behavioral Ethics*, *supra* note 116, at 36.

<sup>133</sup> See Drumwright, et al., *supra* note 15, at 433–36 (offering a primer on behavioral ethics).

<sup>134</sup> See Yuval Feldman, *Behavioral Ethics Meets Behavioral Law and Economics*, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 10–13 (Eyal Zamir and Doron Teichman eds., 2014) (providing a taxonomy of bounded ethical mechanisms) [hereinafter Feldman, *Behavioral Ethics*].

<sup>135</sup> FELDMAN, GOOD PEOPLE, *supra* note 15, at 192 (citing Dolly Chugh, Max H. Bazerman & Mahzarin R. Banaji, *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74–95 (2005)).

<sup>136</sup> Prentice, *Behavioral Ethics*, *supra* note 116, at 39 (citing Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 359 (2013)).

<sup>137</sup> See, e.g., Herbert A. Simon, *Bounded Rationality*, in UTILITY AND PROBABILITY 15–18 (1990) (explaining that the term “bounded rationality” is used to designate rational choice that take into account the cognitive limitations of the decision maker); W. Brian Arthur, *Designing Economic Agents that Act like Human Agents: A Behavioral Approach to Bounded Rationality*, 81 AM. ECON. REV. 353, 353 (1991) (“Most economists accept that there are limits to the reasoning abilities of human beings—that human rationality is bounded.”)

because behavioral ethics and behavioral economics share the same intellectual roots—cognitive psychology and judgment and decision-making research that explores the cognitive limitations resulting from how the brain processes information.<sup>138</sup> Although a full discussion of that research is beyond the scope of this article, suffice it to say that two generations of studies finding that we process information via two separate systems—one fast and automatic, the other deliberate and logical but requiring much more cognitive load—upend the notion that human decision-making is strictly rational.<sup>139</sup> That finding is critical to behavioral economics,<sup>140</sup> but also to behavioral ethics because it helps identify the factors that prevent people from understanding that their decisions may be self-interested and therefore may lead to unethical behavior.<sup>141</sup> Behavioral ethics acknowledges that we often default to self-interested decision-making, and it then attempts to empirically show what mechanisms cause those defaults while at the same time blinding us to them.<sup>142</sup> Behavioral compliance does the same in the context of organizational decision-making, with the goal of helping firms better understand and help to prevent their employees from behaving unethically or illegally.<sup>143</sup>

Based on this research, academics and practitioners are beginning to use behavioral interventions with the aim of “minimize[ing] the corruption of good people.”<sup>144</sup> The overarching approach is to determine what situations make it difficult for individuals to avoid unethical behavior, and then design interventions that reduce the frequency of those situations.<sup>145</sup> For example, one approach is the Giving Voice to Values (GVV) curriculum developed by Mary Gentile that focuses on creating scripts and implementation plans that business people can use when responding to requests by superiors to commit unethical acts.<sup>146</sup> Following the Aristotelian view, GVV posits that if individuals are to behave ethically, they need to build the habit of doing so by flexing their “moral muscle,” particularly when confronting common rationalizations for

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<sup>138</sup> See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–21 (2011) (explaining decades of decision-making research).

<sup>139</sup> See Jonathan St. B.T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 *PERSP. PSYCHOL. SCI.* 223, 223 (2013) (reviewing literature and arguing for a “preferred theoretical approach” whereby “rapid autonomous processes . . . are assumed to yield default responses unless intervened on by distinctive higher order reasoning processes”). Behavioral ethics researchers have found that the deliberative system acts as an ethical monitor, jumping in to control the automatic self-interest each of us possess. This monitoring function appears to work best when cognitive load is low and individuals are able to fully consider the ethical ramifications of a decision. See Feldman, *Behavioral Ethics*, *supra* note 134, at 8.

<sup>140</sup> See, e.g., Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 *AM. ECON. REV.* 1449, 1469 (2003) (“Our research attempted to obtain a map of bounded rationality, by exploring the systematic biases that separate the beliefs that people have and the choices they make from the optimal beliefs and choices assumed in rational-agent models.”).

<sup>141</sup> Feldman, *Behavioral Ethics*, *supra* note 134, at 2.

<sup>142</sup> *Id.* at 3, 7 (the “automaticity of self-interest” is one of behavioral ethics basic tenets).

<sup>143</sup> See Haugh, *Nudging*, *supra* note 15, at 705 (behavioral ethics lays the foundation for behavioral compliance insights and strategies).

<sup>144</sup> FELDMAN, *GOOD PEOPLE*, *supra* note 15, at 193.

<sup>145</sup> *Id.*

<sup>146</sup> MARY C. GENTILE, *GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT’S RIGHT* xiii (2010); see also BIASUCCI & PRENTICE, *supra* note 124, at 204–05 (summarizing curriculum and providing examples).

wrongdoing.<sup>147</sup> One arguable weakness of the GVV approach, however, is that it assumes most people know right from wrong in complex business environments and can identify that at the correct moment.<sup>148</sup> Regardless, GVV's focus on behavior—speaking up for one's values when it matters—is refreshing and appears to be achieving measurable results.<sup>149</sup>

A second approach, the REVISE framework championed by a group of scholars studying dishonesty, seeks to partially sidestep GVV's shortcomings through the application of a three-step process.<sup>150</sup> The process reminds individuals to not justify their dishonesty by using subtle cues that increase moral saliency, creates visibility of ethical decisions by prompting peer monitoring and awareness that wrongdoing is being seen, and fosters self-engagement to reduce the gap between abstract notions of moral self-image and actual behavior.<sup>151</sup> While the REVISE framework is easy to conceptualize and its efficacy has been supported by a number of behavioral studies, not all have since replicated.<sup>152</sup> Even so, what remains—creating visibility related to ethics-laden decisions—is impressive as a behavioral intervention: replicated studies show an almost seventy-five percent reduction in cheating behavior when visibility is increased.<sup>153</sup>

A third approach, which more explicitly applies behavioral science tools, is behavioral ethics nudging.<sup>154</sup> The concept of “nudging” became popular in 2008 after the release of the best-selling book on the topic written by eventual Nobel Prize-winning behavioral economist Richard Thaler and legal scholar Cass Sunstein.<sup>155</sup> Thaler and Sunstein made the case for altering choice architecture, the environment in which choice is made, to improve individual behavior; according to them, deliberately structuring choice could help people make better decisions that would benefit themselves and society.<sup>156</sup> The last decade has seen a boom in the use of nudges, primarily in the

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<sup>147</sup> *Id.* at xiii, 170; *see also* Vikas Anand, Blake E. Ashforth & Mahendra Joshi, *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 *ACAD. MGMT. EXEC.* 39, 40–43 (2004) (discussing the role and use of rationalizations in wrongdoing).

