

REFRAMING COMPLIANCE FOR A POLARIZED WORLD

Miriam H. Baer*

Corporate compliance relies on an intricate network of individuals and organizations to monitor and report wrongdoing. Compliance improves our collective well-being by curbing corporate misconduct and by facilitating the freer flow of information.

Despite notable failures, compliance has thrived over the past three decades, becoming a well-respected element of corporate governance and the impetus for the emergence of a lucrative and thriving industry.

Now, however, compliance faces a new challenge, as polarization has become the norm in American life. Political parties have grown more ideologically homogeneous, and politicians embrace more extreme variations of the positions they supported just a few years ago. Partisan thinking has moved beyond discrete political debates, spreading to the places where people live, socialize, and work. As it has done so, it has magnified hostility and tribalism between and among groups.

Networks create value when they diffuse information promptly and efficiently. Polarization damages compliance's relational nodes, and it undermines the critical thinking and risk-assessment skills that are so crucial to compliance's long-term success. If the compliance network is to survive, it will need to reorganize and reframe itself for a more polarized world.

This Article problematizes polarization's impact on compliance and its many components. It then pivots to

* Vice Dean and Centennial Professor of Law, Brooklyn Law School. The author thanks Wendy Couture, James Fanto, Andrew Gold, Claire Hill, Andrew Jennings, Sung Hui Kim, Donald Langevoort, Jamie Macleod, JS Nelson, David Orozco, Lauren Ouziel, Stephen Park, Sergio Gramitto Ricci, and Karen Woody for their comments and contributions, as well as participants in ComplianceNet's Annual Conference at American University Law School (June 2023), University of Oxford's Reputation Symposium (September 2023), the Business Associations panel for the American Association of Law Schools Annual Meeting (January 2024), and the National Business Scholars Law Conference at UC Davis (June 2024).

consider compliance's best strategies for withstanding and responding to polarization's formidable challenges. Some of compliance's best options are already well known; others will seem surprising. All are deserving of our consideration.

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INTRODUCTION

Compliance is a word of many meanings. In the corporate governance context, most people understand it to fulfill a well-recognized function, which is to help society enforce the law and hold corporate wrongdoers accountable for the harms they inflict on others.

Compliance knits together two different sources of oversight. It harnesses the corporation's *internal* monitoring capabilities, and in

doing so it enhances the government's *external* enforcement powers.¹ By strengthening the government's ability to detect and punish, compliance deters misconduct.² On a more granular level, it ensures that corporate employees comprehend the law and understand where and how to report violations.³ And finally, compliance—when it works—reassures the public that it can trust its organizations, institutions, and markets.

Over the past several decades, compliance has become not only an essential activity, but also a rather expensive one, supported by a billion-dollar industry.⁴ Law firms and consultants routinely market

1. "Institutionalizing compliance as an internal corporate monitoring mechanism appeal[s] not only to criminal enforcement authorities, but also to Congress and other federal regulators." Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2151 (2019) (explaining government's role in fostering and encouraging corporate compliance programs). "Compliance refers to a firm's effort to ensure that it and its agents adhere to legal and regulatory requirements, industry practice, and the firm's own internal policies and norms." Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 205 (2019).

2. "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 H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009).

Compliance pertains to a subset of risks that are best classified as internal to the corporation—those for which the corporation bears direct responsibility. That is, if the law explicitly requires or forbids certain conduct, then the corporation must proceed accordingly and can expect to be held accountable for any violation.

Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135, 2141 (2022).

3. "Compliance is the function...that helps to ensure that the organization, its employees, and its agents conduct their affairs in accordance with law, regulation, ethical standards, and any other external or internal rules or standards that the organization wishes its employees and agents to follow." James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 183, 190–91 (2021); see also Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077 (2016) (describing compliance activity as "the establishment of an autonomous department within firms to detect and deter violations of law and policy").

4. "[C]orporate regulatory budgets, in total, appear to dwarf all local, state, and federal law enforcement expenditures." William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 394 (2017). The market for compliance training alone has reached nearly \$5 billion, while the overall market for corporate compliance services is north of \$30 billion. *Corporate Compliance Training Market Forecast to 2030: Growth Fueled by Advancements in Online Learning Technologies*, YAHOO! FIN. (Jan. 24, 2024), <https://perma.cc/YV2Z-SCNM> (reporting training costs); *ERGC Market Analysis- 2026*, FORTUNE BUS. INSIGHTS (Dec. 23, 2024), <https://perma.cc/9L2Q-C9Y4> (projecting that compliance market will exceed \$40 billion in 2024); Geoffrey Parsons Miller, *The*

their compliance-related services to private and public corporations.⁵ Graduate and professional schools train students in oversight activities,⁶ and academics painstakingly document compliance's successes and failures.⁷

At the very moment that compliance has evolved into a mature industry, our society has begun to experience a salient and formidable phenomenon: polarization.⁸

Like the term compliance, polarization is also a word of many meanings. Today, it has become a term of art that measures a nation's political and social cleavages.⁹ Throughout numerous contexts,

Compliance Function: An Overview, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 981, 982–83 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (tracing compliance's historic growth as an essential corporate governance function).

5. “[P]resent-day compliance is a profession unto itself, with its own educational programs, professional associations, consulting companies, and standalone corporate departments.” William R. Heaston, Comment, *Copycat Compliance and the Ironies of “Best Practice,”* 24 U. PA. J. BUS. L. 750, 757 (2022). See generally Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 169 (2015).

6. Fanto, *supra* note 3, at 185 (noting growth of law school and university compliance-related course offerings); Miriam H. Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599, 1607–09 (2020) (citing growth of compliance-related courses of study in both law and business schools); D. Daniel Sokol, *Teaching Compliance*, 84 U. CIN. L. REV. 399, 400, 415–17 (2016) (criticizing then-extant law courses as lacking sophistication and suggesting alternative teaching methods).

7. See, e.g., Gadinis & Miazad, *supra* note 1, at 2154–56 (emphasizing cooperate law scholars distrust compliance); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 253–55 (2020); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 328–29 (2017); Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 210–11 (2017); David Orozco, *Compliance by Fire Alarm: Regulatory Oversight Through Information Feedback Loops*, 46 J. CORP. L. 97, 99–102 (2020); Donald C. Langevoort, *Global Behavioral Compliance*, in CORPORATE COMPLIANCE ON A GLOBAL SCALE: LEGITIMACY AND EFFECTIVENESS 217 (Stefano Manacorda & Francesco Centonze eds., 2022).

8. See generally Miriam H. Baer, *Corporate Compliance’s Achilles Heel*, 78 BUS. LAW. 791 (2023) [hereinafter *Achilles Heel*] (reflecting on compliance’s growth in the decades following the Sarbanes-Oxley Act and observing polarization’s parallel growth during that time-period).

9. “Extreme partisan polarization is now the ‘defining attribute’ of the U.S. political system.” Yasmin Dawood, *The Fragility of Constitutional Democracy*, 77 MD. L. REV. 192, 197 (2017) (quoting Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011)); see, e.g., Shanto Iyengar et al., *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 130 (2019) [hereinafter *Origins and Consequences*] (“America, we are told, is a divided

researchers in the United States have observed “stark disagreement” between Democrats and Republicans on “the economy, racial justice, climate change, law enforcement, international engagement, and a long list of other issues.”¹⁰ Although the country’s two political parties have long diverged on major issues, those disagreements have grown stronger, more solidified, and more extreme since the turn of the twentieth century.¹¹ Whereas the two major political parties once housed politicians of different and shifting beliefs, they have become ideologically homogeneous. That homogeneity, in turn, has begun to breed a degree of hostility unknown to recent generations.¹²

It is important to underscore the degree to which these cleavages have slowly developed over time. Polarization’s first cracks appeared long before President Trump’s first administration, and even before terrorists attacked the World Trade Center on September 11, 2001. Thus, it is wrong to conceptualize polarization as a recent phenomenon; it has been with us and growing for a long time.

By the same token, it is also incorrect to downplay our current degree of polarization, chalking it up to current events or assuming it is merely another peak in a recurring cycle. The issue is not simply that we Americans disagree on policy; rather, it is that our *affect* has changed.¹³ The gap between our feelings for political copartisans (“in-groups”) and our feelings towards political opponents (“out-groups”) has grown substantially. And that difference in affect has altered our allegiances in other walks of life.¹⁴

nation. What does this mean?”); MARK JURKOWITZ ET AL., PEW RSCH. CTR., U.S. MEDIA POLARIZATION AND THE 2020 ELECTION: A NATION DIVIDED (2020), <https://perma.cc/BP4E-P2FA> (citing degree of polarization between Democrats and Republicans in the lead-up to the 2020 election). Scholars and commentators disagree on the reversibility and origins of the country’s social and political divisions.

10. Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide*, PEW TR. MAG. (Mar. 29, 2021), <https://perma.cc/6RC3-HGX7>.

11. See Dawood, *supra* note 9. “The rise of affective polarization—most notably the tendency for partisans to dislike and distrust those from the other party—is one of the most striking developments of twenty-first-century US politics.” J.N. Druckman et al., *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (2021) (footnotes omitted).

12. See *infra* Part II and notes, pp. 124–29.

13. Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 690 (2015) (explaining concept of affective polarization).

14. See Dimock & Wike, *supra* note 10. “Ordinary Americans increasingly dislike and distrust those from the other party.” *Origins and Consequences*, *supra* note 9; see also MICHAEL DIMOCK ET AL., PEW RSCH. CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE (2014), <https://perma.cc/E6BY-7ENZ>.

Polarization demands new thinking from the corporate enforcement field.¹⁵ How boundedly rational actors behave in a complex environment changes quite a bit when viewed under polarization's lens.¹⁶ To be sure, incentives still matter, but they matter in different ways when our populace becomes polarized. Accordingly, if we want to better understand the underpinnings of a successful enforcement regime supported by compliance, we need to take partisanship into account. The degree of alignment between an actor, her workplace, and a governing party can play a huge role in the incidence, detection, and remediation of wrongdoing.¹⁷ Scholars, accordingly, should more routinely incorporate this political lens into their analyses of corporate behavior and enforcement.

This Article applies this new thinking by hypothesizing polarization's impact on compliance. Compliance is an intricate network of corporate employees and managers, third-party intermediaries, and government actors.¹⁸ The compliance network enhances corporate enforcement, both by deterring bad behavior *and*

15. Fortunately, scholars have already begun to address these issues in adjacent fields. For an excellent overview of the ways in which political posturing impinges on operational decision-making, see generally Jill E. Fisch & Jeff Schwartz, *How Did Corporations Get Stuck in Politics and How Can They Escape?*, 3 U. CHI. BUS. L. REV. 325 (2024) (analyzing and criticizing corporate political posturing); Anthony J. Casey & Tom Ginsburg, *Kalven for Corporations: Should For-Profit Corporations Adopt Public Statement Policies?*, 3 U. CHI. BUS. L. REV. 305 (2024) (proposing a neutrality principle for corporate officers and directors). On the political biases of corporate officers, directors, and managers, see Reilly S. Steel, *The Political Transformation of Corporate America, 2001-2022*, at 52 (Colum. L. & Econ. Working Paper, Paper No. 4974868, 2024), <https://perma.cc/K5KX-2ANS> (measuring political bias among corporate officers, directors, and supervisors, and finding a detectable leftward tilt over a two-decade period). Regarding corporations and their interventions in political disputes generally, see generally Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441 (2019) (analyzing the ways in which corporations have waded into social and political disputes to satisfy various stakeholders).

16. Bounded rationality reflects the actor's inability to calculate and analyze predicted outcomes, relying instead on heuristics and proxies. See generally HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: ECONOMIC ANALYSIS AND PUBLIC POLICY* (1984). On its application to corporate behavior, see John T. Scholz, *Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory*, 60 LAW & CONTEMP. PROBS. 253, 256 (1997).

17. See, e.g., Libby Maman, Yuval Feldman & Tom Tyler, *Polarization and Voluntary Compliance: The Impact of the Ideological Extremity on the Effectiveness of Self-Regulation*, 19 REGUL. & GOVERNANCE 1, 4 (2025) (hypothesizing that ideologically extreme polarization on the far right or left can impact the citizenry's willingness to trust or cooperate with institutions); see also *infra* Part III (discussing pathologies of excessive alignment and misalignment within corporate teams).

18. See generally *infra* Part I.

by quickly channeling information to those who can best act on and use it. To be sure, the network is far from perfect, but it has added sufficient value over the years, so much so that it has increased in size, substance, and importance.¹⁹

Polarization threatens to upend this intricate network. Indeed, polarization poses an acute threat to the compliance world precisely because it undermines the crucial personal relationships (the so-called network ties) that enable information's flow.

Just as there are many types of compliance, so too are there many varieties of polarization. *Ideological* polarization depicts the degree of space separating the major political parties on social and political issues. Ordinary differences of opinion are normal and welcome; in a democratic society we expect people to disagree and debate their disagreements.²⁰ *Extreme* polarization, however, undermines democracy by driving up hostility and animus.²¹ Moreover, like other types of motivated reasoning, polarization encourages individuals to ignore countervailing facts regarding a range of issues.²²

When *ideological* polarization morphs into *affective* polarization, we create a world in which individuals instinctively register great warmth toward copartisans and significantly greater enmity towards antagonists.²³ These wide swings in warmth and enmity spell trouble

19. On the difficulties of measuring compliance's value, see Todd Haugh & Suneal Bedi, *Valuing Corporate Compliance*, 109 IOWA L. REV. 541, 562 (2024) (observing that "legal liability avoidance—what most companies view as the primary goal of their compliance programs—is not a reasonably measurable metric").

20. Regarding the potential benefits of polarization, see Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, 34 CURRENT OP. BEHAV. SCI. 179, 179 (2020) (opining that polarization "[a]t its best" can be valuable insofar as it "encourages civil engagement" and produces "pluralistic policy alternatives"). See also Lilliana Mason & Julie Wronski, *One Tribe to Bind Them All: How Our Social Group Attachments Strengthen Partisanship*, 39 ADVANCES POL. PSYCH. 257, 257 (2018) (noting that pluralism has long served in democratic theory as a "source of stability for American peace and democracy").

21. "[I]ntense, seemingly intractable political conflict along multiple lines of divergence might threaten national unity and constructive opportunities for compromise." John T. Jost et al., *Cognitive–Motivational Mechanisms of Political Polarization in Social-Communicative Contexts*, 1 NATURE REVS. PSYCH. 560, 560 (2022) (contrasting ideological ordinary "ideological debate" with extreme polarization); see also Lauren Ouziel, *Prosecutors as Partisans*, 50 FORDHAM URB. L.J. 1093, 1107 (2023) (arguing that severe polarization can "divide societies, impoverish critical analysis, and prevent the political compromises necessary for stable responses to societal challenges").

22. See *infra* Part II and notes, pp. 124–29.

23. "We define *affective polarization* as the tendency of people identifying as Republicans or Democrats to view opposing partisans negatively and copartisans positively This affective separation is a result of classifying opposing partisans as members of an outgroup and copartisans as members of an ingroup." Iyengar & Westwood, *supra* note 13, at 691.

for a project that relies heavily on voluntary interactions between and among individuals and organizations.²⁴ In other words, polarization imperils compliance.

Compliance relies on a multitude of vertical and horizontal exchanges of information. When polarization truncates those exchanges, it leaves in its wake numerous dead spaces and informational black holes within the compliance network. Even when it leaves relationships facially intact, polarization can fuel the kinds of extremism, blind allegiance, and pathologies in groupthink that lead decisionmakers astray.²⁵ Polarization makes compliance less effective, and in doing so, it renders organizations more prone to wrongdoing, corruption, and the chaos that accompanies scandal and organizational rot.

Fortunately, there is a silver lining to this story. Networks can fix themselves. They can adapt to changed circumstances and emerge stronger and more effective. That means compliance may be able to reconfigure itself to withstand polarization's worst features. Indeed, it may be the case that compliance itself comprises certain features that make it *better* able to survive polarization, provided researchers and policymakers identify and emphasize them. Accordingly, after calling attention to this problem, this Article surveys a series of approaches that offer the promise of enabling the compliance network to reframe itself. Each offers its own advantages and drawbacks, and none are sure bets for an industry and function seeking to re-energize itself. All, however, are worthy of consideration and further analyses beyond this project. Rome wasn't built in a day, and compliance cannot fix itself without the sustained attention of those who practice and study it.

The remainder of this Article unfolds as follows: Part I explains why compliance is best conceptualized as a sophisticated network of private and public actors who devise, coordinate, and implement rules and policies. Two distinct missions drive the network's development: inducing corporate actors to desist from wrongdoing, and enabling societal actors to make more informed decisions.

Part II synthesizes the polarization literature. It begins by discussing political party alignment and ideological sorting, and then progresses to issues such as affective polarization and motivated reasoning.²⁶ Part III hypothesizes polarization's impact on corporate

24. On the importance of trust in growing and maintaining social networks, see Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. 1653, 1668 (2023) ("[T]rust is a key element of social capital."). See also *infra* Part II and notes, pp. 124–32.

