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Corporate Compliance's Achilles Heel

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*By Miriam H. Baer**

In the two decades that have elapsed since the enactment of Sarbanes-Oxley, corporate compliance has solidified into an essential, universally respected corporate governance function. And yet, its future may be compromised by a development that compliance scholars have yet to address, namely the political polarization of our society. As the workplace becomes more politically polarized, and government enforcement institutions become or appear more politicized, compliance programs will again encounter difficulties in ensuring adequate flows of information and prompt detection and redress of wrongdoing. With Sarbanes-Oxley in its rearview mirror, this article aims to contextualize this problem and explore several of its concrete manifestations.

Introduction

To an outer-space visitor who first touched down on Earth in 2002 and returned two decades later, the story of corporate compliance's evolution in the intervening two decades is largely one of success. "Compliance" is an essential, prominent function of any publicly held company.[1] It writes and oversees the company's code of conduct. It spearheads the company's internal monitoring and policing efforts. It coordinates risk-management activities and keeps the company's board abreast of emerging legal and operational issues. It is a billion-dollar industry, due in part to its use of sophisticated technologies, measurement, and training materials.[2] It promises a lucrative career pathway

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1. "'Compliance' is a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law." Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 958 (2009) (articulating commonly accepted definition of the term). On the evolution of compliance into an accepted and essential corporate function, see, e.g., Geoffrey Parsons Miller, *The Compliance Function: An Overview*, *in* The Oxford Handbook of Corporate Law and Governance 981 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 Wm. & Mary L. Rev. 2075 (2016).

2. "There soon will be as many enterprise-wide risk, audit, legal and compliance professionals on the payroll of corporations in the United States as municipal police officers keeping our streets safe."

for lawyers and mid-level employees.[3] It is embedded in the federal government's principles for deciding whether and how to charge a corporation with a crime, as well as the sentencing guidelines that shape the federal punishments that courts impose on convicted organizations.[4] And most recently, it has become the focal point of a string of Delaware judicial opinions that have reaffirmed the corporate director's fiduciary duty to ensure the compliance program is more than a sham.[5] In sum, compliance has matured into a complex and well-respected function that supports diverse monitoring and governance goals.[6] Everyone is in favor of it and few could imagine a world without it.

But our outer-space visitor might be surprised to hear from academics and critics that, despite all its bells and whistles, compliance's achievements are not as solid as they appear. Less than a decade after Congress enacted the 2002 Sarbanes-Oxley Act,[7] a severely underregulated mortgage securities industry triggered a crisis that nearly ground the American banking system to a halt and saddled the American worker with a long-lasting recession.[8] Notwithstanding the dearth of criminal prosecutions that followed this crisis, many attributed it to different degrees of recklessness and wrongdoing within the financial sector.[9] *Compliance*, many argued, failed to do its job.

William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 393 (2017). *See also* Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 966 (2018) ("Over the past 25 years, the size and complexity of corporate compliance programs have increased dramatically.").

3. "Today's top compliance officers—many of whom are, or once were, practicing lawyers—command notably high salaries and possess the types of resumes and past experience one commonly associates with the highest echelons of the legal profession." Miriam H. Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599, 1601 (2020).

4. "The Organizational Guidelines provide that convicted firms should be subject to a lower criminal fine if the firm adopted an effective compliance program, self-reported the wrong, or cooperated, in some circumstances." Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 337 (2012). *See also infra* Part I.

5. *See infra* Part IV.

6. "Corporate compliance programs and voluntary ESG initiatives have proliferated amid widespread debate about the purpose of the corporation and a broadened role for stakeholders." Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 225 (2021).

7. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28 & 29 U.S.C.).

8. There is a debate, largely beyond the scope of this article, as to whether the Financial Crisis's causes related primarily to excessive risk-taking or whether they were also intertwined with wrongdoing. For arguments regarding the latter, see *infra* note 10. For contextualization of the crisis as evidence of poor risk management, see Steven L. Schwarz, *Systemic Regulation of Systemic Risk*, 2019 WISC. L. REV. 1, 3 ("political and media pressure to assign blame for the crisis has resulted in regulation that is punitive and seeks to correct non-existent wrongdoing"); Stephen M. Bainbridge, Caremark *and Enterprise Risk Management*, 34 J. CORP. L. 967, 968 (2009) ("The financial crisis of 2008 revealed serious risk management failures on an almost systemic basis throughout the business community.").

9. For accounts of wrongdoing (including crimes the government allegedly failed to prosecute), see JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020) (analyzing Lehman's potential liability); Tomasz Piskorski, Amit Seru & James Witkin, *Asset Quality Misrepresentation by Financial Intermediaries: The Case of the RMBS Market*, 52 J. FIN. 2635 (2015) (identifying fraud with respect to the failure to disclose certain mortgages); Jeffrey Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS (Nov. 10, 2011), https://www-nybooks-com.ezp-prod1.hul.harvard.edu/articles/2011/11/10/should-some-bankers-be-prosecuted/.

The fear that compliance is more superficial than real has surfaced periodically since the Financial Crisis, in the wake of scandals pertaining to everything from sexual assault to the private sector's handling of successive car and airplane accidents.[10] For all the money companies spend on compliance, they still seem to be remarkably adept at encouraging, acquiescing in, and forestalling the discovery of *non*-compliant behavior.[11]

When corporate wrongdoing becomes or is perceived as pervasive, it places the compliance function in a precarious position. If an activity as expensive as compliance repeatedly fails to live up to its promise, its future is far from guaranteed. Until now, these shortcomings have been viewed primarily through a structural lens, one that seeks to secure better outcomes by experimenting with different legal and regulatory levers.[12] This structural approach, even as it criticizes corporate behavior, often portrays the compliance mission in an idealistic and fairly positive light. Its literature generates relatively optimistic narratives of what compliance can achieve if properly assembled and reformed. It assumes that if organizations and institutions pay better attention to "choice architecture"[13] and incentives, and to cultural dynamics and soft norms, the compliance function itself will eventually right itself and the specter of wrongdoing will abate.[14]

My aim here is to demonstrate why this mode of inquiry is incomplete and increasingly anachronistic. A literature that has so adeptly explored incentives,[15] heuristics,[16] and blind spots[17] has devoted comparatively less attention to

10. "Fake bank accounts. Faulty ignition switches. Sexual harassment. Protection of predators. Over and over again, the public learns of widespread and significant misconduct plaguing organizations that millions of individuals rely upon on a daily basis." Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 250 (2020).

11. "Despite multinational corporations hiring 'hundreds, even thousands of compliance officers at a time,' compliance failures continue to be commonplace . . . ." Todd Haugh, *"Cadillac Compliance" Breakdown*, 69 STAN. L. REV. ONLINE 198, 199 (2017) (citations omitted).

12. *See, e.g.*, John Armour et al., *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 6 (2020).

13. Choice architecture is a term that refers to the institutional structures that indirectly frame and alter an individual's decision-making process. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

14. For an admittedly arbitrary sampling, see James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 183 (2021) (analyzing the potentially positive effects that might yield from a fully "professionalized" compliance industry); Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129 (2018) (arguing that compliance officers should root out the "power few" who commit wrongdoing, rather than spread enforcement efforts evenly throughout the firm); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1009 (2017) ("governmental actors would benefit from more coordinated enforcement efforts aimed at sanctioning recidivist conduct"); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 327–28 (2017) (analyzing instances in which prosecutors should impose compliance "mandates" on firms accused of corporate wrongdoing); Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 155 (2014) (contrasting architectural approaches and policing approaches to compliance).

15. Armour et al., *supra* note 12, at 1.

16. Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 949 (2017) ("biases matter to corporate governance and compliance").

17. MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011).

emerging issues of political partisanship and politicization. Academic discussions of compliance have yet to contemplate the importance of highly contested presidential and congressional party elections, the alarming increase of electorate polarization and segregation, and the impact of society's waning support for government institutions.[18] Polarization and politicization, long the preoccupation of political scientists and social psychologists, have yet to infiltrate the compliance scholar's lexicon. This article seeks to initiate this conversation. If we have learned anything in the past decade, it is that political partisanship not only impacts government and quasi-government institutions, but it also impacts how the public perceives them and how much legitimacy they enjoy. Moreover, insofar as corporate political advocacy in on the rise, our political debates clearly affect how corporate officers and employees conceptualize their jobs.[19] It therefore stands to reason that politics and politicization profoundly affect the implementation and success of corporate compliance. Indeed, in the years to come, political partisanship may become compliance's *most* pressing challenge, and perhaps its Achilles heel if we choose to ignore it. Accordingly, as we look *back* on the past two decades and examine Sarbanes-Oxley's legacy, perhaps the most fruitful thing we can do is address polarization's implications for the very industry that Sarbanes-Oxley helped initiate and develop. The social and political atmosphere that accompanied 2002's Sarbanes-Oxley Act is dramatically different from the one we encounter today, and that distinction foretells profound challenges for corporate compliance officers, especially those who operate according to norms and assumptions inherited from previous generations.

The remainder of this article unfolds as follows: Part I briefly places Sarbanes-Oxley in context as one of the major pieces of federal legislation that cemented compliance's importance as a corporate governance function. Part II recounts, for the uninitiated, several of compliance's perennial challenges, from its relationship to the company's board to its interaction with the company's employees and government enforcement agencies. Because these questions are structural, they are reassuringly abstract and universal. They are "firm-level" questions that exist wholly apart from politics or political party. Moreover, within the compliance literature, they are often portrayed as problems that can be solved.

Part III introduces the topic of polarization. Political developments over the past two decades pose disparate obstacles for corporate compliance departments.

18. *See* discussion at *infra* Part III.

19. Numerous scholars have instead focused on the normative aspects of corporate participation in contemporary political and social debates. Some scholars welcome these developments. For example, Omari Scott Simmons argues that corporate boards can fruitfully engage with political issues through Enterprise Risk Management (ERM) programs. Omari Scott Simmons, *Political Risk Management*, 64 WM. & MARY L. REV. 707 (2023), https://ssrn.com/abstract=3998403. Chris Brummer and Leo Strine contend that improving diversity and observing one's fiduciary duty are complementary obligations. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 28 (2022) ("attention to good DEI practices makes good business sense"). Others are more skeptical of the corporate board's ability to navigate these issues. *See* Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 211 (2020) (observing that the economic inequality, the Covid-19 pandemic, and social movements such as Black Lives Matter "have radically unsettled the business landscape, exposing a range of polarizing divisions").