<sup>148</sup> BIASUCCI & PRENTICE, *supra* note 124, at 204.

<sup>149</sup> *Id.* at 213 (citing qualitative reports of MBA students speaking up for their values and putting themselves “on a different path”).

<sup>150</sup> Shahar Ayal, Francesca Gino, Rachel Barkan & Dan Ariely, *Three Principles to REVISE People's Unethical Behavior*, 10 *PSYCH. SCI.* 738, 738 (2015) (proposing the framework and offering policy recommendations to deter cheating behavior).

<sup>151</sup> *Id.* at 739–40. The first letters of each of the three steps—reminding, visibility, and self-engagement—create the acronym REVISE.

<sup>152</sup> *See* Christoph Schild, Daniel W. Heck, Karolina A. Ścigata & Ingo Zettler, *Revisiting REVISE: (Re)Testing Unique and Combined Effects of Reminding, Visibility, and Self-Engagement Manipulations on Cheating Behavior*, 75 *J. ECON. PSYCHOL.* 102161 (2019) (finding in high-powered study that only the visibility dimension replicated as expected).

<sup>153</sup> *Id.*

<sup>154</sup> *See* Haugh, *Nudging*, *supra* note 15, at 700 (defining behavioral ethics nudging as the use of choice architecture to improve employee ethicality). *See also*, Yuval Feldman & Yatom Kaplan, *Big Data and Bounded Ethicality*, 29 *CORNELL J. L. & PUB. POL'Y* 39 (2019) (arguing that regulators should combat bounded ethicality by using ethical nudges).

<sup>155</sup> *See* RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3–4, 6 (2008) (nudges are a tool of choice architecture, the practice of influencing choice by changing the manner in which options are presented—usually through defaults, framing, and simplifications).

<sup>156</sup> *See id.* (presenting the benefits of nudges and libertarian paternalism).

public policy space, but they are now becoming more prevalent within companies and, more recently, within ethics and compliance.<sup>157</sup> For example, in a previous article, I created a taxonomy of behavioral ethics nudges and evaluated their conceptual, practical, and ethical challenges.<sup>158</sup> That research has formed the basis of a series of behavioral ethics nudge workshops at large companies focused on improving employee ethicality.<sup>159</sup> As with behavioral science more generally, behavioral ethics nudges are gaining in popularity as corporate leaders look for innovative ways to fulfill the dictates of the Organizational Guidelines in a data-driven, behaviorally-oriented manner.<sup>160</sup> The ability of behavioral ethics nudges to create measured behavioral change at scale and often at low cost make them particularly attractive to corporate leaders.<sup>161</sup>

All three of these behaviorally cognizant approaches advance the next generation of compliance and offer new tools for innovative companies. Yet even these approaches are somewhat modest given the scale of the problem they seek to address.<sup>162</sup> Progress is being made, but the behavioral ethics and compliance field is not taking full advantage of all the tools behavioral science has to offer, and certainly not at the scale necessary to create the paradigmatic shift in compliance that was suggested years ago.<sup>163</sup> Luckily, much can be learned from how public health has used behavioral science over a longer timeline, providing a compelling model for corporate compliance to follow.

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<sup>157</sup> Haugh, *Nudging*, *supra* note 15, at 689, 710 (detailing the rise of nudging and its filtration into compliance); *see also*, David Brooks, *The Behavioral Revolution*, N.Y. TIMES (Oct. 27, 2008), <https://www.nytimes.com/2008/10/28/opinion/28brooks.html> (discussing the work of behavioral science and its importance in business and policy).

<sup>158</sup> *Id.* at 710–15; *see also* Yuval Feldman & Yotam Kaplan, *Behavioral Ethics as Compliance*, in CAMBRIDGE HANDBOOK OF COMPLIANCE (Van Rooij & Sokol eds., 2021) (identifying ethical nudges in the form of alerts and reminders aimed to directly improve ethical deliberations, as well as debiasing tools more generally).

<sup>159</sup> For example, I facilitated a series of workshops with the compliance team at a large financial services firm that sought to increase the rate of non-anonymous reporting to their employee helpline, because non-anonymous reports are much easier to verify and remedy. Through the workshop process, the firm determined that altering the choice architecture of its online reporting system to generate a pop-up box explaining the benefits of non-anonymous reports (a deliberation nudge), as well switching the default from anonymous to non-anonymous reporting (a harnessing nudge), would positively influence employee behavior and increase compliance effectiveness. *Id.*

<sup>160</sup> *See, e.g.*, Shrupti Shah, John O’Leary, Jim Guszczka & Jane Howe, *Nudging for Good: Using Behavioral Science to Improve Government Outcomes*, DELOITTE INSIGHTS (June 24, 2019), <https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2020/government-nudge-thinking.html> (highlighting the use of nudges to improve rule compliance); BIASUCCI & PRENTICE, *supra* note 124, at 220–24 (citing numerous ethical nudges and other ways to increase ethicality through behavioral science interventions).

<sup>161</sup> *See* David De Cremer & Celia Moore, *Toward a Better Understanding of Behavioral Ethics in the Workplace*, 7 ANN. REV. ORG. PSYCHOL. & ORG. BEHAV. 369, 382 (2020) (“One of the most active and optimistic areas of current research in behavioral business ethics involves designing and testing interventions—referred to as nudges in behavioral economics—to improve ethical behavior or reduce unethical behavior.”).

<sup>162</sup> *See* Gabrio Forti & Arianna Visconti, *From Economic Crime to Corporate Violence: The Multifaceted Harms of Corporate Crime*, in HANDBOOK OF WHITE-COLLAR CRIME 68–70 (2019) (detailing extreme costs of white collar and corporate crime).

<sup>163</sup> GREENBERG, *supra* note 78, at 2.

## B. Behavioral Science-Informed Public Health

Behavioral and social science has made considerable contributions to public health,<sup>164</sup> primarily because many important public health problems have a behavioral component. For example, some of the most prominent contributors to death and disease in the United States—tobacco use, poor diet and exercise patterns, alcohol consumption, risky sexual practices, and avoidable injuries—are all rooted in behavioral factors.<sup>165</sup> In fact, effective public health programs aimed at helping people maintain and improve their health, reduce the risk of disease, and manage illness “usually require behavior change at many levels (e.g., individual, organizational, and community).”<sup>166</sup> Therefore, understanding and changing behaviors in the context in which they occur are bedrock to successful public health initiatives.

Not surprisingly, then, public health researchers have developed a rich set of behavioral-focused theories to apply and test as a means of improving health outcomes. Critically, these theories draw from a diverse set of social and behavioral science disciplines, as well as more practically-oriented fields.<sup>167</sup> What decades of theory development and application reveals is twofold.