25. See *infra* Section II.C and notes, pp. 130–31.

26. Affective and ideological polarization are distinct concepts. It is possible for someone who holds "moderate" political beliefs to also show strong signs of affective polarization. *Origins and Consequences*, *supra* note 9, at 131 ("[W]e argue that affective polarization is largely distinct from the ideological divide,

compliance.²⁷ It opens by considering polarization's impact on the frequency and degree of corporate wrongdoing, and then proceeds to examine polarization's interference with the compliance network's response to such wrongdoing.

Part III's conclusions are sober: Polarization threatens the compliance network from top to bottom. It can cause pathological tendencies *inside* the firm, and it can erode information pathways *outside* the firm, causing the compliance network to ultimately become a hollowed-out shell.

With the preceding Sections' warnings in mind, Part IV surveys three potential approaches for reframing a stronger, less vulnerable compliance network. The dominant theme underlying all three is the need for mechanisms that forge new identities and reduce hostility and animus.²⁸ They include: the professionalization of compliance; the re-emergence of organized labor and private sector unions; and the widespread activity of "brand management" by corporations, in an effort not only to shore up support with consumers, but also with employees and other stakeholders.

Each of these strategies is quite different from the other, in that each features different methods and goals. Nevertheless, all three strategies can generate the kinds of big-tent identities that scholars often cite as polarization's partial cure. Or, to put it another way: If we can forget for a minute our political, economic, and social disagreements and instead bond over our identities as compliance professionals; as workers and union members; and as stakeholders affiliated with a specific corporate brand, we might forge new relationships and connections, thereby reviving and improving the compliance network's infrastructure.

The Article concludes with a call for stronger attention to compliance's relationship with polarization. Both are still relatively young academic disciplines, and both stand to benefit greatly from interdisciplinary analyses. The study of polarization highlights compliance's shortcomings and challenges; the study of compliance can help us develop strategies to ameliorate polarization. Over the

and that extremity in issue opinions is not a necessary condition for affective polarization."); *see also* Eli Finkel et al., *Political Sectarianism in America*, 370 *SCIENCE* 533, 533 (2020) (explaining differences between policy-driven and nonideological polarization, the latter of which the authors refer to as "political sectarianism").

27. "Today, the federal government, through regulators and enforcement officials, supplements its own enforcement of laws and regulations, which constitutes 'external control,' with the 'internal control' conducted by the organizations themselves." Fanto, *supra* note 3, at 191.

28. "[T]he evidence suggests that making partisanship and politics less salient—and emphasizing other factors—can potentially change behavior as well." *Origins and Consequences*, *supra* note 9, at 140.

long run, discoveries in both fields will help us face the challenges of a turbulent, more highly charged political atmosphere.

I. THE COMPLIANCE NETWORK: DETERRENCE AND INFORMATION

As this Article advised in its opening paragraphs, compliance is a word of many meanings. Even when a speaker uses the narrower term, “corporate compliance,” the term can imply several different concepts.²⁹ Accordingly, this Part opens by conceptualizing compliance as a network of individuals and organizations and then proceeds to describe compliance’s two core missions, improving behavior and facilitating information’s flow.

A. *Compliance as a Network*

Concrete compliance *activity* includes everything from educating employees on relevant laws, to monitoring systems for risk, to investigating and remediating specific instances of wrongdoing.³⁰ The compliance *mission* is one that seeks to reduce corporate wrongdoing by engaging in a series of operational and governance-related activities.³¹

Ironically, “compliance law” is the compound term that rings most hollow. It does not exist. There is no single volume of statutes that sets forth corporate compliance obligations in detail for all private and public corporations. Instead, the compliance industry owes its existence to a confluence of legal and extralegal sources. Laws such as the Sarbanes-Oxley Act have required public companies to improve their internal controls and financial reporting.³² The Department of Justice’s Federal Principles of Prosecution of Business Organizations and the organizational provisions of the Federal Sentencing Guidelines create strong incentives for public *and* private companies to adopt internal compliance programs.³³ Since the mid-1990s, the Delaware courts have recognized and reinforced a type of liability (coined “*Caremark* liability” for its originating case) that forces board members to ensure a system of adequate oversight of

29. “Compliance . . . means different things to different people within a company based on factors such as the industry sector and the particular level of actors within a firm.” Sokol, *supra* note 6, at 401.

30. See Root, *supra* note 1, at 247.

31. See Griffith, *supra* note 3, at 2077–78.

32. See *Achilles Heel*, *supra* note 8, at 796–98 (tracing Sarbanes-Oxley’s trickle-down effects on corporate compliance); Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179, 195–96 (2020) (describing Sarbanes-Oxley and its impact on corporate governance).

33. The Department of Justice has made clear that it is “in the business of promoting compliance programs.” Jacob T. Elberg, *Neither Carrots nor Sticks: DOJ’s Unfulfilled Commitment to Corporate Health Care Compliance*, 2022 WIS. L. REV. 691, 696 (2022) (citing DOJ official’s 2019 remarks at Compliance Week’s annual conference).

managers and employees.³⁴ Finally, Congress, state legislatures, and federal regulators have enacted statutes and regulations that command compliance-related activities for specific industries and sectors.³⁵ Despite—or perhaps because of—compliance regulation’s multiple layers, corporate officers and directors exercise a remarkable amount of discretion in how they write and implement compliance policies across their respective companies.³⁶

“Compliance” is thus an essential component of the corporation’s operation; all employees are vested with the responsibility for complying with the law. Nevertheless, the compliance *function* is the subset of activities we say corporate managers and board members are legally responsible for implementing and overseeing.³⁷ A firm’s compliance *department* may be a standalone department that reports directly to a Chief Compliance Officer (with or without dotted line reporting to the Board), or it may be a subsidiary department of the General Counsel’s office.³⁸ An *industry* of intermediaries, comprised of former compliance officers and regulators, as well as those with quantitative and legal expertise, stand ready to advise the firm and

34. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 961 (Del. Ch. 1996). On *Caremark*’s complicated relationship with compliance, see generally Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727 (2018). Regarding the emergence of a stronger oversight duty in Delaware courts, see Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1893 (2021) (explaining how newer rounds of *Caremark* litigation have “led legal advisers and their [corporate] clients to rethink and refine their record-keeping” which is itself a deterrent to wrongdoing and a benefit for regulatory enforcement authorities tasked with pursuing and proving wrongdoing).

35. Fanto, *supra* note 3, at 192–94 (citing compliance’s “regulatory origin story”).

36. “Despite the multiple layers of external rules that overlap on the same compliance issue, companies tend to wield a significant amount of discretion in coordinating the rules in their related party transaction policies.” Geeyoung Min, *Strategic Compliance*, 57 U.C. DAVIS L. REV. 415, 431 (2023).

37. See Jennifer Arlen, *The Compliance Function*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe, eds., 2d ed., forthcoming), <https://perma.cc/WUT2-9M8H>; see also Miller, *supra* note 4, at 982–85 (tracing compliance’s evolution as an internal control function); Fanto, *supra* note 3, at 184 (describing compliance as a “separate and established function” in organizations).

38. Fanto, *supra* note 3, at 203–04 (advising that “it is becoming standard practice for the CCO to report directly to the board or board committee in addition to reporting to the CEO or another senior executive”); Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 73–75 (2014) (citing divergent reporting structures).

lobby regulators and prosecutors on laws and regulations relevant to government enforcement and compliance policy.³⁹

Many people contribute to and sustain the compliance *network*, but not all of them are employed by a specific corporation's compliance department. Some participants devote full-time attention to compliance-related issues, whereas others are only episodically or tangentially involved. Either way, all network participants directly or indirectly contribute to compliance's dual missions: deterring undesirable behavior and facilitating information's effective and quicker flow.

B. *Deterring Wrongdoing*

For many, compliance is primarily a story about following the rules⁴⁰—either because one feels compelled to do so by informal or formal sanctions, or because one believes it is the right thing to do.⁴¹ Accordingly, most discussions of deterrence are premised either on some variation of cost-benefit analysis,⁴² or are instead founded in

39. Several adjacent “industries” have further contributed to the compliance network's growth. *See also* Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 YALE J. ON REG. 688, 693 (2023) (explaining how whistleblower programs have fueled the creation of a lucrative “tip-sifting” practice for private attorneys in small law firms).

40. *See, e.g.*, Haugh & Bedi, *supra* note 19, at 549 (arguing that compliance's “primary purpose is to deter employees and managers from committing legal violations, both criminal and civil”).

41. For the classic account of the rules-morality tension, see Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106. On the comparative benefits of extrinsic and intrinsic motivations to comply with the law, see Maman et al., *supra* note 17, at 2 (arguing that intrinsic motivations to comply with the law are “more sustainable and higher quality than enforced compliance”); Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227, 228 (2002) (setting forth framework for understanding when “morality”—which can be externally or intrinsically motivated—bests “law” in regulating conduct). On the relationship between intrinsic motivations (e.g., complying because of intrinsic desire to be virtuous) and extrinsic ones (complying to avoid social opprobrium), see Yuval Feldman, *The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law*, 35 WASH. U. J.L. & POL'Y 11 (2011).

42. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968) (formal economic treatment of deterrence). For additional refinements, see Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1233–35 (1985). On the complexities of applying deterrence theory to organizations, see generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

social norms⁴³ and organizational culture theories.⁴⁴ Either way, the assumption is that compliance—for all its shortcomings—is a valuable enterprise.⁴⁵

1. *Compliance as Deterrence*

Deterrence theory rests primarily upon a familiar cost-benefit analysis maxim.⁴⁶ Corporations and individuals obey the law when the costs of a violation, modified by its likelihood of detection, are greater than the perceived benefit of transgressing the law.

By its very terms, the deterrence model requires a healthy, well-oiled enforcement machine. A putative offender's perception of likely punishment is what forces the would-be violator to "internalize" the costs she imposes on others.⁴⁷ If the costs of incurring a violation appear miniscule in comparison to the costs of abiding by the law, rational actors will repeatedly choose the former over the latter.⁴⁸ Moreover, if one corporation openly violates the law with impunity,

43. See, e.g., Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 3 (2000).

44. "Corporate compliance is generally considered to have two main areas of focus: deterring violations of law and generating positive norms." Nathaniel Grow & Todd Haugh, *Assessing the NCAA as a Compliance Organization*, 2021 WIS. L. REV. 787, 822 (2021). As for culture, "many in compliance consider norm generation as the way to build an ethical corporate culture, which helps reduce wrongdoing without employing more formal and costly legal mechanisms." *Id.* at 823.

45. On compliance's enforcement-related benefits, see, for example, Gadinis & Miazad, *supra* note 1. On the ways in which it often falls short of its mission, see, for example, John Armour et al., *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 3 (2020) (citing a "series of recent corporate scandals [that] all follow a depressingly similar pattern: directors and officers appear to have short-changed compliance with law in pursuit of short-term financial gains").

46. "A central question in business regulation is what set of incentives would optimally deter wrongdoing." Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 510 (2020). "Much thinking about law compliance derives from rational-actor models, which emphasize penalties and probabilities of detection and conviction as core determinants of legal versus illegal behavior." John M. Conley et al., *Can Soft Regulation Prevent Financial Crises?: The Dutch Central Bank's Supervision of Behavior and Culture*, 51 CORNELL INT'L L.J. 773, 811 (2019).

47. "[I]njurers efficiently 'internalize' the costs of their acts when they face an expected cost that mirrors the social impact of their deeds." Brian Galle & Murat Mungan, *Predictable Punishments*, 11 U.C. IRVINE L. REV. 337, 339 (2020).

48. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003) (explaining that "establishing some base expectation of a meaningful chance for punishment is a necessary condition to any deterrent effect"). The problem, which Robinson and Darley point out, is that it is much harder to manipulate this cost-benefit analysis than lawmakers frequently realize. *Id.*

its rational competitors will eventually follow suit, particularly when legal compliance appears extremely costly.⁴⁹

As this rational actor model demonstrates, compliance requires more than an internal department that mechanically recites legal obligations. It requires vigilance, oversight, and surveillance—what Jennifer Arlen and Marcel Kahan refer to as skilled internal corporate “policing.”⁵⁰ Moreover, the deterrence model further presupposes a healthy government enforcement-apparatus to which the corporate enforcer will transmit its evidence of wrongdoing.⁵¹ For compliance’s behavioral mission to work, two networks—one nominally private and the other conceptually public—must be healthy, efficient in operation, and in constant contact with each other.

The government can enhance its enforcement powers by: (a) hiring skilled enforcement attorneys; (b) implementing statutes and policies that require self-monitoring; *and* (c) embracing an unforgiving liability rule that holds the corporation vicariously liable for its employees’ crimes.⁵² This last point explains the doctrine known as *respondeat superior*. Under this doctrine, an organization can be held criminally liable for its member’s crime any time that member acts within the scope of her authority and with even a partial intention of benefitting the organization, such as propping up the company’s stock price.⁵³

49. “The public punishment of those who violate [social norms reflected in criminal law] enables the law-abiding to define themselves as such in contrast to those who are not, and, not incidentally, reinforces the view that those who comply with the law are not saps or dupes, but the righteous and respected majority.” Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 46 (1997).

50. Arlen & Kahan, *supra* note 7, at 354–57 (introducing the concept of corporate policing and “policing agency costs”).

51. Within this symbiotic relationship, the compliance officer relies on a strong government presence to formally discipline wrongdoers, and the government draws on corporate compliance to enhance its monitoring capabilities. See Brian D. Feinstein et al., *In-Group Favoritism as Legal Strategy: Evidence from FCPA Settlements*, 60 AM. BUS. L.J. 5, 27 (2023) (describing the relationship between corporate defense counsel and government enforcement agencies in FCPA cases as “very much a symbiotic one”).

52. See generally *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909). See also Miriam H. Baer, *Forecasting the How and Why of Corporate Crime’s Demise*, 47 J. CORP. L. 887, 892 (2022) (arguing that *New York Central* and its progeny have “enable[d] the government to threaten nearly all major corporate actors with prosecution under a variety of circumstances”).

53. “[A]n organization is liable for the misconduct of its employee if the employee was acting within their apparent authority and acted with an intention of aiding the corporation—even if the actor’s primary intention was directly contrary to the organization’s policies—with no requirement that the organization in any way encouraged, condoned, or rewarded the misconduct.” Elberg, *supra* note 33, at 696–97.

When all facts are easily observed, vicariously punishing the corporate employer for the employee's wrongdoing is straightforward. Indeed, were the government omniscient, it would be able to prosecute hundreds of corporate offenders every year.⁵⁴ But, the government is *not* omniscient, and it has little interest in prosecuting minor violations of law. Accordingly, prosecutors have developed, through their charging discretion, a "shadow law" of criminal liability that effectively replaces *respondeat superior*.⁵⁵ Under this shadow law, criminal charges hinge on factors such as the corporation's compliance efforts, its willingness to cooperate with prosecutors, and its inclination to prevent further wrongdoing by improving its operations and governance structures.⁵⁶ It is this "shadow law" that has given birth to the corporation's compliance function.

In sum, compliance expands and strengthens the government's limited enforcement capabilities. Expanded enforcement, in turn, improves deterrence.⁵⁷ Many agree enforcement rates (however low they might be) would drop were the compliance function to disappear.⁵⁸ As one Biden DOJ official publicly acknowledged, "[W]e could never completely identify and address this area of criminality

54. That the government can choose its targets is itself a form of discretionary power. "The American prosecutor is famously the king or queen of discretion: discretion to decide whom to prosecute for what offenses and whom to leave unmolested by legal action." Brewster & Buell, *supra* note 7, at 207.

55. "[T]hese [government charging] policies—which I refer to here as the DOJ's shadow law of corporate criminal liability—narrow the sweep of the respondeat superior rule and replace it with a framework premised on a mishmash of fault principles, regulatory aims, and prudential considerations." Baer, *supra* note 52, at 893.

56. *Id.* at 893–94 (describing and critiquing corporate crime's shadow law).

57. Shapira, *supra* note 34, at 1890 (citing the many "problems with regulatory enforcement have led to an increased emphasis on internal compliance").

58. "Convictions for crime in the suites are harder to secure than for crime in the streets because of the complexity of financial records, organizational complexities, and legal complexities, and because of highly paid lawyers who know how to game these complexities." John Braithwaite, *Scaling Up Crime Prevention and Justice*, in 50 CRIME AND JUSTICE: A REVIEW OF RESEARCH 247, 255 (Michael Tonry eds., 2021); *see also* Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, in NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH 156, 162 (Tina Søreide & Abiola Makinwa eds., 2020) [hereinafter *Promise and Perils*] ("The threat of individual criminal liability for corporate misconduct generally is not effective when government officials are the only parties seeking to detect misconduct."); Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 2023 U. ILL. L. REV. 673, 729 (2023) [hereinafter *Battle for Our Souls*].

without corporations—our corporate citizens—coming forward and reporting the conduct of these wrongdoers.”⁵⁹

2. *At the Employee Level: Uncertainty and Risk*

For government prosecutors and agencies, the compliance network is a net positive. So long as it can verify the company's information as truthful and accurate, the government comes out ahead. To the corporate employee, compliance is more ambiguous. On the plus side, education and training can help the employee become better aware of her legal obligations and allow her to avoid inadvertent violations.⁶⁰ Moreover, a strong compliance program can instill a sense of fair play⁶¹ within a competitive workplace and emphasize pro-social norms.⁶² A well-designed compliance program can also reduce the guesswork involved when an employee observes a peer (much less a supervisor) engaging in wrongdoing. Through the department's well-publicized programs, she learns whom to call, what to expect, and receives reinforcement in the ethical and practical values of reporting wrongdoing.⁶³

Unfortunately, on-the-ground compliance does not always function in a structured, predictable way. A company can implement whistleblower programs that are pretty on paper, but ineffective on the ground.⁶⁴ Its compliance officials can slow-walk or purposely sit

59. Kenneth A. Polite, Jr., Assistant Att'y Gen., U.S. Dep't of Just., Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023), <https://perma.cc/6MEW-EM7T>.