Polarization and politicization collectively distort the tools compliance officers have come to rely on to secure adherence to legal norms. Moreover, they do so unevenly. Some industries are apt to feel polarization's effects more acutely than others. The political lens thus scrambles an enforcement agency's predictive abilities in deciding which industries are most apt to experience bouts of noncompliance. It further weakens the compliance officer's ability to spread pro-social norms and encourage essential crime-fighting behaviors such as whistleblowing.

Part III wraps up by revisiting three trends that look decidedly different when viewed through the political lens. The first pertains to automation. Regardless of how much machine-learning a compliance officer would prefer in the abstract, "politics" all but ensures that companies will lean more heavily on machines in both the near and short term. The second is the work-from-home movement. One can imagine numerous reasons a compliance officer might prefer in-person interactions to a purely remote workplace. Nevertheless, regardless of its positive and negative features, a remote or hybrid workplace offers distinct benefits in a polarized world. To coworkers who are politically antagonistic, work-from-home is the mechanism that enables individuals from different locations and demographic groups to engage productively with each other.

The third trend concerns our evolving enforcement environment. Twenty years ago, many would have identified the Department of Justice as the institution with the greatest influence over corporate compliance, mirroring Sarbanes-Oxley's national, universalized approach to corporate governance and compliance.[20] Today, that national approach is quickly yielding to more local enforcement efforts, as state AGs, local agencies, and state courts have shown a renewed interest in the corporation's internal enforcement apparatus.[21]

The political lens helps us contextualize and assess compliance enforcement's decentralization. If federal-level enforcement becomes so politicized that it fails to attract institutional and popular support, state and private enforcement mechanisms should be welcomed as potentially viable alternatives. Indeed, if the past two decades have reflected a strong national approach to compliance regulation, our current atmosphere seems poised to bring about a very different type of oversight framework featuring different institutions, norms, and actors.

With these thoughts in mind, Part IV concludes with some thoughts on how compliance scholars can incorporate and apply the polarization literature's

20. *See, e.g.*, Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The DOJ's Corporate Charging Policies*, 51 St. Louis U. L.J. 1 (2006) (describing federal government's response to corporate wrongdoing); Baer, *supra* note 1 (citing Department of Justice's outsized role in regulating compliance).

21. For more on this trend, see Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. Corp. L. 887, 910 (2022); Andrew K. Jennings, *State Securities Enforcement*, 47 BYU L. Rev. 67, 127 (2021); Elysa M. Dishman, *Enforcement Piggybacking and Multistate Action*, 2019 BYU L. Rev. 421, 447–50 (describing cooperation between state AGs in different sectors); Mark Totten, *The Enforcers & the Great Recession*, 36 Cardozo L. Rev. 1611, 1612 (2015) ("My claim is that before, during, and even after the Great Recession, a handful of state attorneys general (AGs) led the way on enforcement.").

warnings and lessons, as well as the challenges corporate practitioners are likely to confront as they attempt to uphold compliance's venerable mission of preventing and redressing corporate wrongdoing.

I. Sarbanes-Oxley and the Emergence of the Compliance Function

The story of corporate compliance neither begins nor ends with Sarbanes-Oxley. Efforts to stamp out corruption, fraud, and other corporate criminal behavior have long underpinned the federal government's efforts to prompt corporations to investigate and monitor their employees and customers.[22] Sarbanes-Oxley was just one of numerous tools the government deployed to reassure the nation's stockholders that their investments would be uncorrupted by widespread fraud.[23]

Many corporate crime-fighting statutes and policies pre-date Sarbanes-Oxley. The Foreign Corrupt Practices Act, which forbade corporations from bribing foreign officials, was enacted in the late 1970s and directed corporations to develop a system of internal controls that kept track of payments.[24] During this post-Watergate time period, regulatory agencies such as the Department of Defense also developed compliance-type rules for contractors competing for lucrative defense contracts.[25] The Bank Secrecy Act and federal anti-money laundering laws forced banks to "know" their customers and (more importantly) monitor and report their suspicious bank accounts to the Treasury Department.[26]

More broadly, in 1991, the Organizational Sentencing Guidelines, the product of the Sentencing Commission's multi-year effort to create guidelines for federal judges tasked with sentencing corporate offenders, created a multi-factor rubric that graded corporate offenders more gently if they had in place an "effective" compliance program.[27] The Department of Justice, meanwhile, began

22. *See, e.g.*, Rebecca Walker, *The Evolution of the Law of Corporate Compliance in the United States: A Brief Overview*, 1561 PLI/Corp. 13, 17–18 (2006); Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law's "Duty of Care as Responsibility for Systems,"* 31 J. Corp. L. 949, 950 (2006) ("the internal controls story actually goes back many decades").

23. "Congress enacted a triumvirate of provisions aimed directly at reestablishing investor confidence in financial statements." Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of Section 404*, 29 Cardozo L. Rev. 703, 705 (2007). "Congress enacted the Sarbanes-Oxley Act of 2002 ('Sarbanes Oxley') to restore public trust in the markets." David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 Mich. L. Rev. 1781, 1782 (2007).

24. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977), *amended by* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415. "Concern about the adequacy of internal controls—and corporate accountability generally—was one of the most important issues in securities regulation in the 1970s." Langevoort, *supra* note 22, at 951.

25. "[T]he real rise of compliance as big business is usually traced to the defense contracting scandal of the mid-1980s." Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 497 (2003).

26. "The Bank Secrecy Act of 1970 criminalizes a financial institution's willful failure to implement an anti-money laundering compliance program. *See* 15 U.S.C. § 5318(h) (2012) (setting forth basic compliance requirements); 31 U.S.C. § 5322 (2012) (establishing criminal penalties)." Miriam H. Baer, *Too Vast to Succeed*, 114 Mich. L. Rev. 1109, 1135 (2016).

27. "[T]he OSG, promulgated by the United States Sentencing Commission in 1991, provided a structure of penalties that increased or reduced sanctions (a fine and usually some form of probation)

experimenting in the early 1990s with so-called "deferred prosecution agreements," extrajudicial agreements that relieved the corporation of a criminal conviction in exchange for a package of commitments, including the promise to implement or upgrade one's compliance program.[28] The DOJ eventually memorialized the broad factors that Main Justice expected its prosecutors to consider in deciding and implementing corporate charging decisions.

The 1999 Holder Memo, named for Eric Holder, the (Democratic) Deputy Attorney General at the time, eventually became the blueprint for the Department's approach to corporate crime and its remediation.[29] After several iterations, it would eventually be added to the department's Justice Manual, and would also be supplemented by a compliance manual advising of the specific characteristics that prosecutors should consider when judging a compliance program's soundness.[30]

Taking note of these practical developments, the Delaware Chancery court advised in an opinion written by Chancellor Allen that the corporation's board members harbored an oversight duty to ensure that the company's internal monitoring systems were intact.[31] The so-called *Caremark* duty was eventually construed as a component of the duty of loyalty,[32] but it applied only to a "sustained and systemic failure of the board to exercise oversight."[33] It remained difficult to prove a violation of such duty until a few years ago, when the Delaware courts expanded (or clarified) the *Caremark* duty to include more than ensuring the corporate compliance program's bare existence, particularly where "mission critical" safety or regulatory issues were afoot.[34]

according to, among other things, the existence of a corporate compliance program and the corporation's provision of assistance in identifying and prosecuting individual employee-violators." Baer, *supra* note 1, at 964.

28. For early accounts, see Finder & McConnell, *supra* note 20, at 1; Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 858 (2007); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311 (2007).

29. On the Justice Department's evolving policy toward wrongdoers, see Gideon Mark, *The Yates Memorandum*, 51 U.C. Davis L. Rev. 1589, 1596 (2018). For an account of the Department's latest approach to corporate crime and its deterrence, see Ben Penn, *DOJ "Raises Stakes" for Companies to Confess White-Collar Crime*, Bloomberg L. (Sept. 16, 2022, 5:41 AM), https://news.bloomberglaw.com/us-law-week/doj-raises-stakes-for-companies-to-confess-white-collar-crime; Luc Cohen, *U.S. Justice Dept Announces "Carrots and Sticks" Approach to Corporate Crime*, Reuters (Sept. 15, 2022, 3:35 PM), https://www.reuters.com/legal/us-justice-department-crack-down-repeat-corporate-offenders-2022-09-15/; Dylan Tokar & Dave Michaels, *Justice Department Targets Executive Pay, Probationary Deals to Curb Corporate Crime*, Wall St. J. (Sept. 15, 2022, 7:40 PM), https://www.wsj.com/articles/justice-department-targets-executive-pay-probationary-deals-to-curb-corporate-crime-11663265022.

30. In 2019, the DOJ issued a "manual" to be used by compliance professionals as they evaluate their company's compliance programs. It updated this manual in 2020. U.S. Dep't of Justice, Evaluation of Corporate Compliance Programs (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download. *See also* Armour et al., *supra* note 12, at 1 (analyzing 2019 version of manual).

31. *In re* Caremark Int'l Inc., 698 A.2d 959, 970 (Del. Ch. 1996).

32. Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (locating the oversight duty within the fiduciary duty of loyalty).

33. *In re Caremark*, 698 A.2d at 971.

34. Marchand v. Barnhill, 212 A.3d 805, 822–23 (Del. 2019). For scholarly discussion of how easy or difficult it is to bring a *Caremark* claim, compare Langevoort, *supra* note 22, at 953 (stating in 2006 that "rhetorically, [*Caremark*] is a strong wake-up call to directors, but with very little liability threat behind it"), *and* Claire Hill, Caremark *as Soft Law*, 90 Temple L. Rev. 681 (2018) (arguing that

Within this long arc, Sarbanes-Oxley occupies an interesting place. *Practically* speaking, its compliance-related regulations imposed modest pressure on the large, highly regulated institutions whose officers had already created departments in response to regulatory requirements and federal enforcement initiatives.[35]

More importantly, as a rhetorical device, Sarbanes-Oxley reinforced the notion that "compliance" was an essential tool in the nation's anti-crime toolbox, a box that was almost exclusively maintained by *federal* authorities.[36] On the heels of Enron's dissolution and Worldcom's bankruptcy filing, Sarbanes-Oxley, along with the highly reported federal prosecutions of Enron and Worldcom executives, focused the nation's attention on federal law enforcement agencies, particularly the DOJ and its storied United States Attorneys' Offices, as institutions that could be relied upon to rein in corporate misconduct. Accordingly, the lawyers who advised post-Enron companies on their internal controls did so with an eye toward quelling federal investigations and avoiding federal criminal charges.[37]

None of this is surprising when one considers several of SOX's key compliance-related and criminal law initiatives, which included:

Changes to the Federal Criminal Code

- An increase in the maximum statutory sentences for federal prosecutions under the mail and wire fraud statutes, from five to twenty years' imprisonment.[38]

- The enactment of a new securities fraud statute, 18 U.S.C. § 1848, whose statutory maximum sentence was also twenty years' imprisonment.