First, many social, cultural, and economic factors contribute to the development and change of individual health patterns.<sup>168</sup> Put another way, “[n]o single factor . . . adequately accounts for why people eat as they do, smoke or do not smoke, and are active or sedentary.”<sup>169</sup> So a broad understanding of behaviors and behavioral change, both individually and socially influenced, is necessary for effective public health. This may be called the “ecological” perspective of public health because it recognizes that interventions must be targeted toward individual decision-making and behavior as well as organizational and environmental factors.<sup>170</sup>

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<sup>164</sup> See David R. Holtgrave, Lynda S. Doll & Janet Harrison, *Influence of Behavioral and Social Science on Public Health Policymaking*, 52 AM. PSYCHOL. 167, 167 (1997).

<sup>165</sup> See Karen Glanz & Donald B. Bishop, *The Role of Behavioral Science Theory in Development and Implementation of Public Health Interventions*, 31 ANNU. REV. PUBLIC HEALTH 399, 400 (2010) (providing an overview of “the state of the science of theory use for designing and conducting health-promotion interventions”).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* Influential theories, such as the Health Belief Model, Transtheoretical Model of behavioral change, or the Social Ecological Model, are highly interdisciplinary, drawing from psychology, sociology, social psychology, anthropology, economics, marketing, communications, and nursing. *Id.* at 400, 402–03.

<sup>168</sup> *Id.*; see also Committee on Capitalizing on Social Science and Behavioral Research to Improve the Public's Health, Division of Health Promotion and Disease Prevention, Institute of Medicine, *Promoting Health: Intervention Strategies from Social and Behavioral Research*, 15 AM. J. HEALTH PROMOTION 149, 152 (2001) (finding that two fundamental issues must be addressed in developing health interventions based on social and behavioral research: “the need to address generic social and behavioral determinants of health, and the need to intervene at multiple sources of health influences”).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* The term “ecological” is derived from biological science and refers to the interrelationships between organisms and their environments. James F. Sallis, Neville Owen & Edwin B. Fisher, *Ecological Models of Health Behavior*, in HEALTH BEHAVIOR: THEORY, RESEARCH, AND PRACTICE 43 (Karen Glanz, et al. eds., 2015). It can be contrasted with the medical model that “focuses largely on disease and injury and their outcomes” and is “intrinsically” concentrated on individuals. Fielding, et al., *supra* note 14, at 176.

Second, implicit in the ecological approach is a recognition that health risk is the key metric underlying public health attempts to maximize community health.<sup>171</sup> To improve community health overall, public health professionals must identify the true source of health risk, not just for one individual but for the larger population.<sup>172</sup> This necessarily requires a risk analysis that considers legal policies; economic, social, and physical environments; communities and families; and individual and group behaviors, in addition to biologic factors.<sup>173</sup> While public health interventions will never fully eliminate these risks, they can be mitigated.<sup>174</sup> But that requires large-scale data collection and analysis and evidence-based practices.<sup>175</sup>

A few examples illustrate how behavior, risk, and data come together in the public health field. Consider the Center for Disease Control's WISEWOMAN program, which is a paradigmatic public health initiative.<sup>176</sup> The program provides heart disease and stroke risk factor screenings for low-income and underinsured women, and then provides services to promote healthy behaviors.<sup>177</sup> Women aged forty to sixty-four are screened for cardiovascular disease risk factors (such as blood pressure, cholesterol, smoking, and physical activity), and then, based on the number of risk factors identified, are offered differing levels of lifestyle interventions aimed at reducing disease risk for their particular population.<sup>178</sup> Interventions are "evidenced-based, culturally-relevant to local populations, and grounded in behavioral science theory."<sup>179</sup> The data collected as to both risk factors and interventions is significant, as the program has been operating since 1995 and is now available in sixteen state and tribal health agencies.<sup>180</sup> Between 2008 and 2013 alone, the program treated 150,000 women; over 100,000 were provided behavioral interventions to reduce their cardiovascular disease risk.<sup>181</sup> Based on the numerous studies enabled by such robust data, the program has been found to be "an exemplary public health intervention" because of its demonstrated reduction in long-term health risk among a wide swath of vulnerable women.<sup>182</sup>

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<sup>172</sup> *Id.* at 177 (public health asks the question, "What in the American culture created this situation?").

<sup>172</sup> *Id.* at 177 (public health asks the question, "What in the American culture created this situation?").

<sup>173</sup> *Id.* at 176–77.

<sup>174</sup> *Id.* at 178–79 (providing example of early childhood development interventions aimed at reducing risk factors to change the "overall health trajectory").

<sup>175</sup> *Id.* at 185.

<sup>176</sup> WISEWOMAN is an acronym of the program's formal title: The Well-Integrated Screening and Evaluation for Women Across the Nation program. *WISEWOMAN Overview*, CDC (March 10, 2021), <https://www.cdc.gov/wisewoman/about.htm>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Glanz & Bishop, *supra* note 165, at 407.

<sup>180</sup> *Id.*; *WISEWOMAN Overview*, *supra* note 176.

<sup>181</sup> *WISEWOMAN Overview*, *supra* note 176.

<sup>182</sup> Glanz & Bishop, *supra* note 165, at 407; *see also*, Julie C. Will & Ryan K. Loo, *The WISEWOMAN Program: Reflection and Forecast*, 5 PREVENTING CHRONIC DISEASE 1, 2 (2008) (participants who returned for one-year evaluations showed significant reductions in systolic blood pressure, total cholesterol, smoking, and ten-year risk of coronary heart disease); Toshi Hayashi, Mayreen A. Farrell, Lily A. Chaput, David A. Rocha & Marianne Hernandez, *Lifestyle Intervention, Behavioral Changes, and Improvement in Cardiovascular Risk Profiles in the California WISEWOMAN Project*, 19 J. WOMEN'S HEALTH 1129 (2010) (finding that women provided enhanced interventions were more likely to improve their health behaviors and reduced ten-year heart disease risk).