60. “Most consider the starting point for all compliance to be educating employees on what the applicable laws and company policies are and how to comply.” Grow & Haugh, *supra* note 44, at 825.

61. Cf. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1109 (2014) (speaking of labor and employment compliance: “[e]mployees benefit from lawful pay, safe working conditions, and nondiscriminatory policies; employers benefit by operating on a level playing field, without being undercut by competitors who save money by paying lower wages, skimping on costly safety measures, or otherwise disregarding their legal obligations”).

62. “[P]eople must be regularly reminded of the prohibition to help ensure that it is foremost in their mind when an opportunity to violate the law arises.” *Battle for Our Souls*, *supra* note 58, at 699.

63. One can say, as scholars explained years ago, that compliance creates a “focal point” that coordinates the efforts of different individuals who are inclined to uphold the law by reporting wrongdoing. See Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87, 88–119 (2005).

64. See Braithwaite, *supra* note 58, at 258 (describing how “beautiful paper policies on whistleblowing led to ugly practices of dead-end accountability” (citing Eugene Soltes, *Paper Versus Practice: A Field Investigation of Integrity Hotlines*, 58 J. ACCT. RSCH. 429 (2020))).

on information rather than convey it to proper parties.⁶⁵ Employees may find themselves the targets of soft retaliation and other silencing mechanisms that are harsh enough to make work life miserable, but not concrete enough to warrant a lawsuit or government investigation.⁶⁶ Thus, for all the good it can do, compliance can fail, sometimes in spectacular ways.

Even in companies that avoid the worst scandals, employees may come to view the compliance department as a tool for managerial abuse.⁶⁷ At a minimum, compliance entails workplace monitoring and surveillance—what can easily become excessive and insufficiently restrained surveillance.⁶⁸ It may result in a surfeit of rules (some valuable, some not⁶⁹) and lead to scapegoating and pretextual punishments.⁷⁰ One need not be an expert in human behavior to see how excessive surveillance creates a dystopian workplace that crowds out the internal motivations for abiding by the rules,⁷¹ and therefore

65. See *id.* (referencing findings indicating that ineffective hotlines “shunt complainants to willfully closed doors”).

66. See *The Whistleblower’s Dilemma: Do the Risks Outweigh the Benefits?*, KNOWLEDGE WHARTON (Nov. 5, 2019), <https://perma.cc/8V7W-R79A>.

67. See *The Impacts of Corporate Compliance Programs*, PITT L. ONLINE BLOG (Apr. 6, 2023), <https://perma.cc/5Z38-62CB>. Fears of weaponized compliance reflect broader debates over employee autonomy and the control of their private information. See generally Matthew T. Bodie, *The Law of Employee Data: Privacy, Property, Governance*, 97 IND. L.J. 707, 711 (2022) (arguing that “law should empower employees with respect to their data across a variety of contexts”).

68. “Employers are, to a large extent, legally unrestricted in their ability to monitor or surveil their employees.” Robert Sprague, *Privacy Self-Management: A Strategy to Protect Worker Privacy from Excessive Employer Surveillance in Light of Scant Legal Protections*, 60 AM. BUS. L.J. 793, 794 (2023). “Ubiquitous employer surveillance of workers has a long and rich history as a defining characteristic of workplace power dynamics” Ifeoma Ajunwa et al., *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 737 (2017).

69. See Grow & Haugh, *supra* note 44, at 829–30 (describing the phenomenon of “over-compliance” whereby companies reflexively grow their compliance organizations and generate redundant rules in response to scandals and public outcry); see also Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197–208 (2015) (applying overcriminalization critique to growth of corporate compliance).

70. See generally William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 659 (2002) (explaining how “decentralized, divisionalized” corporations are particularly “well designed to scapegoat employees successfully without detection”).

71. “[W]hen an individual encounters an extrinsic incentive (e.g., a payment or fine) to encourage good behavior, the incentive may displace or erode her *intrinsic* motivation for good choices.” Kristen Underhill, *Money That Costs Too Much: Regulating Financial Incentives*, 94 IND. L.J. 1109, 1111 (2019) (explaining crowding out phenomenon). For limitations on the theory (particularly, where incentives to engage in wrongdoing are high), see *Battle for Our Souls*, *supra* note

perversely undermines deterrence.⁷² These are issues that exist in even the healthiest of societies, an assumption I relax greatly when discussing our polarized electorate in Part II.

3. *The Primacy of Early Disclosure*

Many observers cite the difficulties of policing a complex organization while keeping current with a rotating and expanding set of enforcement agencies and rules.⁷³ New administrations and new laws thus trigger a series of credibility questions: How can a company be certain that its internal policing will produce the government's promised reward of leniency by regulators and prosecutors? And, how can an organization be certain that its investment in compliance today will pan out under a new administration and its various policies tomorrow?

One of the standard tools for addressing this uncertainty is what economists call costly signaling, wherein the speaker makes claims and commitments that can be verified and distinguished from cheap talk.⁷⁴ The *government* can engage in costly signaling and thereby quell concerns that its policies are fleeting cheap talk. At the same time, *organizations* can also engage in costly signaling and persuade skeptics that their commitment to compliance is both sincere and long-lasting.

For example, in recent years, the DOJ has engaged its costly signal by moving away from an open-ended list of factors by which individual prosecutors *might* reward corporate self-disclosure, and instead tying its leniency to more concrete factors, such as the corporation's early self-disclosure of wrongdoing.

A useful example is the Foreign Corrupt Practices Act (FCPA) pilot enforcement program, which eventually became the model for the DOJ's corporate enforcement policies. In exchange for a corporation's voluntary disclosure that one of its employees had bribed a foreign official, it could receive a full declination of charges,

58, at 693 n.99 (citing "recent experimental studies [that] provide evidence contrary to the crowding out hypothesis").

72. "[O]ne of the most important aspects of compliance success is the internal legitimacy of the compliance program within the organization." Grow & Haugh, *supra* note 44, at 791 (citing Tom Tyler et al., *The Ethical Commitment to Compliance: Building Value-Based Cultures*, 50 CAL. MGMT. REV. 31, 33 (2008)); see also Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 317, 333 (1999); Paine, *supra* note 41, at 106, 110–11.

73. "What counts as fraud or extortion can depend on changing markets and shifting understandings in rapidly evolving economies." Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 553 (2015).

74. Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1220 (2007) (distinguishing cheap talk from costly signaling).

avoid a costly monitor, and receive a reduction of recommended fines by as much as 50 percent.⁷⁵ On the other hand, if the corporation waited until *after* the initiation of an investigation to provide cooperation, it could receive no more than 25 percent off the recommended fine.⁷⁶ Thus, in a clear and salient manner, the Pilot Program dramatically altered the relative costs and benefits of early disclosure.⁷⁷

In the past, it might have been unclear how the DOJ might treat an “early” admission compared to a late one if the latter were accompanied by full-throated cooperation; today, that difference is much sharper. Moreover, it has spread from violations under the FCPA⁷⁸ to all federal prosecutions of corporations,⁷⁹ including those involving national security.⁸⁰ Moreover, it has also influenced the government’s treatment of *individual* wrongdoers who seek the government’s leniency in its execution of prosecutorial discretion.⁸¹

75. Leslie R. Caldwell, *Criminal Division Launches New FCPA Pilot Program*, DOJ: OFF. OF PUB. AFFS. (Apr. 5, 2016), <https://perma.cc/D9QP-WQXY>.

76. *Id.* (“[I]f a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates . . . but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing. By contrast, when a company . . . voluntarily self-discloses misconduct, it is eligible for the full range of potential mitigation credit.”).

77. Karen E. Woody, *Corporate Crime and Cooperation*, 79 BUS. LAW. 65, 77–94 (2024) (tracing the evolution of the DOJ’s cooperation policies from the open-ended Holder Memo of 1999 to the far more detailed Monaco Memo announced in 2022); see also Lucinda A. Low & Brittany Prelogar, *Incentives for Self-Reporting and Cooperation*, in NEGOTIATED SETTLEMENTS IN BRIBERY CASES: A PRINCIPLED APPROACH 200, 210–11 (Tina Søreide & Abiola Makinwa eds., 2020).