Caremark duties are largely aspirational sources of soft law), *with* Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH U. L. REV. 1857, 1859 (2021) ("Yes, there is a trend of revamped director oversight duties. And this trend is here to stay . . . .").

35. In the years that pre-date Sarbanes-Oxley, companies were already investigating themselves and encountering thorny legal and ethical issues as a result. *See, e.g.*, David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 148 (2000) (addressing the "corporate privilege waiver" issue that surfaced at the time); Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1 (1997).

36. *See* Michael W. Peregrine, *Corporate Compliance and the Legacy of Sarbanes Oxley*, N.Y.U. PROGRAM ON CORP. COMPLIANCE & ENF'T (Aug. 3, 2017), https://wp.nyu.edu/compliance_enforcement/2017/08/03/corporate-compliance-and-the-legacy-of-sarbanes-oxley/. On the transformation of compliance into an anti-crime enforcement activity, see Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215 (2017). On the growth of the DOJ as a major source of compliance regulation, see Baer, *supra* note 1, at 972 ("Although numerous other agencies assist in regulating compliance, the DOJ, by dint of its power to bring criminal charges, is one of the most powerful—and therefore most prominent—institutions with the authority to declare a corporation's compliance program effective or deficient.").

37. *See, e.g.*, Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 164–65 (2008) (describing course of events that led federal prosecutors to assume central role in defining and overseeing corporate compliance).

38. 18 U.S.C. §§ 1341, 1343 (2018). "With the passage of the Sarbanes-Oxley Act of 2002, the statutory maximum for imprisonment for wire fraud quadrupled from five to twenty years, raising the stakes for defendants." Jason Petty, *Neither Here Nor There: Wire Fraud and the False Binary of Territoriality Under* Morrison, 89 U. CHI. L. REV. 803, 809 (2022).

- The enactment of new and revised obstruction-of-justice provisions, which more broadly prohibited and punished the destruction of documents likely to be requested in investigations and judicial proceedings.[39]

Instructions to the United States Sentencing Commission

- An instruction to the Sentencing Commission to increase the (then mandatory) Sentencing Guidelines' recommended sentencing ranges of imprisonment for crimes relating to fraud and theft.[40]

- An instruction to the Sentencing Commission to review its Organizational Guidelines to ensure they were sufficient "to deter and punish organizational criminal misconduct."[41] This language prompted the Commission to promulgate policy language defining an "effective" compliance program.[42]

Whistleblowing Protection

- Section 805 of the Act introduced anti-retaliation protections for corporate whistleblowers, including the ability to bring an administrative action through OSHA seeking back pay. Although these measures were ultimately eclipsed by stronger protections and eventually bounty programs, the Act was notable for these initial efforts at providing whistleblowing protection.[43]

39. "Prior law made it an offense to 'intimidat[e], threate[n], or corruptly persuad[e] *another person*' to shred documents. § 1512(b) (emphasis added). [Sarbanes-Oxley's] Section 1519 cured a conspicuous omission by imposing liability on a person who destroys records himself." Yates v. United States, 574 U.S. 528, 536 (2015).

40. "The Sarbanes-Oxley saga . . . culminated in a 2003 round of sentencing guideline amendments that extended the original punitive impulse to virtually everyone convicted in federal court of some form of stealing—the faceless foot soldiers of economic crime." Frank O. Bowman III, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 Ohio St. J. Crim. L. 373, 375 (2004).

41. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 805(a)(2)(5); 116 Stat 745, 801–02.

42. U.S. Sentencing Comm'n, Guidelines Manual Chapter 8, § 8B2.1 (2021), https://guidelines.ussc.gov/gl/%C2%A78B2.1 (defining effective compliance program). *See also* Press Release, U.S. Sentencing Comm'n, Commission Tightens Requirements for Corporate Compliance and Ethics Programs (May 3, 2004), https://www.ussc.gov/about/news/press-releases/may-3-2004 ("The United States Sentencing Commission on Friday, April 30, 2004, sent to Congress significant changes to the federal sentencing guidelines for organizations, which should lead to a new era of corporate compliance."). The new Guidelines "superseded previous guidance on effective compliance programs, requiring not only that the organization 'exercise due diligence to prevent and detect criminal conduct' as required by the former Organizational Sentencing Guidelines, but also requiring promotion of 'an organizational culture that encourages ethical conduct and a commitment to compliance with the law.'" Douglas M. Lankler & Carlton E. Wessel, *The Evolving Notion of Compliance Program "Effectiveness" in* Defending Corporations and Individuals in Government Investigations § 2:3 (Daniel J. Fetterman & Mark P. Goodman eds., 2022).

43. *See* 18 U.S.C. § 1513 (2018) (criminalizing retaliation when it is undertaken with retaliatory intent); *id.* § 1514A (creating administrative relief with the Department of Labor and cause of action for reinstatement and back pay). For implementing regulations, see 29 C.F.R. § 1980.100 (2023). For a comparison of Sarbanes-Oxley and the evolution of the protections and incentives created by the later Dodd-Frank Act, see Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*,

Statutory Changes Directed at Corporate Governance

- Section 302, which demanded the truthful certification by the CEO and CFO as to the veracity and completeness of the publicly traded company's annual and quarterly financial disclosures.[44]

- Section 404, which required that the company's managers describe and attest to its "internal controls over financial reporting," and secure an opinion from an independent auditor regarding those controls.[45]

SOX featured many other provisions, but the foregoing are the components that heightened federal criminal law's salience to corporate boards and to the compliance officers they would soon hire and promote.[46]

SOX also facilitated the growth and maturation of the compliance industry and the development of compliance as an internal governance *function*.[47] The purpose of developing a compliance program—an "effective" one as defined by the Sentencing Commission—was to discourage, detect, and promptly report to government enforcers internally detected instances of employee wrongdoing.[48] Articles from this time period portray the corporate compliance department as a bridge between the company and the prosecutor's office, the go-between that would benefit the company while also reducing the government's enforcement load.[49]

50 U.C. DAVIS L. REV. 2215, 2223–26 (2017) (tracing whistleblowing's evolution from Sarbanes-Oxley to Dodd-Frank); Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 729 (2013) (comparing protections for putative whistleblowers). For criticisms of the Sarbanes-Oxley whistleblowing measures, see Richard Moberly, *Sarbanes-Oxley's Whistleblowing Provisions: Ten Years Later*, 64 S.C. L. REV. 1 (2012).

44. "Section 302 says that, in addition to certifying the accuracy of the disclosures, the officers must also affirm that they are responsible for internal controls; have designed such controls to ensure that material information is brought to their attention; have evaluated its effectiveness in the last 90 days; have presented in their report their conclusions about its effectiveness; and have discussed in the report any changes in internal controls during the period under review, including corrective actions." Langevoort, *supra* note 22, at 954 (summarizing Section 302's requirements).

45. For some observers, Section 404 became "nearly synonymous with Sarbanes-Oxley itself." Prentice, *supra* note 23, at 704 (defending Section 404's benefits).

46. Ironically, while SOX's "internal controls" measures garnered the bulk of attention, its criminal provisions threatened the broadest impact, as they applied to individuals who had nothing to do with corporations, much less publicly held ones. *See* Petty, *supra* note 38, at 809.

47. *See* Miller, *supra* note 1, at 981 ("Together with its close cousins, governance and risk-management, compliance is an essential internal control activity of corporations and other complex organizations.").

48. *Id.* (describing compliance as "a form of internalized law enforcement" that partially substitutes for state enforcement efforts).

49. *See* Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 73 (2010). "[T]he inside counsel is the single most important lawyer in a securities fraud committed by a public company and, as Ronald Gilson has argued, the logical lawyer candidate for the gatekeeping function." Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 997 (2005). For a recent and interesting empirical gloss on SOX's effect on in-house counsel, see Dhruv Aggarwal, Sarbanes-Oxley and Firm-Specific Knowledge: Evidence from Inhouse Lawyers (April 13, 2023), https://ssrn.com/abstract=4417579 or http://dx.doi.org/10.2139/ssrn.4417579 (finding empirical evidence that

There were, of course, cracks in the foundation of this internal/external enforcement partnership.[50] For one thing, the law itself never fully supported the concept. As I have argued elsewhere:

> Lawyers owe fiduciary duties, duties of zealous representation, and duties of confidentiality to their *clients*—and certainly not to government prosecutors. . . . Prosecutors, in turn, owe duties to the general public—and not to corporate shareholders. . . . The DOJ's Corporate Enforcement Policy may *appear* to have created a lay "partnership" between external enforcers and internal corporate investigators, but this model is inherently unstable.[51]

Evidence of these conceptual weaknesses occasionally surfaced, such as when the government pressured the company to interfere in its employees' attorney-client relationship (as with the government's pursuit of KPMG for its tax shelter business),[52] or when the government appeared to commandeer the company's investigation, thereby triggering the Fifth Amendment's privilege against self-incrimination (as in Deutsche Bank's recent LIBOR debacle).[53]

Notwithstanding these setbacks, the corporation's internal policing apparatus has continued to serve as an essential crime-fighting tool. As one scholar recently observed, "[c]ompanies pour hundreds of billions of dollars into internal compliance programs meant to prevent and detect wrongdoing by their employees."[54] Sarbanes-Oxley did not create this apparatus from whole cloth, but it vastly reinforced it and promoted its salience.[55] Legislation such as Sarbanes-Oxley made companies *more* likely to bulk up their compliance departments, and despite efforts to roll back some of Sarbanes-Oxley's oversight, few practitioners or policymakers have argued with the idea that companies have a continuing obligation to monitor and police themselves.