Another example, originating from a public health study begun decades earlier, shows just how innovative behavioral health interventions have become. In 2002, researchers studying the role of social networks and health became aware of longitudinal data collected as part of the Framingham Heart Study (FHS).<sup>183</sup> Since 1948, detailed cardiovascular and other health data was collected on study participants (approximately 5000 adults making up roughly two-thirds of the population of Framingham, Massachusetts), their children, and grandchildren.<sup>184</sup> Every two years, participants were examined by doctors and, critically, also provided information about those people in their social networks, such as family and friends, many of whom were also study participants.<sup>185</sup>

While the FHS has provided “much of what we know about the determinants of cardiovascular disease,” it has also provided a unique understanding of how social networks influence health behaviors, including smoking, eating, and lifestyle habits leading to obesity.<sup>186</sup> This has allowed researchers to craft data-driven interventions that not only target study participants’ behavior directly, but also seek to change their behavior by targeting the behavior of people in their networks who influence them.<sup>187</sup> Such interventions draw from decades of research showing that health behavior change is dependent on individuals’ perceptions of their risks, others’ approval or disapproval of their behavior, and how widely adopted the behavior is—all of which “are shaped by people’s social networks.”<sup>188</sup> Behavioral interventions focused on social influence have been successful in mitigating a host of ecological health risks.<sup>189</sup>

One final, highly salient example comes from the Covid-19 public health crisis. Although the research is only just beginning, the overwhelming indications are that public health risks during a widespread outbreak of a contagious disease can be mitigated through behavioral science based interventions.<sup>190</sup> In many ways, getting the public to comply with life-saving, risk-reducing

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<sup>183</sup> See Nicholas A. Christakis & James H. Fowler, *Social Contagion Theory: Examining Dynamic Social Networks and Human Behavior*, 32 *STATIST. MED.* 556, 556 (2013) (reviewing research on social contagion).

<sup>184</sup> *Id.* at 557–58; Neil Schneiderman & Marjorie A. Speers, *Behavioral Science, Social Science, and Public Health in the 21<sup>st</sup> Century*, in *INTEGRATING BEHAVIORAL AND SOCIAL SCIENCES WITH PUBLIC HEALTH* 5 (Am. Psychol. Assoc. 2001) (describing how the study used a prospective, longitudinal research design and the investigators collected behavioral, clinical, and demographic information).

<sup>185</sup> *Id.* at 558.

<sup>186</sup> Nicholas A. Christakis & James H. Fowler, *Connected: The Surprising Power of Our Social Networks and How They Shape Our Lives* 107 (2009) [hereinafter Christakis & Fowler, *Connected*].

<sup>187</sup> *Id.* at 107–11 (using social network analysis, the researchers were able to demonstrate that health behaviors such as obesity and smoking are “contagious” and suggested interventions); see also DAMON CENTOLA, *HOW BEHAVIOR SPREADS: THE SCIENCE OF COMPLEX CONTAGIONS* 97 (2018) (describing network theory-influenced intervention based on FHS data whereby a small group is “seeded” with a behavior so as to stimulate change in the greatest number of people).

<sup>188</sup> Zhang & Centola, *supra* note 118, at 99.

<sup>189</sup> See, e.g., Ruth F. Hunter, Kayla de la Haye, Jennifer M. Murray, Jennifer Badham, Thomas W. Valente, Mike Clarke & Frank Kee, *Social Network Interventions for Health Behaviours and Outcomes: A Systematic Review and Meta-Analysis*, 16 *PLoS MEDICINE* e1002890 (2019) (meta study finding that social network interventions can be effective in the short and longer term for sexual and other health outcomes).

<sup>190</sup> Ildiko Tombor & Susan Michie, *Methods of Health Behavior Change*, in *OXFORD RESEARCH ENCYCLOPEDIA OF PSYCHOLOGY* 2 (2017) (discussing frameworks for health behavior change in context of non-communicable and infectious disease, including HIV/AIDS, influenza, diphtheria, and polio).

protocols—especially when they may not want to—is an exercise in health compliance writ large.<sup>191</sup> Behavioral science provides both the theory and tools for how those protocols may be accomplished.<sup>192</sup> Research is being rapidly deployed in real-time, addressing everything from hand-washing and mask-wearing, to social distancing and quarantining, to vaccine uptake and crisis communication.<sup>193</sup> In China, for instance, behavioral researchers helped develop a series of interventions aimed at making it easier to identify individuals who should be quarantined, while allowing those at low risk to continue attending work and school.<sup>194</sup> The interventions—easy-to-obtain health status codes and applying traffic light color-coding to those codes—reduced confusion and made health risk more salient and visible.<sup>195</sup> In Israel, researchers conducted intervention studies to determine if simple reminder messages could encourage handwashing.<sup>196</sup> That research informed policymakers when they designed messaging campaigns to promote infection-reducing behaviors.<sup>197</sup> And in the United States, researchers at Yale’s Human Nature Lab developed an app that combined nudging and network analyses to ping users when their risk of catching Covid-19 was increasing based on their social interactions—a type of “Waze for coronavirus.”<sup>198</sup>

While the ultimate efficacy of these behavioral interventions specific to Covid-19 will not be known for some time, public health’s record in identifying interventions to control contagion is

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<sup>191</sup> See Diana Kwon, *Near Real-Time Studies Look for Behavioral Measures Vital to Stopping Coronavirus*, BEHAV. & SOC’Y. (March 19, 2020) (reporting on efforts of behavioral scientists to stem the pandemic’s effects).

<sup>192</sup> See Anne Leonore de Bruijn, *Why Did Israelis Comply with COVID-19 Mitigation Measures During the Initial First Wave Lockdown?*, C-LAB Working Paper (Aug. 2019), [https://www.researchgate.net/publication/343917321\\_Why\\_did\\_Israelis\\_comply\\_with\\_COVID-19\\_Mitigation\\_Measures\\_during\\_the\\_initial\\_first\\_wave\\_lockdown](https://www.researchgate.net/publication/343917321_Why_did_Israelis_comply_with_COVID-19_Mitigation_Measures_during_the_initial_first_wave_lockdown) (finding that stay-at-home and social distancing compliance depended on a combination of moral factors; fear of punishment was not significantly associated with compliance); Peter D. Lunn, Cameron A. Belton, Ciarán Lavin, Féidhlim P. McGowan, Shane Timmons & Dierdre Robertson, *Using Behavioral Science to Help Fight the Coronavirus: A Rapid, Narrative Review*, 3 J. BEHAV. PUB. ADMIN. 1, 9 (2020) (assessing and reporting data on five areas, covering individual and collective behavior, where “behavioral science might make a constructive contribution to fighting COVID-19”).

<sup>193</sup> See, e.g., Bavel, et al., *supra* note 119, at 460 (providing evidence from research relevant to the pandemic regarding social and cultural influences on behavior, science communication, and moral decision-making); JOLANDA JETTEN, ET AL., *TOGETHER APART: THE PSYCHOLOGY OF COVID-19* (2020) (providing an analysis of the psychology related to Covid-19 and applicable behavioral interventions); WORLD HEALTH ORG., *BEHAVIOURAL CONSIDERATIONS FOR ACCEPTANCE AND UPTAKE OF COVID-19 VACCINES: WHO TECHNICAL ADVISORY GROUP ON BEHAVIOURAL INSIGHTS AND SCIENCES FOR HEALTH* (Oct. 15, 2020) (discussing strategies for achieving high and equitable uptake of vaccines through evidence-based and behaviorally informed practices).