78. See Caldwell, *supra* note 75. As of this writing, the Trump administration has indicated its intention to pull back on FCPA enforcement. Since this is a non-statutory development, and therefore can be reversed at any time, it arguably leaves intact the benefits of self-monitoring and early disclosure. See, e.g., Exec. Order 14209, 90 Fed. Reg. 9587 (Feb. 14, 2025); *FCPA Enforcement Under the Second Trump Administration*, MORRISON FOERSTER (Feb. 12, 2025), <https://perma.cc/R56P-ZC96> (arguing that “organizations are best served by staying the course on ensuring anti-bribery and anti-corruption compliance” given that the FCPA remains good law and carries a statute of limitations of five years).

79. The Monaco Memo expands this approach to all corporate wrongdoing. See Memorandum from Lisa Monaco, Deputy Att’y Gen., U.S. Dep’t of Just., to Assistant Att’y Gen., Crim. Div., et al. (Sept. 15, 2022), <https://perma.cc/ZMS6-XNWT>.

80. Satish M. Kini et al., *DOJ National Security Division Issues First-Ever Declination Under Enforcement Policy*, DEBEVOISE & PLIMPTON (May 29, 2024), <https://perma.cc/GJP3-ASN5>.

81. See U.S. DEP’T OF JUST., THE CRIMINAL DIVISION’S PILOT PROGRAM ON VOLUNTARY SELF-DISCLOSURES FOR INDIVIDUALS (2024), <https://perma.cc/Y6WA-FA7M>. “The Pilot Program offers a clear path for voluntary self-disclosure by certain corporate executives and other individuals who are themselves involved in misconduct by corporations, in exchange for a Non-Prosecution Agreement

4. *Compliance as Norms-Building*

The preceding Sections have assumed that employees and firms respond rationally to incentives. An alternative theory of law abidingness is that people comply with the law because of their intrinsic beliefs or values, which in turn may be amplified by their communities, by the society in which they live, and by their organization's specific culture.⁸² Under this norms-based model, corporate managers instinctively believe a particular activity is the "right thing to do."⁸³ The same actors may also share an ingrained preference for being seen as good citizens, and they very likely view their government systems favorably, or at least as generally "legitimate."⁸⁴

Whether these norms are wholly intrinsic or partially instrumental, they can be enhanced by the company's compliance program, which in turn can influence the corporation's culture.⁸⁵ Compliance can make the company less cutthroat, less inclined to crown winners and sweep aside losers, less tolerant of anything-goes behavior, and less credulous of pie-in-the-sky promises and revenue goals.⁸⁶

Norms-based rhetoric enjoys a complicated relationship with deterrence-based policies. A corporation might instruct its employees to "do the right thing" in its Code of Conduct, referencing the workforce's intrinsic values, even though the company's officers are

(‘NPA’).” *DOJ Promises NPAs to Certain Individuals Through New Voluntary Self-Disclosure Program*, CROWELL & MORING (Apr. 23, 2024), <https://perma.cc/3C2M-C7CF>.

82. On norms generally, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1991). “[T]he law enlists the force of internalized morality to achieve the ends of the state.” Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1597 (2000); see also Shavell, *supra* note 41, at 232.

83. Cooter, *supra* note 82, at 1577 (quoting Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 46 (1997)). For a recent analysis of corporate culture, its impact on wrongdoing, and an argument calling for punishment of corporate executives in relation to such cultures, see Elise Bernlohr Maisel, *Illegal Corporate Cultures*, 75 DUKE L.J. (forthcoming 2025).

84. For early work on norms and their intersection with law, see, for example, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030–31 (1996).

85. See Haugh & Bedi, *supra* note 19, at 550 (arguing that one of compliance's missions is the generation of prosocial norms).

86. Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1624 (2007) (“No legal entity has an express policy of encouraging criminality, but some undoubtedly have cultures that enable and even promote an aggressive posture toward legal constraints, or do not condemn or punish misconduct unless it is detected publicly.”).

motivated primarily by instrumental leniency policies and the threat of harsh sanctions. In other contexts, norms and deterrence move in opposing directions. Instead of surveilling and disciplining employees, the normative approach might call for a stronger emphasis on corporate culture and strengthening feelings of community.⁸⁷

It is important to emphasize the limitations of a norms-based theory and of approaches that seek deterrence by demanding “good” organizational cultures. Years of organizational behavior research confirm the strong role that motivated reasoning plays in enabling wrongdoing. Executives are extremely adept at convincing themselves that they are fully in compliance with the rules, that their firm’s culture is healthy and law-abiding, and that they are in fact good agents and acting faithfully on behalf of the organization.⁸⁸ If that is the case, then “good norms” (and even “good culture”) may have limited effect in tamping down organizational wrongdoing.

C. *Facilitating the Flow of Information*

As the preceding Section demonstrates, the deterrence and norms frames both direct attention to the corporation’s internal operations. Compliance is something that corporations “do” to reduce wrongdoing, and if they do a good job, their company receives a reward, such as a prosecutor’s declination of charges.

In fact, compliance relies heavily on many actors *outside* the corporation.⁸⁹ Moreover, its mission is much broader than behavior modification. One of the reasons the compliance *network* has grown despite embarrassing episodes of wrongdoing is that it still facilitates a quicker and more efficient flow of information, both inside the firm and out.⁹⁰

Compliance, in other words, is an information-producing network. Many of the very policies and programs it touts as effective deterrents (e.g., deferred prosecution agreements, government

87. Normative approaches are also less “legalistic.” Fanto, *supra* note 3, at 222 (“[Organizational and business ethics scholars argue that] compliance is most effective when it fosters ethical decision-making and an ethical culture in an organization, rather than focusing primarily on legal compliance.”).

88. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 146 (1997) (“[A]ntisocial behavior in business settings may be less the product of base moral corruption than of the ability of normal people in stressful environments to distort and rationalize.”).

89. On the many consultants who guide companies in their identification and remediation of compliance risks, see Asaf Eckstein & Roy Shapira, *Compliance Gatekeepers*, 41 YALE J. ON REG. 469, 473 (2024).

90. See Katherine J. Strandburg et al., *Law and the Science of Networks: An Overview and an Application to the “Patent Explosion,”* 21 BERKELEY TECH. L.J. 1293, 1310 (2006).

leniency and whistleblowing policies) *also* serve its information-channeling mission.⁹¹

Information can be used for multiple purposes besides deterrence. It can be assembled in a manner to hold wrongdoers accountable in a court of law (what one might call a retributive purpose, separate and apart from deterrence). It can be used to hold government officials accountable for their actions or lack thereof. It may allow *investors* to intelligently allocate their capital. And, it can enable legislators to make informed policy decisions. The compliance network endeavors to meet all of these needs by ensuring the flow of information from offices, conference rooms, and shop floors, to the public and private stakeholders enjoying the power to make material legal and economic decisions.

Accordingly, “compliance” is more than the product of a singular, internal department that coordinates training programs and revises business codes of conduct. Rather, compliance is comprised of a complex *network* whose many members serve as conduits (or, in network theory “nodes” or “ties”) between companies and government agencies, and between the private sector and the general public.⁹²

Like any network, the compliance network is comprised of strong (iterative, close) and weak (sporadic, casual) relationships; these are what network theorists commonly refer to as “ties.”⁹³ Network

91. “A network, consisting of ‘nodes’ and ‘links,’ may be a group of individuals linked by friendship or commerce, a group of computers linked by network cables, a nervous system, a system of roads or airline flights, a collection of cracks in the earth, a group of patents and the citations between them, or another of a virtually limitless variety of systems of connected ‘things.’” *Id.* at 1295 (defining term with reference from network theory).

92. For an introduction to network theory and related theories of human and social capital, see generally Ronald S. Burt, *Structural Holes and Good Ideas*, 110 AM. J. SOCIO. 349 (2004); Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOCIO. 1360 (1973); Mark S. Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOCIO. 481 (1985); James Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOCIO. SUPP. S95 (1988). Much of this analysis serves as the foundation for studies of productivity and innovation. See, e.g., Laura G. Pedraza-Fariña & Ryan Whalen, *A Network Theory of Patentability*, 87 U. CHI. L. REV. 63, 98 (2020) (“Networks can provide powerful insight into how high-impact, new ideas are generated.”). Scholars have expanded network theory’s application, using it to understand criminal networks, Barak Ariel et al., *“I Heard It Through the Grapevine”: A Randomized Controlled Trial on the Direct and Vicarious Effects of Preventative Specific Deterrence Initiatives in Criminal Networks*, 109 J. CRIM. L. & CRIMINOLOGY 819, 821 (2019), and corporations, Lawrence E. Mitchell, *Structural Holes, CEOs, and Informational Monopolies: The Missing Link in Corporate Governance*, 70 BROOK. L. REV. 1313, 1320 (2005).