II. Compliance as a Structural Puzzle

As compliance has evolved into a stable, essential function of corporate governance, scholars have approached it as a structural puzzle to be tweaked and updated as new information emerges. Fields such as behavioral psychology,

certain GCs benefitted from SOX because "firm-specific knowledge became more important in [its] immediate aftermath").

50. Laufer, *supra* note 2, at 392 (arguing that the so-called partnership of corporate and government enforcement was always "disingenuous" in that the government relied so heavily on corporate resources).

51. Miriam H. Baer, *Designing Corporate Leniency Programs*, *in* The Cambridge Handbook of Compliance 351 (Benjamin van Rooij & D. Daniel Sokol eds., 2021), https://www.cambridge.org/core/books/cambridge-handbook-of-compliance/designing-corporate-leniency-programs/85A75E43FBFDF6FE956A9A11E94A5192.

52. For a discussion of the fallout from that episode, see Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DePaul L. Rev. 295, 318 (2008).

53. United States v. Connolly, No. 1:16-CR-00370, 2018 WL 2411216 (S.D.N.Y. May 15, 2018).

54. Shapira, *supra* note 34, at 1858.

55. *Cf.* Haugh, *supra* note 36, at 1231–32 (connecting Sarbanes' disclosure requirements regarding the existence of the public company's code of conduct to the growth of the compliance function).

systems design, and organizational theory have combined to inform this approach.[56]

Most agree that the compliance function's essential mission is to induce the organization to prevent, deter, investigate, and remediate wrongdoing.[57] This multi-pronged goal promotes a series of debates of the "who," "what," and "how" varieties. The "who" questions ask who should implement and oversee the compliance department. Should the compliance officer be an attorney or an independent "professional"?[58] Do we want her to report to the general counsel or directly to the board? Finally, who will we rely on to measure compliance's activities and validate its successes or failures?[59]

The "what" questions relate to compliance's objectives. Does it exist solely to deter and remediate violations of law? If so, which violations of law? (Surely, no one wants a compliance function to focus on every ordinance or regulation ever written.) Does the compliance function play a role in flagging and remediating risk? What role should it play in inculcating prosocial norms and values, and should values and norms be its aim or risk and deterrence?[60]

The "how" questions are the most concrete. How does the compliance function obtain information from the company's employees, and how does it overcome trust issues in doing so? How does it bridge pernicious silo issues, in which the various components of the company are either unwilling or unable to effectively communicate with each other? And finally, how does the compliance function serve the *firm*'s interests, while also serving the interests of the government enforcement agencies, who have at times viewed the company's compliance officers as junior enforcement officers?

Mirroring this inquiry, the legal academy's description of corporate wrongdoing is also often described in curiously apolitical terms.[61] Criminology's venerated fraud triangle describes a trio of pressure, opportunity, and "neutralizations"

56. David Orozco, *Compliance by Fire Alarm: Regulatory Oversight Through Information Feedback Loops*, 46 J. CORP. L. 97 (2020). *See also* Robert C. Bird & Julie Manning Magid, *Toward a Systems Architecture in Corporate Governance*, 24 U. PA. J. BUS. L. 84 (2021); Todd Haugh, *Leading a Healthier Company: Advancing a Public Health Model of Ethics and Compliance*, 58 AM. BUS. L.J. 799 (2021); Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside Out*, 2013 U. ILL. L. REV. 1131; Sung Hui Kim, *Gatekeepers, Inside Out*, 21 GEO. J. LEGAL ETHICS 411 (2008).

57. *See, e.g.*, James A. Fanto, *Surveillant and Counselor: A Reorientation in Compliance for Broker-Dealers*, 2014 BYU L. REV. 1121.

58. "From the beginning, attorneys and those with regulatory backgrounds were the most sought-after hires tasked with developing and leading corporate compliance programs." Haugh, *supra* note 56, at 821 (describing initial push for attorneys to occupy compliance roles). *See also* Fanto, *supra* note 14; Michele Beardslee DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71 (2014).

59. On issues of validation and measurement, see Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS. 47 (2020).

60. For one of the earliest entries in the debate over whether compliance should focus on norms or deterrence, see Lynn Sharpe Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar./Apr. 1994, at 106.

61. *But see* JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME (2020).

that lead individuals to commit offenses such as fraud or bribery.[62] A wide range of behavioral and organizational literature (much of it catalyzed by Donald Langevoort's work) explains how tournaments, overoptimism, and herd behavior promote excessive risk-taking and goal-setting, often setting the corporation up for a big fall and revelations of wrongdoing.[63] Business ethicists explain how blind spots and "fading" dynamics are strong enough to affect nearly everyone, depending on the situation.[64] None of us is a monster, but all of us are vulnerable to pressures and opportunities that cause us to fall on the wrong side of legal and ethical lines.

There is something soothing to be found in these narratives, even as they illuminate compliance's shortcomings in curbing greed and opportunism.[65] Indeed, Sarbanes-Oxley itself betrays this optimism. *Remove* temptations (like corporate loans to executive officers), *induce internal monitoring* (by forcing corporate officers to report on and certify internal controls), ramp up *whistleblowing and attorney gatekeeping* (through anti-retaliation protections and up-the-ladder reporting rules), and finally *claw back* executive compensation (for executives whose companies issue eventual restatements), and somehow the enforcement pieces will all fall into place. Or, in more technical terms: If a corporation implements these structural innovations, its "policing agency costs"[66] will decrease, at least just enough to make an enforcement agency's job marginally more manageable.

Roberta Romano famously derided many of Sarbanes-Oxley's underlying assumptions as "quack corporate governance."[67] A bevy of scholars responded just as lustily that she was wrong.[68] Where compliance is concerned, one need not resolve this debate. The atmosphere that created Sarbanes-Oxley no longer exists. Two decades after a bipartisan Congress rushed legislation into existence, our national electorate is far more fractured, and their elected representatives are far less able to reach agreement on anything. Further, the corporate

62. *See generally* Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 Iowa L. Rev. 1153, 1156 (2021).

63. For a sampling of Langevoort's foundational work in this area, see Langevoort, *supra* note 16, at 958 ("promotion tournaments"); Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 Cornell L. Rev. 1209, 1219 (2011) (overoptimism and herding behavior); Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 Geo. L.J. 285, 287 (2004) (on self-deception).

64. *See generally* Yuval Feldman, The Law of Good People: Challenging States' Ability to Regulate Human Behavior (2018); Kim, *supra* note 49, at 997.

65. For a recent sobering account, see Donald C. Langevoort, *Global Behavioral Compliance, in* Corporate Compliance on a Global Scale 217 (Stefano Manacorda & Francesco Centonze eds., 2022), https://www.researchgate.net/publication/356565982_Global_Behavioral_Compliance.

66. This concept of policing agency cost was coined by Jennifer Arlen and Marcel Kahan in *Corporate Governance Regulation Through Nonprosecution*, 84 U. Chi. L. Rev. 323 (2017).

67. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521 (2005). Others agreed. *See, e.g.*, Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. Corp. L. 1 (2002).

68. *See, e.g.*, Robert A. Prentice & David B. Spence, *Sarbanes-Oxley as Quack Corporate Governance: How Wise Is the Received Wisdom?*, 95 Geo. L.J. 1843, 1861 (2007).

workplace that Sarbanes' defenders and critics visualized is also an anachronism, as it envisioned a workplace and boardroom where individuals met and interacted in person. Accordingly, regardless of how one views the laws and regulatory provisions that enabled the compliance function to solidify in *2002*, one would be hard pressed to imagine them playing out the same way *2022*, in Congress much less in any virtual boardroom or hybrid workplace.

III. The Politicized View of Compliance

The remainder of this article asks what compliance looks like once we focus our attention on the political dynamics of any given company. I do not mean this approach to be a shorthand for debates over public policy. Corporations have influenced public debates for centuries.[69] The question of how deeply corporations are or should be enmeshed in local or national political processes, or in social issues of concern, is hardly a new one. Corporate political advocacy is an important development, but not the singular focus of this Part.

Nor do I mean to invoke questions concerning the corporation's direct influence over elections. This, too, is nothing new, even if the Supreme Court's *Citizens United* case remains controversial.[70] Finally, at least at this juncture, I do not intend to address recent efforts by numerous corporations to openly embrace diversity, equity, and inclusion (DEI) or corporate social responsibility (CSR), to diversify their boardrooms, or to consciously adopt an environmental, social, and governance (ESG) framework. These developments are unquestionably important, but they ultimately are byproducts of the degree to which our political atmosphere has changed within the past two decades.[71]

To contextualize and understand this change, this Part begins by surfacing the phenomenon known as affective polarization, a psychological outgrowth of political partisanship. Section A introduces this concept and queries how polarization subconsciously influences compliance. Section B turns attention to the rising politicization—perceived or actual—of enforcement institutions such as the Department of Justice. Sections C and D theorize how politicization impacts life abstractly and concretely within corporate settings.

69. Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights 35–38 (2018).

70. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

71. On corporate political advocacy generally, see T.J. Weber et al., *Differential Response to Corporate Political Advocacy and Corporate Social Responsibility: Implications for Political Polarization and Radicalization*, 42 J. Pub. Pol'y & Marketing 74 (2023) (on the connection between "CPA" and polarization). For legal scholarship discussing social advocacy's implications for the corporate firm, see Lisa M. Fairfax, *Social Activism Through Shareholder Activism*, 76 Wash. & Lee L. Rev. 1129, 1149 (2019) ("The corporation's sheer size and available resources means that corporations can have a greater impact on critical issues than any single individual could.").