<sup>194</sup> Ning Zhang, *Behavioral Insights for Containing the COVID-19 Pandemic: Some Practices in China*, BEHAV. SCI. & POL’Y, at 5, [https://behavioralpolicy.org/journal\\_issue/covid-19/](https://behavioralpolicy.org/journal_issue/covid-19/).

<sup>195</sup> *Id.*

<sup>196</sup> Guy Hochman, *How Can the MA Program In Behavioral Economics Help Mitigate Covid-19 Spread?*, TIMES ISRAEL (Feb. 1, 2021), <https://www.timesofisrael.com/spotlight/how-can-the-ma-program-in-behavioral-economics-help-mitigate-covid-19-spread/>.

<sup>197</sup> *Id.*

<sup>198</sup> Brita Belli, *Yale App Hunala Aims to Be ‘Waze for Coronavirus,’* YALENEWS (June 5, 2020), <https://news.yale.edu/2020/06/05/yale-app-hunala-aims-be-waze-coronavirus>.

strong, suggesting current efforts will be successful as well.<sup>199</sup> Undoubtedly, behavioral science and its pandemic-lessening tools—which are being implemented on an unprecedented scale across the globe—will inform public health practices for generations to come.<sup>200</sup>

### III. APPLYING A PUBLIC HEALTH MODEL OF ETHICS AND COMPLIANCE IN PRACTICE

The above examples, drawn both from behavioral ethics and compliance and public health, illustrate the following: behaviors are part of a system, and a given behavior can be influenced by that system.<sup>201</sup> This is as true for health behaviors that increase disease risk as it is for business behaviors that increase compliance risk. To make sure that business behaviors are ethical, prosocial, and welfare increasing, especially the ones taking place within America’s largest companies, business leaders should commit to internalizing the best lessons of public health into compliance. This will require innovative leadership and an Apgar-esque doggedness to ensure that the valuable lessons of one domain are transferred to another. Corporate leaders, and those advising them, have exercised this vision before, transitioning compliance from its legalistic roots to its current place of responsibility in the organizational hierarchy.<sup>202</sup> It is time to do that again and move compliance toward its behaviorally cognizant future, one informed by the science of public health. The following offers a blueprint—a checklist if you will—of the steps compliance leaders can take to realize that future.

#### A. *Change in Mindset*

Those in compliance—including corporate leaders overseeing internal control functions and regulators overseeing corporations—first need to recalibrate their mindset. They should view their role not only as a means to increase rule-following behavior within companies, but as a means to increase individual employee ethical decision-making. Ethical behavior flows from ethical decision making; organizational compliance and good corporate governance follow from there.<sup>203</sup> This view recognizes that ethical decision-making is at the core of corporate wrongdoing, but that it can be influenced by a host of factors—from traditional economic and legal incentives to

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<sup>199</sup> Bavel, et al., *supra* note 119, at 467 (discussing behavioral lessons from Spanish Flu pandemic); Utteeyo Dasgupta, Chandan Kumar Jha & Sudipta Sarangi, *Persistent Patterns of Behavior: Two Infectious Disease Outbreaks 350 Years Apart*, 59 *ECON. INQUIRY* 848, 848–49 (2021) (finding human behavior consistent between outbreaks centuries apart). *But see*, Tony Yates, *Why Is the Government Relying on Nudge Theory to Fight Coronavirus?*, *GUARDIAN* (Mar. 13, 2020), <https://www.theguardian.com/commentisfree/2020/mar/13/why-is-the-government-relying-on-nudge-theory-to-tackle-coronavirus> (questioning the U.K. government’s reliance on nudges as opposed to lockdowns to control the spread of Covid-19).

<sup>200</sup> *See, e.g.*, Cornelia Betsch, *How Behavioural Science Data Helps Mitigate the COVID-19 Crisis*, 4 *NAT. HUM. BEHAV.* 438, 438 (2020) (recognizing that in a pandemic, “fast and massive behavioural change is key” and explaining behavioral data collection efforts to identify interventions).

<sup>201</sup> Tombor & Michie, *supra* note 190, at 2.

<sup>202</sup> *See supra* Part I.

<sup>203</sup> Todd Haugh, *Harmonizing Governance, Risk Management, and Compliance Through the Paradigm of Behavioral Ethics Risk*, 21 *UNIV. PENN. J. BUS. L.* 873, 979–83 (2019). *See also*, Griffith, *supra* note 3030, at 2075 (making a compelling case that “compliance is the new corporate governance”).

cognitive ones operating subconsciously on employees.<sup>204</sup> The goal for corporate compliance, then, is to continuously improve the ethical behavior of its employees, leading to positive individual compliance outcomes, and as a result positive ethical culture and overall governance. This is the now-familiar framework of public health, which considers individual health traits and behaviors, but also understands that broader social, economic, and environmental conditions increase health risks.<sup>205</sup>

The trick is that a positive compliance culture is created incrementally, one decision-maker at a time.<sup>206</sup> Again, this is how public health operates—each intervention with a patient that improves their individual health improves public health. Individual inoculations, for example, create public immunity.<sup>207</sup> Individual health screenings of women improve the community's health, which improves generational health.<sup>208</sup> The same is true in a company of interconnected employees. So instead of leaders trying to impose top-down, homogenous compliance rules on the organization as a whole, they should view compliance as bottom-up, with each instance of positive behavioral change contributing toward building an ethical culture within the company. For example, instead of offering vague pronouncements of new corporate values or mandating training for the entire organization on a new topic, leaders must identify the ethical conduct risks that arise from individual employee tasks and design specific training and interventions to address those risks. If a company has compliance risk stemming from sales staff meetings with government officials, more company-wide FCPA workshops are not the answer; instead, providing specific and easy-to-follow guidance for only those employees meeting with officials—and within the flow of their work—will offer the best opportunity to actually change individual behavior. As individual ethical behavior increases, so does positive corporate culture. This type of behavioral compliance approach, described in more detail below, is compatible with the lessons of public health, and is how Compliance 1.0 becomes Compliance BeSci.0.

At the same time, corporate leaders and those in compliance need to adopt a more scientific mindset. The goal is individual ethical behavioral change leading to wider organizational compliance, but leaders cannot simply assume their way there. Compliance 1.0, and even many aspects of Compliance 2.0, are built on untested assumptions about how ethical decision-making operates,<sup>209</sup> how employees learn and retain compliance-related information,<sup>210</sup> and how wrongdoing occurs and spreads within companies.<sup>211</sup> This is a partial product of Compliance 1.0's origins. Former prosecutors and regulators tasked with doing ethics and compliance work assumed

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<sup>204</sup> *Id.* at 203, at 979; Chen & Soltes, *supra* note 12, at 117, 125.