93. For the seminal treatment of strong and weak ties, see Granovetter, *The Strength of Weak Ties*, *supra* note 92, at 1366 (explaining how “weak tie” individuals broker information between disparate groups, which is itself a source of leverage). Healthy networks benefit from a mix of strong and weak ties. See

participants transfer information to each other and produce knowledge.⁹⁴ In compliance-speak, they convey emerging threats; reveal root causes; locate new ways to disable, identify or short-circuit malevolent schemes; and convey many other valuable nuggets of information. Most importantly, through multiple and redundant pathways, network actors bridge “structural holes” enabling corporations to learn more quickly that something is amiss and allowing enforcers to develop evidence necessary to hold wrongdoers accountable.⁹⁵

Compliance officers therefore serve as more than employee ombudsmen or deputy government officials. They are, in this network, information coordinators and conduits. They oversee monitoring efforts, initiate and facilitate investigations, convey information to corporate board members and outside counsel, and verify information as it makes its way to enforcers and the general public.⁹⁶ When information about wrongdoing—or about the laws that define wrongdoing—quickly moves from point A to point B, the compliance officer who harnesses such information reduces the severity and likelihood of harm. Even if the network fails to deter antisocial behavior (or to do so completely), it still promotes social welfare insofar as it accelerates the movement of valuable information from one part of the network to the other.⁹⁷

Consider one of the enduring problems in organizational life: information black holes caused by structural silos, a factor that corporate defense attorneys tend to emphasize after a compliance

Longqi Yang et al., *The Effects of Remote Work on Collaboration Among Information Workers*, 6 NATURE HUM. BEHAV. 43, 43 (2022).

94. The concept is discussed heavily in the patent literature. See, e.g., Pedraza-Fariña & Whalen, *supra* note 92, at 99 (“[J]oining disparate or weakly connected portions of a social network can lead to valuable intermingling of information that otherwise would not be recombined.”). The important point here is that these are not merely “social” networks, but instead “information” networks that benefit from the joining of information units. *Id.*

95. For an early application of network theory and structural holes to better understand the origins and persistence of wrongdoing within large, publicly held corporations, see Mitchell, *supra* note 92, at 1321.

96. For network-based discussions of corporate wrongdoing and compliance, see Todd Haugh, *Leading A Healthier Company: Advancing A Public Health Model of Ethics and Compliance*, 58 AM. BUS. L.J. 799, 804 (2021) (using network theory to better understand corporate wrongdoing); Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129, 164–65 (2018) (examining the role of “network effects” and network theory in ethical and corporate criminal misconduct).

97. The compliance network is far from the *only* source of information. Litigation has long served an information-producing role. See, e.g., Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Providing Information*, 91 WASH. L. REV. 1193 (2016); Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. 907, 907–08, 931–32 (2018).

failure comes to light.⁹⁸ When the left hand doesn't know what the right hand is doing, opportunities multiply for wrongdoing to occur and go undetected. A network that breaks down those silos and encourages information sharing across structural "holes" enables compliance officers and others to develop useful knowledge and intervene before maleficent schemes grow too large or harmful.

There exists another problem: Information can sometimes become "bottlenecked" within the firm by a bad actor.⁹⁹ An employee who has witnessed wrongdoing reports what he knows to a manager or even a compliance department, and the information is promptly buried—either because the manager perceives the information through a distorted lens or because the manager wishes to evade detection. In the worst of these scenarios, the firm visibly and unaccountably retaliates against the whistleblower employee, causing other employees to revert to strategies of silence or exit.¹⁰⁰ Information thus becomes hidden and blocked from enforcement officials; other employees decide not to report anything, lest they suffer the blowback of managerial revenge.

A healthy compliance network undoes the bottleneck; in fact, it keeps it from forming in the first place. It develops alternative and safer reporting channels, such as anonymous reporting hotlines and government bounty programs. Moreover, it reduces the likelihood of corporate retaliation by implementing anti-retaliation measures.

These informational measures, commonly referred to as whistleblowing policies, are often seen as enforcement tools that improve accountability and deterrence. Certainly, one can see them in that vein. But even if they have no effect on underlying behavior, they still create new reporting channels for corporate employees and thereby enable the quicker flow of information.

With this network in mind, one can understand why the discovery of a scandalous, criminal scheme (or even many), is far from the strongest threat to compliance. It is hardly a secret that companies violate the law or that some compliance regimes are more adept than others in preventing and detecting wrongdoing. All of this is to be expected. What does, however, pose an existential threat to compliance is the emergence of a contagion that erodes network ties and stymies the flow of information. From that perspective, one can

98. Buell, *supra* note 86, at 1625 ("Private organizations are relatively opaque, the more so the larger and more sophisticated they are. Layers of hierarchy must be penetrated to reach principal actors. Division of labor makes ascription of responsibility for conduct and results challenging.").

99. Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1114 (2006) (describing "information blocking and filtering by executives and subordinate managers").

100. For the classic account of these organizational dilemmas, see generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

understand why the polarization phenomenon described in Part II poses such a daunting threat.

II. FROM POLARIZATION TO PARTISANSHIP: GOING TO EXTREMES

Over the past half-century, political and social psychologists have measured the beliefs and homogeneity of the Democratic and Republican parties and the American electorate. This work conclusively establishes that American politics has become more politically and ideologically polarized over the past half-century, certainly at the “elite” level, and very likely across the electorate.¹⁰¹

Scholars often say that the two major political parties have become more ideologically sorted; their members’ beliefs are more homogeneous and therefore, in the minds of many, increasingly more extreme.¹⁰² At the same time, society has become more fragmented in its consumption of leisure and information.¹⁰³ As individuals obtain their news and enjoy free time in a more siloed manner, they are thought to become more absolutist in orientation, more prone to conspiratorial thinking, and more steeped in social bias.¹⁰⁴

Before outlining polarization’s implications for compliance in Part III, I briefly synthesize this literature, concluding with a discussion of polarization’s most concerning aspect, its “affective” dimension.

A. *From Politics to Identity*

For years, the American public has been polled on its political and social beliefs, and its attachment to the two major political parties, the Democrats and Republicans. These surveys ask responders to categorize themselves as “strongly” attached to X party,

101. See generally JAMES E. CAMPBELL, *POLARIZED: MAKING SENSE OF DIVIDED AMERICA* (2016) (citing polarization at both elite levels and across the electorate).

102. MORRIS P. FIORINA, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING AND POLITICAL STALEMATE* 77–79 (2017); see also Mason & Wronski, *supra* note 20, at 260–63 (using data from the American National Election Survey to show increasing political and social sorting since 1972).

103. On the segmentation of media consumption among and between partisans, see MATTHEW D. LUTTIG, *THE CLOSED PARTISAN MIND: A NEW PSYCHOLOGY OF AMERICAN POLARIZATION* 27–36 (2023). For discussion of affective polarization’s interaction with social media, see Steve Rathje et al., *Out-Group Animosity Drives Engagement on Social Media*, PNAS, June 23, 2021, at 1.

104. According to Iyengar et al.’s 2019 analysis, some of our worst fears about affective polarization have yet to come to pass: “While provocative, and certainly part of the popular discourse, the scholarly evidence on social homophily is mixed.” *Origins and Consequences*, *supra* note 9, at 136. Nevertheless, the authors concede that families and online news audiences have become more polarized. *Id.*

less strongly attached, “lean” toward X party, and so forth.¹⁰⁵ Other polls have surveyed Americans’ ideological commitments (liberal, progressive, conservative, and so forth).¹⁰⁶ Over the years, a detectable number of individuals—in both parties—have shifted toward the extreme poles of political and ideological spectra.¹⁰⁷ This migration to the poles easily predates the election of Donald Trump and similar politicians.¹⁰⁸

Numerous studies show that political parties have realigned and become homogeneously “sorted” in terms of ideology.¹⁰⁹ Whereas some conservatives once occupied the Democratic party and a small group of liberals could be found in the Republican party, those overlaps no longer exist.¹¹⁰ In addition, individuals who may have once shifted on different issues are now more solidified in relation to their governing ideology; as a result, their political party has become “an important form of social identity.”¹¹¹ Thus, if one were to plot ideological viewpoints on a straight line, one would find more conceptual space between the most liberal Republican and the most conservative Democrat. Party members—especially politicians—no longer overlap and are less likely to cooperate or sponsor bipartisan legislation.¹¹²

As a result of party-sorting, ordinary voters are far less likely to “split their ticket” between one party nationally and another party at the state or local level, or between the executive and legislative branches.¹¹³ Moreover, party identification has also become

105. See Domenico Montanaro, *Feel Like You Don't Fit in Either Political Party? Here's Why*, NPR (Nov. 9, 2021), <https://perma.cc/TQN2-8Q7W>.