A. Polarization

According to the latest surveys and reports, our society is more politically and socially fractured than it was even two decades ago.[72] Citizens are polarized along multiple dimensions, including age, gender, ethnicity, class, and educational attainment.[73] Ideological polarization, which has itself increased over the past half-century, has given way to what political scientists call "affective polarization,"[74] the phenomenon by which partisans move beyond disagreement on specific policies and instead associate political affiliation with social identity. Affective polarization predicts that members of a particular political party will view "in group" members highly favorably and "out group" members with hostility, even when objective evidence suggests one should do otherwise.[75] Researchers in this area disagree on the causes of affective polarization, but they agree strongly that it exists and has transformed "mild dislike" of one's political opponents into hostility and animus.[76] There is broad agreement as well that affective polarization has surged in the past two decades, that it extends beyond political campaigns or specific issues, and that it has the power to transform social and casual encounters.[77]

Thus, we live in a world in which Democrats and Republicans intensely dislike each other.[78] They increasingly choose not to live amongst or marry each other.[79] They do not buy the same things,[80] belong to the same civic

72. *See, e.g.*, Thomas B. Edsall, *America Has Now Split and Is in Very Dangerous Territory*, N.Y. Times (June 26, 2022) (citing Jennifer McCoy & Benjamin Press, *What Happens When Democracies Become Perniciously Polarized?*, Carnegie Endowment Int'l Peace (Jan. 18, 2022), https://carnegieendowment.org/2022/01/18/what-happens-when-democracies-become-perniciously-polarized-pub-86190); Reem Nadeem, *Beyond Red vs. Blue: The Political Typology*, Pew Res. Ctr.—U.S. Pol. & Pol'y (Nov. 9, 2021), https://www.pewresearch.org/politics/2021/11/09/beyond-red-vs-blue-the-political-typology-2/; Michael Dimock & Richard Wike, *America Is Exceptional in the Nature of Its Political Divide*, Pew Res. Ctr. (Nov. 13, 2022), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.

73. *See, e.g.*, Abigail Geiger, *A Wider Ideological Gap Between More and Less Educated Adults*, Pew Res. Ctr.—U.S. Pol. & Pol'y (Apr. 26, 2016), https://www.pewresearch.org/politics/2016/04/26/a-wider-ideological-gap-between-more-and-less-educated-adults/.

74. Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 Ann. Rev. Pol. Sci. 129 (2019); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 Am. J. Pol. Sci. 690 (2015). *See also* Shanto Iyengar, *Fear and Loathing in American Politics*, *in* The Cambridge Handbook of Political Psychology 399, 402–03 (D. Osborne & C. Sibley eds., 2022) (reporting on studies indicating prejudicial feelings towards political out-group exceeds "comparable [racial] bias" by more than 150 percent).

75. Iyengar, *supra* note 72, at 399.

76. *Id.* at 400.

77. *Id.* at 404 (observing that "partisanship appears to act as a litmus test even at the level of casual social encounters").

78. Affective polarization describes the hostility individuals feel toward those who belong to the opposing political party, apart from differences of opinion over specific policies. Rather than dissipate, these feelings have intensified over time as individuals grow older. *See* Joseph Phillips, *Affective Polarization: Over Time, Through the Generations, and During the Lifespan*, 44 Pol. Behav. 1483 (2022).

79. Lynn Vavrek, *A Measure of Identity: Are You Wedded to Your Party?*, N.Y. Times (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/upshot/are-you-married-to-your-party.html (marriage).

80. Alexander Ruch, Ari Decter-Frain & Raghav Batra, *Millions of Co-purchases and Reviews Reveal the Spread of Polarization and Lifestyle Politics Across Online Markets*, ARXIV Preprints (Jan. 17, 2022), https://arxiv.org/ftp/arxiv/papers/2201/2201.06556.pdf.

institutions,[81] or attend the same houses of worship.[82] Most importantly for compliance purposes, they also prefer not to do business with or work with each other.

This preference permeates the highest echelons of corporate management. Recent scholarship by Fos, Kempf, and Toutsoura demonstrates that corporate executive teams have become "increasingly partisan"[83] even as they have added more women to their ranks. Corporate team members are more inclined to lean toward the Republican party. Regardless of their political affiliation, they have become more partisan, and their partisanship produces "assertive matching," whereby leaders and teams instinctively attempt to match with like-minded colleagues. As a corporate team grows more polarized, misaligned executives become more likely to depart their firms.[84] Their departures, in turn, are followed by subsequent reductions in shareholder wealth, a phenomenon the authors themselves are unable to explain.[85] Such partisanship is not limited to publicly held corporations. Numerous researchers have cited political partisanship in start-up firms,[86] national law firms,[87] across boards,[88] and among rank-and-file employees.[89]

Why might this be a problem for corporate *compliance*? Compliance has always depended on healthy degrees of interpersonal trust, deliberation, and analysis.[90] The corporation motivates its employees to abide by the law and then takes steps to monitor wrongdoing and redress situations that encourage or permit lawbreaking. Compliance's success relies on the willingness of mid- and low-level employees to voice their concerns and communicate their

81. *Sharp Partisan Divisions in Views of National Institutions*, Pew Res. Ctr.—U.S. Pol. & Pol'y (July 10, 2017), https://www.pewresearch.org/politics/2017/07/10/sharp-partisan-divisions-in-views-of-national-institutions/.

82. Samuel L. Perry, *American Religion in the Increasing Era of Polarization*, 48 Ann. Rev. Soc. 87 (2022).

83. Vyascheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, *The Political Polarization of Corporate America* 51 (NBER Working Paper No. 30183, June 2022), https://www.nber.org/papers/w30183. For discussion of these findings, see Pamela Reynolds, *How Partisan Politics Play Out in American Boardrooms*, Harvard Bus. Sch. (Sept. 20, 2022), https://hbswk.hbs.edu/item/how-partisan-politics-play-out-in-american-boardrooms.

84. Fos et al., *supra* note 83, at 21–22.

85. *Id.* at 24. The authors theorize that the loss in value could be attributable to losses that arise out of groupthink and similar bubble-produced decisions. *Id.* As this article argues, a highly polarized team may also reflect an atmosphere that is ill-suited for a successful compliance function.

86. Joseph Engelberg et al., *Partisan Entrepreneurship* (NBER Working Paper No. 30429, 2021), https://papers.ssrn.com/abstract=3821106.

87. Karen Sloan, *Corporate Law's Partisan Gulf Widened in 2020, Analysis Finds*, Reuters (Nov. 9, 2021), https://www.reuters.com/legal/government/corporate-laws-partisan-gulf-widened-2020-analysis-finds-2021-11-09/.

88. *See, e.g.*, Dhruv Aggarwal, The Myth of Lawyer-Statesmen? An Empirical Analysis of General Counsel (unpublished manuscript) (on file with author) (citing differences between general counsel, who are more often Democrats and liberal, and board members, who are more likely to be conservative and Republican).

89. Taylor Telford, *Politics Are Becoming Tougher to Avoid at Work, Survey Finds*, Wash. Post (Oct. 5, 2022), https://www.washingtonpost.com/business/2022/10/05/politics-bias-at-work-survey-shrm/.

90. On the ways in which exposure to different viewpoints can improve decision-making, see Beau Sievers et al., *How Consensus-Building Conversation Changes Our Minds and Aligns Our Brains*, PsyArXiv Preprints (Aug. 19, 2022), https://psyarxiv.com/562z7.

knowledge to internal compliance officers and other high-level officials within the firm.[91] For firms to detect and report wrongdoing, as well as to detect and redress vulnerabilities to wrongdoing, employees and supervisors must respect and trust each other and their organization's processes.[92]

Extreme polarization reduces trust and quashes group deliberation. When groups are polarized, "outsider" opinions are at risk of being disregarded, suppressed, or self-censored.[93] Even worse, when a polarized group obtains new information, its members fail to rationally update their assumptions and shift policies.[94] Instead, they are likely to engage in biased assimilation.[95] That is, they may cherry pick and distort the information they have received so that they may affirm their prior beliefs. Instead of moving away from objectively incorrect assumptions, they will double down on those beliefs, making decisions that either cause or threaten societal harm.[96]

These developments should concern any scholar invested in compliance's success. The issue isn't simply one of *structure,* of making sure information moves efficiently from point a to point b. Nor is it one of ensuring that a firm measures and validates its rosy assertions of good citizenship and adherence to law. The problem goes deeper than that. Consider the extent to how more politically fractured our society is today than it was two decades ago. Sarbanes-Oxley was itself a piece of bipartisan legislation, enacted in the wake of Enron's fall, concurrent with a series of criminal prosecutions and a well-regarded task force.[97] It is more

91. Speaking up within one's organization is often conceptualized as a form of healthy "voice." "The choice is between 'voicing' the dissatisfaction to the . . . organization in the hope of an improvement, or to opt for an 'exit' . . . to a different . . . organization." Panagiotis Delimatsis et al., *Strategic Behavior in Standards Development Organizations in Times of Crisis*, 29 TEX. INTELL. PROP. L.J. 127, 146 (2021) (citing AO HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970)).

92. *See generally* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283 (2003). *See also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990) (setting forth procedural-justice theory of compliance). For workplace compliance, see Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOK. L. REV. 1287 (2005).

93. *See* Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. LEGAL ANALYSIS 263 (2009); CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE (2009). One should expect self-censorship to occur under a broader set of circumstances. Employees will hold back opinions not only when polarization actually exists, but also whenever the employee perceives it to exist.

94. Cass R. Sunstein et al., *How People Update Beliefs About Climate Change: Good News and Bad News*, 102 CORNELL L. REV. 1431 (2017); Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65 (2014).

95. Sunstein et al., *supra* note 94; Donald Braman et al., *Biased Assimilation, Polarization, and Cultural Credibility: An Experimental Study of Nanotechnology Risk Perceptions*, GW LAW FACULTY PUBS. & OTHER WORKS 197 (2008), https://scholarship.law.gwu.edu/faculty_publications/197. For older papers establishing this application of confirmation bias, see Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2098 (1979).

96. Sunstein et al., *supra* note 94.

97. Roberta Romano, *Does the Sarbanes-Oxley Act Have a Future?*, 26 YALE J. ON REG. 229, 237 (2009) (describing bipartisan legislative process that produced Sarbanes-Oxley in such a short time). Regarding the Enron Corporate Task Force and its prosecutorial might, see Jerry W. Markham, *Regulating the "Too Big to Jail" Financial Institutions*, 83 BROOK. L. REV. 517, 528 (2018) ("By March of

than a thought experiment to ask whether so sweeping a bill would receive the level of initial support it received back then.

When corporate teams and rank-and-file employees are politically polarized, policies and facts that raise compliance concerns are apt to be distorted and misunderstood. Polarization becomes the ultimate information silo, keeping one person from trusting—and therefore openly talking—to another. Compared to poorly designed systems, affective polarization's psychological silo creates a far more daunting challenge for reformers. It's difficult enough to ensure that one department shares information freely with another. It is far more difficult to scale the psychological supports an employee erects to protect herself, particularly when political partisanship causes her to invest in the belief that "out" groups are invested in undermining her well-being.