<sup>205</sup> See Fielding, et al., *supra* note 14, at 178 (describing ecological model of public health and its inputs).

<sup>206</sup> *Id.*

<sup>207</sup> See John P. Fox, Lila Elveback, William Scott, Lael C. Gatewood & Eugene Ackerman, *Herd Immunity: Basic Concept and Relevance to Public Health Immunization Practices*, 94 AM. J. EPIDEMIOLOGY 179, 180 (1971) (discussing assumptions of individual and public immunities).

<sup>208</sup> Hayashi, et al., *supra* note 182, at 1129.

<sup>209</sup> Langevoort, *supra* note 116, at [1]; FELDMAN, GOOD PEOPLE, *supra* note 15, at 32.

<sup>210</sup> See Ricardo Pellefione, *Keeping Compliance Simple*, <http://www.thebroadcat.com/downloads> (highlights the use of strategies optimizing adult learning theory, an often overlooked aspect of compliance education and training); see generally, SUSAN A. AMBROSE, MICHAEL W. BRIDGES, MICHELE DIPIETRO, MARSHA C. LOVETT & MARIE K. NORMAN, *HOW LEARNING WORKS: 7 RESEARCH-BASED PRINCIPLES FOR SMART TEACHING* (2010).

<sup>211</sup> Haugh, *Power Few*, *supra* note 93, at 154.

their legalistic toolbox was right for the job, but that mindset no longer holds given the Evaluation guidance that prioritizes rigorous data-informed analysis and testing.<sup>212</sup> Adopting a public health mindset obviates this problem. Public health does not assume how disease risk manifests in a community; it uses the tools of scientific inquiry to find out. And then it develops and tests interventions to mitigate that risk, iterating until risk reduction through sustained behavioral change has been demonstrated.<sup>213</sup> That is the mindset required to lead the adoption of a public health model of compliance in U.S. companies.

### *B. Change in Evaluation and Tracking of Behavioral Ethics Risk*

A change to a more scientific mindset regarding compliance, based upon a public health model, will require corporate leaders to focus on evaluating and tracking behavioral ethics risks. Ethical decision-making and the conduct risk it creates within companies is complex. While the starting point for understanding it occurs at the individual level, each of us has a different threshold for engaging in unethical or illegal acts, which can be affected by a host of factors.<sup>214</sup> Thus, leaders should be continually assessing their own ethical decision-making risk and that of their peers and reports. While direct observation is probably the most common method currently used,<sup>215</sup> it leaves much to be desired because it is hardly scientific, and unethical behavior is not often touted by employees or easily observed.

Instead, compliance leaders can draw from their public health counterparts and screen employees to assess their ethical health. Numerous diagnostics can provide useful baselines regarding how employees consider ethical decision-making.<sup>216</sup> For example, a recently-validated diagnostic, the Rule Orientation Scale, captures the extent to which one thinks about legal rules in a rigid, rule-oriented manner or in a way that recognizes exceptions—the latter providing more room for a person to rationalize rule-breaking behavior.<sup>217</sup> Much like a blood pressure or cancer screening, employees can be regularly assessed for ethical awareness and ethical decision-making ability through simple diagnostics.

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<sup>212</sup> EVALUATION, *supra* note 95, at 14–17.

<sup>213</sup> Fielding, et al., *supra* note 14, at 176–77.

<sup>214</sup> See Mark Granovetter, Threshold Models of Collective Behavior, 83 AM. J. SOC. 1420, 1427 (1978) (modeling thresholds of rioters); 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) (showing that people often mimic the behavior of others, thereby rationalizing their own misconduct).

<sup>215</sup> Linda Klebe Treviño, Niki A. den Nieuwenboer, Glen E. Kreiner, & Derron G. Bishop, *Legitimizing the Legitimate: A Grounded Theory Study of Legitimacy Work Among Ethics and Compliance Officers*, 123 ORG. BEHAV. HUMAN DEC. PROCESSES 186, 191 (2014) (describing common assessment of unethical behavior).

<sup>216</sup> See, e.g., Kelly R. Pope, *Measuring the Ethical Propensity of Accounting Students: Mach IV Versus DIT*, 3 J. ACAD. ETHICS 89, 89–90 (2005) (describing the Defining Issues Test and comparing it to the Mach IV test, both of which assess ethical decision-making); Celia Moore, James R. Detert, Linda Klebe Treviño, Vicki L. Baker & David M. Mayer, *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 Personnel Psychol. 1, 34 (2012) (measuring the propensity of a person to morally disengage).

<sup>217</sup> Adam Fine, Benjamin van Rooij, Yuval Feldman, Shaul Shalvi, Eline Scheper, Margarita Leib & Elizabeth Cauffman, *Rule Orientation and Behavior: Development and Validation of a Scale Measuring Individual Acceptance of Rule Violation*, 22 PSYCHOL. PUB. POL'Y & L. 314, 323 (2016). The scale does this by asking respondents to agree or disagree with statements such as “It is acceptable to break a legal rule if . . .” a legal rule is not enforced or the rule was made without representing your interests. *Id.*

A limitation of these diagnostics, however, is that they often measure aspects of ethical decision-making in the abstract.<sup>218</sup> Leaders seeking to increase ethicality should be most concerned about identifying conduct specific to their employees' roles and settings; indeed, that is the aim of the Evaluation guidance.<sup>219</sup> As such, a colleague and I, in partnership with a Fortune 100 company, are working to develop a validated scale that can be used to measure the behavioral risk of individual employees in the context of their company. Although the effort is at the scale construction and pre-testing phase, and therefore no conclusions may be drawn about its ultimate validity, we believe it has advantages over prior efforts. The large dataset being used (even at the pre-testing stage, we have access to over 10,000 employees in multiple countries) and the nature of the validation offers a step forward in assessing behavioral compliance risk. Primarily that is because we target what we believe to be the critical elements of conduct risk—employee understanding of the firm's values, alignment of employee values with the firm's values, and cognitive and organizational obstacles that might thwart that alignment—and will then test those elements against actual behavior. Again, taking a page from public health, we have sought a large dataset derived from real-world conditions to better identify behavioral compliance risk.<sup>220</sup>

Whichever way individual behavioral risk is identified, the next step for leaders is to understand how that risk might be impacted by ecological factors, including others' ethical decision-making. This is where a public health mindset is necessary once again. As with the WISEWOMEN and Framingham Heart Study, compliance leaders can investigate how social and environmental factors may increase compliance risks.

Although compliance failures within companies are often thought of as independent, that is not often the case.<sup>221</sup> As demonstrated by the public health studies described above, most behaviors—including wrongdoing—have a social component.<sup>222</sup> In fact, multiple studies have found that social influence is a critical factor in all types of unethical behavior.<sup>223</sup> In one experiment, student participants were observed to be much more likely to cheat on a task after seeing other students from the same school cheat.<sup>224</sup> This was not the case when the participants

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<sup>218</sup> In addition, the diagnostics are almost always validated based on data collected from a few hundred college or MBA students at western universities. See Joseph Henrich, *The Weirdest People in the World?*, 33 BEHAV. & BRAIN SCI 61, 61 (2010) (the over-sampling of American college students in psychology studies may skew understanding of human behavior).

<sup>219</sup> See EVALUATION, *supra* note 95, at 2–3 (directing regulators to consider a company's risk management process and "risk-tailored resource allocation"); Chen Interview, *supra* note 55, at 5 (noting that the DOJ has "consistently advocated that [companies] focus on risky employees, control-function gatekeepers, and leaders").

<sup>220</sup> Will & Loo, *supra* note 182, at 2; Schneiderman & Speers, *supra* note 184, at 5.

<sup>221</sup> See Haugh, *Power Few*, *supra* note 93, at 135–36 (unethical employee conduct likely follows a skewed distribution where volatility is typical).

<sup>222</sup> See *supra* Part II.

<sup>223</sup> See, e.g., 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).

<sup>224</sup> Francesca Gino, Shahar Ayal & Dan Ariely, *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 396 (2009) (finding that individual unethical behavior depends on social norms of others within small social networks).

observed cheating from non-affiliated students.<sup>225</sup> A different study found that student participants cheated in higher numbers and did not view selfish behavior as wrong when the participants felt “psychologically close” to other students who were cheating.<sup>226</sup> Taken together, these and other studies suggest that people often “copy the behavior of in-group members,” using that behavior to justify and rationalize their own unethical conduct.<sup>227</sup>

In light of this research, companies should work to understand the relationship between wrongdoers in their organizations and those they may influence. If unethical decision-making and behavior were independent to each employee, then traditional compliance tools like repeated individual training and reminders (such as Morgan Stanley’s approach) would arguably make more sense. However, the old compliance tools have not worked because they failed to recognize that ethical behavior is relationally influenced and spreads along social networks. New tools are needed.

For example, to remedy wrongdoing, compliance monitoring and investigations should include inquiry into who was involved in the problematic behavior and how they are connected to others within their division or unit (or beyond), including those who were involved in the misconduct and those who were not. This is the approach of the FHS study, whereby researchers not only asked about the patient in front of them, but also about those people in the patient’s larger network.<sup>228</sup> While any good compliance investigation will seek the root cause of a violation, most traditional investigations stop there, failing to understand the ties between violators.<sup>229</sup> Rarely does an investigation consider non-violators.<sup>230</sup> But this level of inquiry is essential for understanding the true compliance risk facing the company, because wrongdoing is contagious.<sup>231</sup> If one or more of the wrongdoers is an influential employee, compliance interventions may need to be much more aggressive and wide-ranging. The uncovered bad conduct may have already spread within the company or be lurking under the surface.

Insights from public health research are particularly critical here because they offer a way to proactively reduce compliance risk. Compliance leaders might start by surveying employees to understand who their most frequent collaborators and friends are at the company. This information would allow the compliance team to create a map of the organization’s social network that goes beyond the traditional organizational chart, which considers just one aspect of influence.<sup>232</sup> A network map provides useful insight into who is ethically influential, who is psychologically close

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<sup>225</sup> *Id.* at 397.

<sup>226</sup> Gino & Galinsky, *supra* note 223, at 23.

<sup>227</sup> Moore & Gino, *supra* note 214, at 57.

<sup>228</sup> CHRISTAKIS & FOWLER, *supra* note 183, at 558.

<sup>229</sup> *See* Root, *supra* note 62, at 203 (advocating for root cause analysis in compliance).

<sup>230</sup> *See* ANDREW BOUTROS, T. MARKUS FUNK & JAMES T. O’REILLY, THE ABA COMPLIANCE OFFICER’S DESKBOOK 135 (suggesting best practices for conducting compliance investigations and interviewing witnesses).

<sup>231</sup> This is generally understood as the idea of behavioral ethics contagion. Although a full discussion of the research is beyond the scope of this article, contagion has been well-documented in unethical decision-making and behavior. *See, e.g.*, Gino & Galinsky, *supra* note 223, at 23; Gino, Ayal & Ariely, *supra* note 224, at 396; Moore & Gino, *supra* note 214, at 57.

<sup>232</sup> *See, e.g.*, Nicholas A. Christakis & James H. Fowler, Social Network Sensors for Early Detection of Contagious Outbreaks, 5 PLOS ONE 1, 2 (2010) [hereinafter *Sensors*]; *see also*, David Krachardt & Jeffrey R. Hanson, Informal Networks: The Company Behind the Chart, 71 HARV. BUS. REV. 104 (1993) (describing the steps of network analysis).

to whom, and ultimately where hidden risk may occur.<sup>233</sup> Most importantly, a network map will allow compliance to create a “sensor network” capable of identifying wrongdoing before it spreads.<sup>234</sup>

As in the FHS study, a random set of employees may be asked who their closest friends and acquaintances are at the company. This creates two groups: the surveyed employees and their nominated friends. Because of something known as the “friendship paradox” in network science, the nominated group of friends is on average more connected within the company than the surveyed employees.<sup>235</sup> The friendship paradox creates a situation in which the group of nominated friends will encounter ideas and experience most behaviors spreading across the network more quickly than the surveyed employees.<sup>236</sup> As a result, the nominated friends become “sensors” for what will eventually filter out to the surveyed employees and then throughout the entire organization.<sup>237</sup>

Once a sensor network is created, it allows compliance teams to proactively identify, through targeted monitoring, when unethical behavior is spreading through the company. The strength of the indicators provided by the sensor network will depend on the behavior at issue and the specific network dynamics,<sup>238</sup> but sensor networks have given advance warning of pending outbreaks in networks before.<sup>239</sup> In fact, this type of network analysis is becoming commonplace in the sphere of public health focused on controlling contagious diseases.<sup>240</sup> Any behavior that spreads based on interpersonal connection and influence, including ethical decision-making within a company, follows the same general principles.<sup>241</sup> Compliance teams can use this knowledge to more efficiently and effectively target growing compliance risk before it reaches extremes.

### C. Change in Data Collection and Analysis

Effective behavioral change requires lots of data. This is one of the primary lessons from the largescale FHS and WISEWOMEN public health initiatives; effective and sustainable interventions only come after researchers understand the root causes of risk in the target population, which can only be accomplished with data. While corporate leaders are often masters

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<sup>233</sup> See Jiyoung Woo, Sung Wook Kang, Huy Kang Kim & Juyong Park, *Contagion of Cheating Behaviors in Online Social Networks*, 6 IEEE ACCESS 29098 (2018) (finding evidence of contagion in cheating behaviors in online platforms and using network theory to identify high-risk players).