Now, one might argue that political partisanship has always been a challenge for compliance officers. But social science indicates that polarization and partisanship are weightier issues today than they were two decades ago.[98] Moreover, our political fights are indelibly intertwined with disputes over corporate power and governance.[99] Corporate social responsibility (CSR) and environmental, social, and governance (ESG) concerns have surged to the forefront of debates about corporate governance and securities disclosures.[100] For an employee, her employer's political advocacy and social governance efforts (sometimes referred to as "brand activism") makes those political cleavages feel more salient and more fraught, up and down the corporate ladder.[101] Whether these political activities are benign, positive contributions to social welfare, or in fact cynical exercises in performative posturing, they all cue identarian impulses by reminding corporate employees where each political party stands on a given issue.[102] Heated political elections and social media further ensure that political disputes impact the workplace, even if subconsciously.[103] For a society whose members

2004, the DOJ had indicted hundreds of executives caught up in the financial scandals at Enron and other companies and over 500 of whom were convicted.").

98. Fos et al., *supra* note 84 (regarding effect strengthening recently).

99. *See, e.g.*, Michael R. Siebecker, *The Incompatibility of Artificial Intelligence and* Citizens United, 83 OHIO ST. L.J. 1211, 1246 (2022) (describing the "tightening grip of corporate power on the political realm").

100. "CSR describes broadly a company's commitment to [social responsibility] goals. In contrast, ESG reflects a way to measure the societal impact by providing metrics." Thomas Lee Hazen, *Corporate and Securities Law Impact on Social Responsibility and Corporate Purpose*, 62 B.C. L. REV. 851, 854 (2021) (distinguishing the two concepts).

101. "Brands are increasingly taking public stances on divisive social and political issues, a practice referred to as corporate political advocacy." Chris Hydock et al., *Should Your Brand Pick a Side? How Market Share Determines the Impact of Corporate Political Advocacy*, 57 J. MARKETING RES. 1135 (2020).

102. On the importance of cueing and affective polarization, see Iyengar, *supra* note 74, at 399–400 (explaining how political campaigns provide "partisan cues" to the public). For critiques of ESG and corporate social responsibility platforms, including arguments that they may mask corporate managers' self-interested behavior, see STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER MAXIMIZATION 105–23 (2023).

103. Iyengar, *supra* note 72, at 399. Iyengar further observes, "[i]t is abundantly clear that elite rhetoric and campaign messaging in America have become more shrill and hostile over time." *Id.*

frequently equate "work" with personal identity,[104] workplace polarization is therefore far less of an "if" than a "when."

Notwithstanding the foregoing, we should consider the following caveat. Polarization may indeed be a weightier issue than it was two decades ago, but *how* and *where* it manifests itself is far from settled. It might affect some industries more than others. It might impact certain types of questions to a greater degree than others. And it may become more salient following a particular regime change, a hard fought election, or a highly disruptive court case.[105] Thus, for the compliance officer, polarization is a chronic background problem that exists but is still difficult to pinpoint or measure with any degree of precision. It is a variable that could easily skew and undermine compliance, but it is just amorphous enough to elude effective redress and neutralization.

B. Politicization

For years, the DOJ, a *de facto* regulator of corporate compliance, has been able to successfully avoid claims of partisanship and politicization. Particularly where corporate crime and compliance are concerned, most of the DOJ's harshest detractors have shied away from openly partisan attacks. Critics might complain that the Department is too sluggish in pursuing corporate officers, or that it has overreached in its treatment of a given corporate defendant, but for the most part, the Department's failures have been attributed to faulty prosecutorial assumptions or weak structures, and not pure partisan alignment.[106] If affective polarization continues to grow, this universalist perspective on federal enforcement may well be overtaken by a more polarized view of DOJ successes and failures.

Those familiar with the Department of Justice's contemporary treatment of corporate wrongdoing often trace the DOJ's corporate crime policies back to Eric Holder's 1999 memo advising of the standard factors prosecutors should weigh. Holder was the Deputy Attorney General during the Clinton Administration's waning years. When George Bush was elected president, Larry Thompson became the Deputy Attorney General, and the Holder Memo was superseded by the Thompson Memo.[107]

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at 407. On social media's effect on journalism and partisanship, see *id.* at 408–09 (reviewing competing findings of lesser or more heightened effects).

104. As Jayne Ressler argues, one's work relationships "can go to the core of the employee's sense of self." Jayne S. Ressler, *Workplace Anonymity*, 70 Buff. L. Rev. 1495, 1500 (2022) (citing Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 Wash. U. J.L. & Pol'y 163, 199 (2011).

105. "[Politically biased cognition] is nearly universal and is activated by the features of the local political environment (polarization, election proximity, media coverage, discourse from political elites, etc.)." Elizabeth Harris et al., *The Psychology and Neuroscience of Partisanship, in* The Cambridge Handbook of Political Psychology 50, 55 (D. Osborne & C. Sibley eds., 2022).

106. For my own gloss, see Miriam H. Baer, Myths and Misunderstandings in White-Collar Crime (2023).

107. Mark, *supra* note 29, at 1596. For a particularly cheery view of the Thompson Memo from the time, see Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecutions in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095 (2006).

There were, of course, differences between the Holder and Thompson memos, but there was far more that united them than divided them. Both memos began from the premise that corporations were subject to *respondeat superior*'s sweeping theory of vicarious criminal liability.[108] Both used the same general framework to weigh criminal charges versus a deferred or non-prosecution agreement. And both emphasized the value in inducing corporations to self-police and voluntarily cooperate with federal prosecutors in bringing individual officers and employees to account. They might have utilized different tools or language, but these were the kinds of differences that made for good debates among academics and practitioners. Thus, corporate crime policy was more or less *apolitical*, or at least *nonpartisan*.

Jennifer Nou observes that the term "politicized" is usually an epithet accusing an agency's "political appointees [of acting] in a nontechnical manner to achieve some partisan outcome."[109] An agency becomes overly "politicized" when its enforcement decisions lack objective explanation or appear designed to reward a leader's friends and punish his enemies.

Not every controversial policy decision is the product or evidence of politicization. For example, the Department of Justice might decide to shift more of its resources toward the investigation and prosecution of white-collar crime and away from immigration and drug enforcement (or vice versa). These are of course important policy decisions, but they resonate differently from a decision to punish Company A because its board is too "liberal" or reward Company B because its owners are "conservative."

To repel claims of politicization and partisanship, the Department of Justice's leaders and supporters have insisted on maintaining a strong independence norm, putting in place formal and informal constraints to limit the extent to which a President can deploy the government's punitive might or pull punches when the circumstances might warrant. In their historical account of the DOJ, Bruce Green and Rebecca Roiphe elaborate:

> Just as expertise formed the cornerstone of the administrative state, so too professional independence became the defining characteristic of the DOJ. . . . It grew to denote a distance from both the changing tide of popular opinion and the ambitions of partisan politics. In the wake of the Watergate scandal, the debate over how to

108. *Compare* Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., U.S. Dep't of Justice, to All Component Heads and United States Attorneys 2 (June 16, 1999), *with* Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Departments Components and United States Attorneys 2 (Jan. 20, 2003). For more on the static nature of the DOJ's approach (despite its many eponymous memos), see Julie R. O'Sullivan, *How Prosecutors Apply the "Federal Prosecutions of Corporations" Charging Policy in the Era of Deferred Prosecutions, and What that Means for the Purposes of the Federal Criminal Sanction*, 51 Am. Crim. L. Rev. 29, 30 (2014). On *respondeat superior* liability, see William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 Vand. L. Rev. 1343, 1364 n.89 (1999) ("The doctrine of respondeat superior, derived from tort law, views corporations as principals, and officers, directors, and employees as agents."). On the ways in which *respondeat superior* elevates the federal prosecutor to the role of overseeing corporate policing, see O'Sullivan, *supra*, at 29.

109. Jennifer Nou, *Constraining Executive Entrenchment*, 135 Harv. L. Rev. F. 20, 29 (2021).

> foster and ensure independence culminated in the explicit articulation of the separation of the DOJ from presidential control.[110]

Thus, independence and professionalism are two strong values that not only define the DOJ and its enforcement personnel, but which have also served as important elements in providing the Department requisite distance from partisan political disputes.[111] A "distanced" DOJ is one that is more likely to enjoy public support and respect and to avoid the animus associated with affective polarization.

Here too, the story takes a turn. Over the past two decades, the DOJ's studious independence, intended to protect it from claims of political partisanship, has faded. Early signs occurred during the Bush administration, when congressional hearings revealed efforts to dismiss United States Attorneys who were thought to be insufficiently loyal to the Bush administration's political agenda.[112] In later years, the DOJ was excoriated for its failure to successfully prosecute corporate executives responsible for the 2008 Financial Crisis. But these ills—distracting as they may be from the DOJ's core mission—are conceptually distinct from the issues that arose during and toward the end of the Trump administration's tenure. During and after the Trump presidency, the DOJ became "politicized," both in reality and perception. Numerous accounts indicate that the Trump administration's law enforcement decisions were made with an eye toward pleasing the former president, punishing his enemies, or somehow evening the "score" between Democrats and Republicans.[113]

Post-Trump, the DOJ has continued to attract politicization complaints—merited or not. Despite the current Attorney General's sterling reputation, numerous news organizations question whether his decisions are or could be viewed as "partisan." The Department's decisions to investigate efforts to overturn the 2020 election; to pursue individuals who participated in the January 6, 2020, insurrection; and to investigate and pursue the former president's failure to return materials to the National Archives have all been castigated at one point or another as politically motivated.[114]

How does the evolving perception of federal enforcement affect internal *corporate* compliance? Recall, compliance regulation has become nationalized and

110. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 39 (2018).

111. *See* Brian Richardson, *The Imperial Prosecutor?*, 59 AM. CRIM. L. REV. 39, 40 (2022) (citing the federal prosecutor's "unusually strong legitimacy and independence").

112. For discussion, see Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087 (2009). Later reports also suggested partisanship in hiring and the allocation of honors positions. *See* John Bresnahan, *IG Report: DOJ Under Bush Favored GOP-Conservative Job Candidates*, POLITICO (June 24, 2008), https://www.politico.com/blogs/politico-now/2008/06/ig-report-doj-under-bush-favored-gop-conservative-job-candidates-009900.