<sup>234</sup> Christakis & Fowler, *Sensors*, *supra* note 232, at 6.

<sup>235</sup> *Id.* at 2 (explaining that on average a person’s nominated friend has more friends than they do; therefore, they are more central to the network).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 6.

<sup>238</sup> See *id.* (explaining factors that affect advanced detection); see also CENTOLA, *supra* note 187, at 37 (explaining differences between simple and complex contagions and how network structures influence transmission).

<sup>239</sup> *Id.* at 2 (explaining how sensor networks were used to give a sixteen-day advance warning of a pending H1N1 outbreak at Harvard in 2009). See *infra* Part III.C.

<sup>240</sup> See Belli, *supra* note 198 (describing application of network science to detect and mitigate Covid-19 through an app that uses network analysis).

<sup>241</sup> See Aiysha Dey, Jonas Heese & James Weber, *Starling Trust Sciences: Measuring Trust in Organizations*, HARV. BUS. SCH. CASE 9-120-006, at 3–5 (Sept. 27, 2019) (describing a compliance tool that uses data, network, and behavioral science to create a “contagion map” that shows how negative behaviors can spread throughout a company).

at understanding external data related to their business (like consumer habits and market trends), they have devoted much less attention to internal data regarding employee conduct and risk.<sup>242</sup> Yet this is what the Evaluation guidance now requires with its focus on the collection of “compliance data” and continuous improvement.<sup>243</sup>

Luckily, companies are not starting from zero here. Most compliance departments collect helpline data, which can directly identify unethical or illegal behavior.<sup>244</sup> Employee surveys, another standard tool of compliance, can also identify problematic behavior if the questions target it. Although a good starting point, these tools often only uncover behavioral risk that is already at the surface, in a way that does not fully capture the extent of the risk.<sup>245</sup>

Instead, companies should consider a more forensic approach, seeking data that identifies indicators of ethically risky behavior rather than the direct behavior itself, which can be hard to capture. This is how public health data collection is conducted; in addition to asking the patient about how they are feeling, researchers also listen to their lungs, draw blood, and so on, and then patient data is aggregated, revealing trends among and across populations, which leads to systemic interventions.<sup>246</sup> The same can be done in compliance. For example, every company tracks their reimbursement expenses for gifts and entertainment. A closer look at this data through a behavioral lens might reveal important risks that would not be obvious by spot checking transactions one at a time, or by only questioning an employee about a problematic reimbursement request. For instance, perhaps the recipient of those expenses creates heightened ethical risk simply by who they are—a government official or “local fixer” used to secure business.<sup>247</sup> Or perhaps a series of reimbursements submitted were just below the threshold that would trigger heightened review, or a certain business group has increased reimbursement rates without supporting documentation right before new business is acquired.<sup>248</sup> None of this data is necessarily evidence of unethical behavior, but certain reimbursement patterns or trends may reveal risky behaviors that should be closely monitored. The only way to see the true risk is by collecting the data and aggregating it as is done in public health studies.

Once such data is identified and captured, it can be used to provide base rates of potentially problematic behavior in the company.<sup>249</sup> Base rates gives compliance teams something to measure against to see if interventions are actually working. Using the example from above, if a forensic analysis determined sales staff were violating gifts and entertainment rules, a host of interventions could be employed, from additional targeted training to revised incentives to behavioral ethics

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<sup>242</sup> Pellafone, *supra* note 116, at [9]; Chen, *supra* note 116.

<sup>243</sup> EVALUATION, *supra* note 95, at 15.

<sup>244</sup> Eugene Soltes, The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality, 26 J. FIN. CRIME 923, 933–34 (2019)

<sup>245</sup> *Id.*; Haugh, *Power Few*, *supra* note 93, at 154.

<sup>246</sup> Christakis & Fowler, *Connected*, *supra* note 186, at 558.

<sup>247</sup> Pellafone, *supra* note 116, at [9].

<sup>248</sup> *Id.* at [11].

<sup>249</sup> Soltes, *supra* note 244, at 931–32. And while even the most comprehensive data collection efforts will likely still underreport unethical behavior in a company, it is much more accurate than other methods.

nudges.<sup>250</sup> If nudges were implemented—possibly using just-in-time reminders of acceptable spending limits or of who may receive gifts—the compliance team would compare the rates of misconduct before the intervention against two groups: a control and the nudged group. Sophisticated companies with many similarly situated employees might try different interventions simultaneously against a control to see what worked best and then roll out that intervention to all employees, later measuring to see if it brought the base rates of wrongdoing down. This approach is similar to the controlled trials process employed in almost every public health initiative, including testing Covid-19 vaccines.<sup>251</sup> The process is used because it is data-driven and effective; there is no reason compliance should not be using it as well.<sup>252</sup>

## CONCLUSION

Ethical leadership is not easy, especially as it relates to corporate compliance. The field, despite its rapid growth, has largely stagnated because it took for granted the propriety of its legalistic roots. The result is that unethical behavior has continued at a troubling rate. Now is the time to approach compliance differently, drawing on the lessons of successful public health initiatives, which have become so prominent since the beginning of the Covid-19 pandemic. With its focus on data-driven behavioral change, public health offers an innovative model that corporate leaders can follow to invigorate their compliance functions and move toward the standards now being endorsed by leaders in the field and the DOJ's new, more comprehensive guidance. Widespread adoption of a public health model of compliance is an innovation that will result in companies that are healthier—legally, ethically, and financially.

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<sup>250</sup> Pellafone, *supra* note 116, at [14]. *See generally*, JAY A. SIGLER & JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION (1988) (discussing proper use of incentives in compliance).

<sup>251</sup> *See* Amy Finkelstein, *Bringing Rigorous Testing to Health Care Policy*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/business/testing-health-care-policy.html> (describing how randomized, evidence-based trials are being used for many government policy initiatives); *see also* Hengchen Dai, Silvia Saccardo, Maria A. Han, Lily Roh, Naveen Raja, Sitaram Vangala, Hardikkumar Modi, Shital Pandya, Michael Sloyan & Daniel M. Croymans, *Behavioral Nudges Increase COVID-19 Vaccinations: Two Randomized Controlled Trials*, NATURE, Aug. 2021) (describing randomized control trials of nudges that increased Covid-19 vaccination rates).

<sup>252</sup> *See* EVALUATION, *supra* note 95 at 15 (indicating DOJ will judge continuous improvement standard against this approach).