113. *See, e.g.*, Martin Pengelly, *Berman Book Prompts Senate Panel to Investigate Trump DOJ Interference*, GUARDIAN (Sept. 13, 2022), https://www.theguardian.com/us-news/2022/sep/13/senate-geoffrey-berman-trump-interference-prosecutions.

114. *See* Marc Caputo & Ryan J. Reilly, *"Rife with Political Risks": Why Garland Faces Tough Calls in Considering Trump Charges*, NBC NEWS (Sept. 8, 2022), https://www.nbcnews.com/politics/justice-department/rife-political-risks-garland-faces-tough-calls-considering-trump-charg-rcna46621.

entwined in federal criminal law.[115] The accounting fraud prosecutions that followed Enron and Worldcom's implosions focused the nation's attention on *federal* criminal law and its enforcement. The DOJ has long taken advantage of this focus by publicly advising of the corporate behaviors that would draw criticism and praise from federal prosecutors, and by fashioning non-binding policies that provide further guidance on when corporations can expect to receive leniency in exchange for information.[116] Now, however, if *federal* prosecutors become more politicized, corporate compliance officers will rightfully interpret prosecutorial decision-making through a more partisan and polarized lens. Notice, then, the double whammy: polarization and partisanship threaten the compliance function's ability to collect information from managers and employees, and at the same time, they also dampen the firm's willingness to voluntarily disclose information to regulators and prosecutors. Information thus encounters two difficult-to-remove bottlenecks.

In sum, given the centrality of the corporate compliance function's relationship with government enforcers, it is difficult to overstate politicization's negative impact on corporate compliance. In the next two sections, I flesh out what that impact might look like in both abstract and concrete terms.

C. Silos and Distrust

Much of compliance's challenge boils down to three issues: *First,* because corporate life is highly specialized, information is necessarily compartmentalized. A similar degree of compartmentalization exists throughout the enforcement ecosystem, as vertical and horizontal specializations in enforcement create barriers to the flow of information. As Veronica Root-Martinez has deftly explained, compliance-related information inside and outside the firm eventually becomes *siloed.*[117] *Second,* because corporate officers, rank-and-file employees, and government agents all have different agendas and interests, a pervasive trust vacuum further prevents information from making its way through the corporation (up to and including the board) and out to the stakeholders and enforcement agencies who could best use that information.[118] *Finally,* in addition to silos and trust vacuums, compliance is further hampered by self-interest.[119] When managers and mid-level supervisors can benefit from turning a blind eye and remaining silent

115. *See supra* Part II. The Department periodically revises its corporate enforcement policies. *See, e.g.*, Lisa O. Monaco, Deputy Att'y Gen., Remarks on Corporate Criminal Enforcement at New York University (Sept. 15, 2022), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement.

116. *See, e.g.*, Baer, *supra* note 51, at 351.

117. Root, *supra* note 14, at 1009.

118. Miriam H. Baer, *When the Corporation Investigates Itself*, *in* Research Handbook on Corporate Crime and Financial Misdealing 308 (Jennifer Arlen ed., 2018).

119. As James Park has argued, the corporate manager's self-interest can be intertwined with a desire to benefit the firm, especially when the wrongdoing pertains to how the stock market values the firm. James J. Park, The Valuation Treadmill: How Securities Fraud Threatens the Integrity of Public Companies 83 (2022) ("While there may be some cases where executives issue misstatements because of personal greed, there are others where they act to further corporate goals.").

(or simply convincing themselves that nothing untoward has happened), that is how they are likely to behave.[120]

One can argue that much of what we call "compliance regulation" is aimed at overcoming the triad of silos, trust issues, and opportunistic self-interest. That's all well and good if all one cares about is structure and the gaps that form when systems are neglected or poorly designed. Once we acknowledge polarization and politicization, however, the challenge of redressing this triad becomes more difficult. An information silo caused by poor system-design functions quite differently from the psychological silo erected out of deep-seated animus—and fear—of one's political adversaries. To be clear, this fear is not necessarily misplaced. Researchers have found that political "[p]artisanship motivates intergroup discrimination."[121] The worker fearful that a comment or challenge to authority will be viewed in a particularly negative way may well be right.

Trust issues within the company, as well as between the company and government enforcers, pose difficult hurdles. They are not insuperable, however, if one creates a credible architecture of incentives and behavioral supports.[122] That is indeed the compliance function's promise—that it will coordinate the relationship between employees and managers, and between managers and outside enforcers. It is also the primary reason structural innovations are assumed to be a "net good" even if they are initially costly. Notice, however, how easily compliance's architecture loses its effectiveness if the corporation's employees or officers become convinced that "politics" will supersede objective analysis and wipe out written policy. "Structure" cannot do too much if a company's employees see themselves as living in a world of hostile enemies.

My point here is not to predict some sort of Armageddon or total breakdown of the firm. Rather, it is to say that as our society becomes more polarized, and our enforcement institutions more politicized, the information bottlenecks of two decades ago will become stickier and more difficult to unclog. Information will continue to be suppressed and eventually lost, thereby causing the compliance function to suffer. Corporate teams will be less adept in identifying risks and less likely to pivot when those risks become more noticeable. In sum, compliance departments that continue to rely on the same techniques and methods that were once heralded as effective should eventually produce worse outcomes.

120. As Donald Langevoort has long argued, there is a distinction between rank opportunism and the type of wrongdoing that arises from excessive risk-taking, overly optimistic goal-setting, and self-deception. Langevoort, *supra* note 63, at 289. For the argument that corporate fraud is simply another way of meeting one's performance goal, see Baer, *supra* note 3, at 1620 (arguing that much wrongdoing "can be traced to unrealistic and unforgiving performance regimes").

121. Elizabeth Harris et al., *The Psychology and Neuroscience of Partisanship, in* CAMBRIDGE HANDBOOK OF POLITICAL PSYCHOLOGY 50, 51 (D. Osborne & C.G. Sibley eds., 2022) (describing one experiment in which participants "chose to work with a less competent partner" rather than a Republican or Democrat, "even though the task was entirely unrelated to politics (i.e., solving puzzles)").

122. On the need for trust between enforcers and corporate compliance officers, see Baer, *supra* note 121, at 308. Regarding the need for intrafirm trust and infrastructures that improve trust, see Baer, *supra* note 14.

Firms will, yet again, spend lots of money, only to ask why the compliance department failed to prevent tomorrow's scandal.

In the wake of scandals that result in large losses of money and systemic shocks, the compliance officer will find herself in a far more precarious position than she might have once expected. Compliance will, despite its many bells and whistles, find itself fighting for its future survival. To the architects and proponents of sweeping legislative reforms such as Sarbanes-Oxley, that may be cause for disappointment, if not outright surprise.

D. Practical Implications for Compliance and the Workplace

The preceding prediction—that polarization will continue and indelibly impact the corporate workplace and its broader enforcement network—is reflected in several workplace and enforcement-related trends, three of which I discuss here.

The first pertains to artificial intelligence (AI). AI is and has become a major feature of the private sector. Scholars such as Mihailis Diamantis have already written of the ways in which artificial intelligence impacts the incidence of corporate wrongdoing and compliance.[123] To a compliance officer, machines are both a boon and a burden. On the one hand, machines cannot fall prey to momentary impulses or moral failings; nor might they trigger liability under federal law's *respondeat superior* doctrine.[124] But machines *can* of course do quite a bit of harm depending on how they are programmed or how they ultimately "teach" themselves.[125] Moreover, because compliance has always depended on and included in its mission the inculcation of pro-social norms and values, the compliance function itself can never be fully automated. Compliance can *use* machines, but it should never be replaced by machines.

Notice how polarization and politicization alter this equation. In the abstract, there is some optimal mix of persons and machines that operate and govern the firm, hopefully all in compliance with the law. In a real world characterized by increasing levels of polarization and politicization, however, mechanization appears more desirable, at least initially. Machines do not belong to political parties. They don't fight over political issues or see their colleagues through a partisan prism. Nor do they create the political and social misalignment problems that underpin polarization and indirectly undermine corporate efficiency. Machines, moreover, offer companies the ability to disclaim bias or polarized thinking when someone questions a company's decision. Thus, we may end up with

123. "Advanced algorithms utilizing big data and artificial intelligence are rapidly reshaping every corner of modern business." Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. Rev. 893, 895 (2020).

124. *Id.* at 898–99.

125. On the ways in which machine-driven harm is in tension with conventional theories of corporate liability, see Mihailis E. Diamantis, *Employed Algorithms: A Labor Model of Corporate Liability for AI*, 72 Duke L.J. 797 (2022) (illuminating problem and setting forth proposal to treat some machine generated algorithms as corporate employees for liability purposes).

more AI and a greater reliance on machine-thinking than many would find optimal.

This is a problem on two levels. First, one can imagine multiple sectors and fields where an excessive reliance on AI produces worse outcomes. The field of compliance, for instance, relies on trust-building, information flows, and iterative relationships. To that end, one would expect interpersonal contact to be superior to machines in developing the kinds of norms and deep personal ties that compliance officers rely on to detect and prevent wrongdoing.

Moreover, an overreliance on machines may ironically strengthen affective polarization, advancing a pernicious feedback loop. Political psychologists posit that the best way to reduce affective polarization is to maintain structured settings in which different people can civilly interact with each other and decrease their hostility toward out-groups.[126] The workplace that replaces its employees with machines reduces opportunities for these healthy interpersonal contact opportunities To put it another way, affective polarization skews our preferences in the direction of machines and an overreliance on machines reinforces affective polarization.

A similar dynamic is embedded in the debate over remote work. As Covid-19 recedes, supervisors are debating how much to lean into this trend, and the debate is itself polarized along different socioeconomic lines. Some workers never left the workplace, others have yet to return, and many others have constructed a hybrid work week.[127]

How remote work impacts the incidence of corporate wrongdoing is difficult to predict and calculate. The vaunted "fraud triangle" tells us that deceptive crimes such as fraud are contingent on a triad of factors, namely opportunity, pressure, and self-rationalizations.[128] From a pressure standpoint, the fact that employees can work remotely can either empower employees (since they can apply for and accept jobs in locations far from home), or strengthen the hands of employers, who are no longer restrained to hiring from a specific location.[129] As for opportunity, for certain misconduct (including fraud and bribery), remote work could theoretically narrow pathways to violating the law, as employees can no longer easily speak to each other in person. (Savvy fraudsters

126. Matthew S. Levendusky & Dominik A. Stecula, We Need to Talk: How Cross-Party Dialogue Reduces Affective Polarization (2021).

127. Fabian Braesemann et al., *The Global Polarisation of Remote Work*, Plos One (Oct. 20, 2022), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0274630.

128. "The widely adopted framework known as the 'fraud triangle' identifies three main factors behind workplace fraud: (1) pressure, (2) opportunity, and (3) rationalization." Elizabeth Pollman, *Private Company Lies*, 109 Geo. L.J. 353, 378 (2020). For more on the triangle and its intellectual history, see Lederman, *supra* note 62, at 1157 (citing Donald R. Cressey, Other People's Money: A Study in the Social Psychology of Embezzlement 12 (1953)).

129. "Remote work solutions influence labor relations and change the bargaining power of capital relative to labor." Julia Puaschunder & Martin Gelter, *The Law, Economics, and Governance of Generation Covid-19 Long-Haul*, 19 Ind. Health L. Rev. 47, 84 (2022) (suggesting that capital comes out ahead).

should shy away from conspiring over email or recorded tele-meetings.)[130] At the same time, remote work can weaken the very norms and social ties that restrain employees from violating rules. Like AI, remote work reduces interpersonal, face-to-face contact among employees, suppliers, customers, and regulators. Less contact, in turn, may set us up for *more* affective polarization.[131] And finally, for certain industries, remote work could affirmatively *increase* the incidence of wrongdoing by causing a notable *decrease* in the likelihood of its prompt detection, as compliance officers and would-be whistleblowers lack the ability to witness and promptly act upon suspicions of wrongdoing.[132]

Sung Hui Kim highlights this point in her discussion of in-house attorneys as valuable gatekeepers. Information makes its way to gatekeepers through "formal" channels (e.g., reporting and disclosure requirements) and through "informal" channels, including "accidental, everyday social interactions among employees of the company who share the same physical space."[133] Notice the assumption upon which Kim's observation is built: that employees and inside attorneys (who could just as easily be replaced by compliance personnel) *share physical space*. If informal "information channels" benefit from fortuitous encounters, compliance personnel ought to resist work-from-home's expansion, all else being equal. After all, if it is water-cooler gossip that enables the compliance department to glean important information, work-from-home eliminates that information channel, leaving the firm worse off.

Here again, the reminder that we are undergoing a major shift in how we feel about "out-groups" provides a potent explanation for remote work's popularity. Even if remote work increases the risk of undetected wrongdoing—and inadvertently creates certain information silos —it may promote psychological benefits that make a polarized workplace more palatable. People who work remotely may be less likely to strike up conversations about politics. (They certainly are less likely to strike up *any* unplanned conversation, so political ones ought not to be any different.) Indeed, remote work may be the mechanism that enables an officer or employee to remain on the job, even when their politics are out of alignment with the larger group. This, perhaps, is one of the undiscussed silver linings of working from somewhere other than an office: it reduces the interpersonal costs that arise out of being a member of a misaligned team. Accordingly, we might hope that insofar as it paves the way for more heterogenous working groups, remote work might also facilitate a workplace with *less* herdlike

130. Ben Penn, *Pandemic Zoom, Teams Surge Offers Evidence Trove to Prosecutors*, BLOOMBERG (May 2, 2023), https://news.bloomberglaw.com/us-law-week/pandemic-zoom-teams-surge-offers-evidence-trove-to-prosecutors.

131. "[T]he personal becomes a bridge to improving the political, and we can build on people's personal experiences to ameliorate our politics." LEVENDUSKY ET AL., *supra* note 127, at 3.

132. "With this remote work comes challenges to employers as to how to monitor a workforce out of sight." Melissa Z. Kelly & Gregory P. Abrams, *High-tech, High-risk: Potential Pitfalls from Remote Employee Monitoring*, REUTERS (Dec. 6, 2022), https://www.reuters.com/legal/legalindustry/high-tech-high-risk-potential-pitfalls-remote-employee-monitoring-2022-12-06/.

133. Kim, *supra* note 56, at 453.

behavior, *less* political self-sorting, and *more* deliberative and valuable decision-making.

Notice, then, the dilemma: the very mechanism that deflates polarization's costs may also increase the risk of noncompliance. Without a supervisor or colleague nearby, it may be easier for an employee to commit fraud, bribery, or regulatory violations. But it may also be easier for that employee to make peace with people who adhere to different beliefs and ideologies.

Polarization and politicization shed additional light on a third trend, which pertains to compliance's enforcement Although it is difficult to say this with certainty, it certainly feels as if we are witnessing a defederalization of corporate compliance enforcement.

Sarbanes-Oxley may one day be viewed as a high-water mark in the federal system's regulation of corporate compliance. If we look back on this time period, we might conclude that the typical corporate compliance officer within a large or mid-size company was well versed in *federal* criminal and regulatory law. She hired attorneys at the top law firms to advise her on how best to deal with *federal* prosecutors and regulators, from the DOJ, to the SEC, to the local United States Attorneys' Offices.[134] She faithfully reviewed updates to the DOJ's charging memos and Organizational Sentencing Guidelines; and she was careful to follow the internal governance obligations set forth in legislation such as Sarbanes-Oxley and regulations set forth by the SEC. No wonder, then, that the companies who could afford to do so hired former prosecutors and regulators to staff their compliance departments and represent the company in corporate criminal inquiries.

Today, our compliance officer would be well advised to look beyond federal law. Corporate wrongdoing can be pursued globally, locally, and by civil complaint.[135] As a result, compliance is no longer solely the federal government's domain. Indeed, from this perspective, it may be highly fortuitous that the Delaware court's invigorated *Caremark* approach surfaced when it did, in 2019.[136] When the federal government's enforcement agencies lose political support and endure an erosion of legitimacy, we welcome other sources of enforcement to fill the gap.[137]

134. Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 Ariz. L. Rev. 1221 (2011).

135. On corporate criminal enforcement's global expansion, see Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. Cal. L. Rev. 697 (2020).

136. "[A]lthough Delaware courts in the past 'routinely dismissed *Caremark* claims at the motion to dismiss stage, even in the face of substantial 'corporate traumas,' a significant number of recent cases have survived the pleading stage." Stephen M. Bainbridge, *Don't Compound the* Caremark *Mistake by Extending It to ESG Oversight*, 77 Bus. Law. 651, 663–64 (2022). *See also* Shapira, *supra* note 34.

137. That's not to say those alternatives will be effective. Jennifer Arlen has warned that civil enforcement liability "is more vulnerable to companies' political influence than corporate criminal enforcement because both the President and Congress have a greater ability to intervene" in an agency's civil enforcement program. Jennifer Arlen, *Countering Capture: A Political Theory of Corporate Criminal Liability*, 47 J. Corp. L. 861, 864 (2022). Notice, however, that Arlen's comparison is still one of *federal* enforcement tools (criminal versus civil). If corporate crime and corporate compliance regulation

To that end, Delaware's re-emergence as a key regulator of corporate compliance is no accident. Indeed, it arguably represents a reversal of the "symbiotic federalism" concept that Marcel Kahan and Edward Rock heralded in 2005. Speaking of the relationship between federal and state corporate regulators, the professors wrote:

> If Delaware is not able to regulate certain conduct effectively, it is probably in its interest to have this conduct regulated on the federal level (or by other states) to fill the lacunae in its own law. Without such federal regulation, continued and unsanctioned wrongdoing could result in a populist backlash against Delaware as the provider of an ineffective regulatory regime . . . . [B]y making the system as a whole less scandal-prone, federal regulation reduces the likelihood of a populist attack.[138]

The authors, writing in 2005, were eerily prescient about how populist anger might engulf government institutions. The only point the authors failed to predict is that the federal government itself eventually became the target of such attacks.

There is nothing *per se* problematic about shifting from a federal approach to a more decentralized framework that emphasizes state and local enforcement personnel. If society finds state and institutions more democratically responsive to public demands, that shift may in fact be welcome. But here again, our experience with corporate debacles of the type that birthed Sarbanes-Oxley might give us pause. The very scope and complexity of corporate wrongdoing has long served as our reason for relying on a strong, federally coordinated enforcement response. If the federal government's enforcement apparatus does in fact become so "politicized" that it loses its legitimacy and ability to influence corporate behavior, it is far from clear that either state or local institutions will develop the necessary bandwidth to pick up the federal government's slack.

IV. Conclusion

It is beyond debate that compliance has solidified into a standardized, well-regarded governance function within large and publicly held corporations. Nevertheless, for reasons outside the compliance industry's control, corporate compliance remains fragile. If our society becomes more polarized and our enforcement institutions become more politicized and partisan, these developments inevitably will undermine the firm's internal compliance apparatus and the broader web in which corporations and enforcement agencies operate. Compliance is, after all, a story of relationships as much as it is a story of architecture, systems, and metrics. We know from the burgeoning literature on political psychology that our political views clearly impact how we receive information and how we see the world and each other.

become less "federalized" and also subject to overlapping enforcers, political interference and capture will become less predictable and possibly less of a problem.

138. Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 Vand. L. Rev. 1573, 1621 (2005).

For all those reasons, those of us invested in compliance's endurance should pay more attention to politics and its interaction with workplace psychology. For academics, this prescription arises at a fortuitous moment. Scholars have already begun to track the relationship between political partisanship and workplace behavior, and between political affiliation and corporate teams. Compliance scholars would do well to mine these literatures for their implications. Two decades ago, a legal academy that had just commenced its extended study of behavioral economics and social norms fruitfully exploited the behavioral and organizational psychology fields to better understand the dynamics of corporate wrongdoing.[139] Today, the academy should turn its attention to a different set of dynamics. To do otherwise is to set ourselves up for another round of corporate wrongdoing and failures.

139. Donald Langevoort's work paved the way for much of this analysis: Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law's "Duty of Care as Responsibility for Systems,"* 31 J. CORP. L. 949 (2006); Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007); and Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals about Self-Deception, Deceiving Others, and the Design of Internal Controls*, 93 GEO. L.J. 285 (2004).