106. See Lydia Saad, *U.S. Political Ideology Steady; Conservatives, Moderates Tie*, GALLUP (Jan. 17, 2022), <https://perma.cc/W92G-YQS6>.

107. See, e.g., Matthew D. Luttig, *The “Prejudiced Personality” and the Origins of Partisan Strength, Affective Polarization, and Partisan Sorting*, 39 ADVANCES POL. PSYCH. 239, 239 (2018) (observing that “scholars agree that partisanship has become stronger, affective partisan polarization more intense, and partisan-ideological sorting more pervasive”). James Campbell opens his book with the following warning: “America is polarized. Our political parties are highly polarized, and the American electorate is highly polarized. By highly polarized, I mean there are substantial differences in political perspectives across a single ideological dimension.” CAMPBELL, *supra* note 101, at 1.

108. It also extends beyond the United States. On the global aspects of polarization, see Finkel, *supra* note 26, at 533 (citing four nations, including the United States, whose rates of increase in sectarianism have been greatest from 1975 through 2017).

109. “[P]arty sorting is the key to understanding our current political turbulence.” FIORINA, *supra* note 102, at 15.

110. See generally MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* (2009).

111. Iyengar & Westwood, *supra* note 13, at 690.

112. See, e.g., ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 13 (2010).

113. In the 1950s and ’60s, ticket splitting was modest; it increased substantially in the ’70s and ’80s, and then waned, dropping to an amount lower

consonant with other distinctions in American life, such as race, educational attainment, and geography.¹¹⁴ Thanks to this “social sorting,” one’s political party is now commonly tied up in one’s social identity,¹¹⁵ and that identity has been shown to have a stronger effect on behavior than racial bias.¹¹⁶

According to social identity theorists, when multiple identities converge into a single identity, they become stronger and more solidified, rolling up into a “mega” identity, which increasingly informs the individual’s worldview and guides her decision-making.¹¹⁷ This, in turn, promotes self-esteem and also provides epistemic meaning.¹¹⁸ Moreover, partisanship and the strong connection with one’s group may play in particular to a certain

than the ’50s in 2012. CAMPBELL, *supra* note 101, at 121. Fiorina attributes the reduction in ticket-splitting to party sorting. FIORINA, *supra* note 102, at 15 (“[T]oday’s homogeneous parties increasingly offer [voters] a choice between a liberal Democrat and a conservative Republican for every office, so there is not as much of a reason for voters to split their tickets now as there was in earlier decades . . .”).

114. See Mason & Wronski, *supra* note 20, at 260–62, 265. “As partisan and ideological identities [became] increasingly aligned, other salient social identities including race and religion, also converge[] with partisanship.” *Origins and Consequences*, *supra* note 9, at 134.

115. Mason & Wronski, *supra* note 20, at 259 (“[A]n individual’s partisan identity can also be treated as a social one, which is to say that this identity is not entirely dependent upon logical policy-based decisions.”).

116. Iyengar & Westwood, *supra* note 13, at 695–96 (finding, from experimental survey, that politically mediated bias outweighs implicit racial bias).

117. “Today, Democrats and Republicans are more likely to live in different communities, pursue different hobbies, attend different houses of worship, and associate with different cultural signifiers like cars and clothing brands. Disentangling this tightly coiled set of traits, which scholars refer to as ‘mega-identity,’ can be an insurmountable challenge.” Feinstein et al., *supra* note 51, at 8–9 (citing LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 14 (2018)). In a separate piece, Mason and Wronski contend that the convergence of social and political identities renders individuals less tolerant of each other. See generally Mason & Wronski, *supra* note 20. The cumulative effect of similarly aligned identities strengthens the sense of “us versus them” thinking. *Id.* at 263. “Conversely, when group identities are cross-cutting . . . individuals are generally found to be more tolerant, less biased, and feel more positive emotions toward outgroups.” *Id.*

118. According to Matthew Luttig, partisanship fills an acute need among those who crave “cognitive closure” and certainty. LUTTIG, *supra* note 103, at 11. “For people who are closed, partisanship has become less about emotional goodwill than about cognitive certainty regarding who is one of ‘us’ and who is one of ‘them.’” *Id.* On the ways in which groups provide epistemic meaning and construct shared realities, see *id.* at 14–18 (summarizing literature).

personality trait, namely those who harbor a need for “cognitive closure.”¹¹⁹

Most agree that the political “elite” (activists, politicians, and political donors) have become more ideologically extreme and that social and political sorting dynamics have altered American politics and social life.¹²⁰ Some scholars reject the claim that the entire electorate (the “normal people” according to Morris Fiorina) has grown more ideologically extreme, in part because of relative consistency in answers to periodic surveys about hot-button topics such as abortion and firearms.¹²¹ Others disagree with this claim, drawing on additional evidence of polarization across numerous fields.¹²² As James Campbell observes, the question is one of degree: “[A] nation that is 40% moderate and 60% ideological (liberal or conservative) operates quite different politically from one that is a 50-50 split.”¹²³

In any event, regardless of how *ideologically* polarized the electorate has become, it clearly has become more *sectarian*, and its degree of *affective* polarization may be the metric of most interest to those whose study corporate compliance, a topic I describe in the next Section.

B. *From Identity to Affect*

Up until recently, one might have concluded that “polarization” is primarily an ideological or political phenomenon, and that beyond certain freighted issues, it is unlikely to affect daily workplace interactions in all but a few specific industries or positions. More

119. *Id.* at 54 (concluding that a series of studies “suggest that stronger levels of the need for cognitive closure are associated, among the politically attentive, with being a more group-centric type of partisan”).

120. “In sharp contrast to Congresses elected a half century ago, in most recent Congresses the party distributions do not overlap: the most liberal Republican falls to the right of the most conservative Democrat.” FIORINA, *supra* note 102, at 18.

121. *Id.* at 21–22 (contrasting the “political class,” who make up 15% of the electorate with the “normal people” who comprise the remainder). Presumably, many of the corporate teams that are the focus of corporate governance scholarship would easily fall within Fiorina’s “political class,” which also include donors and trade lobbyists.

122. Luttig argues that once one views polarization, as Iyengar and others have, as a form of affect and not as the outgrowth of a debate over discrete policies, polarization’s rise becomes quite clear. LUTTIG, *supra* note 103, at 9. Speaking of this debate, Matthew Levendusky concedes, “In the end, the evidence suggests that this type of mass ideological polarization is limited, though voters’ issue positions have become considerably more strongly related to their partisanship over time, a process known as partisan sorting.” MATTHEW LEVENDUSKY, OUR COMMON BONDS: USING WHAT AMERICANS SHARE TO HELP BRIDGE THE PARTISAN DIVIDE 5 (2023).

123. CAMPBELL, *supra* note 101, at 3.

recent literature, however, demonstrates the emergence of *affective polarization*, a social and psychological phenomenon with wide-ranging influence and diffusion across societies.

Affective polarization describes the gap between one's feeling towards one's in-group (often referred to colloquially as one's "tribe") and one's feeling towards an out-group.¹²⁴ Those feelings exist, regardless of whether the individuals involved are discussing or arguing over a specific law or policy question. Ideological polarization measures the differences and extremity of our beliefs.¹²⁵ Affective polarization analyzes our feelings towards members of groups *whom we believe* subscribe to different belief sets.¹²⁶

Numerous studies establish affective polarization's emergence as a distinct phenomenon. Since the 1970s, political psychologists have analyzed a series of questions administered by the American National Election Survey (ANES), which asks its respondents to rate their feelings towards one's registered political party *and* the opposing party, known in expert circles as "feeling thermometers."¹²⁷ Thus, on a 1–100 scale, an individual might register a 50 towards his own political party and a 30 towards the opposing party. The difference of these two numbers represents the degree of bias one holds towards one's in-group and out-group.¹²⁸

Over the past three decades, the gulf between positive and negative feelings between political parties has nearly doubled.¹²⁹ The bulk of the movement has been on the negative side of the equation: Americans respond in surveys that they feel worse about their opposing party than they used to, regardless of whether they align themselves with Democrats or Republicans.¹³⁰

124. Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OP. Q. 405, 406 (2012).

125. *See id.* at 421–22.

126. Among the foundational pieces are *Affect, Not Ideology*, *supra* note 124, and *Fear and Loathing Across Party Lines*, *supra* note 13. One of the keys to affective polarization appears to be the belief that opposing partisans are uniformly as extreme as their most extreme members, which is categorically untrue. LEVENDUSKY, *supra* note 122, at 3–4.

127. *Affect, Not Ideology*, *supra* note 124, at 409–11.

128. *Origins and Consequence*, *supra* note 9, at 131 (explaining the use of feeling thermometers); LEVENDUSKY, *supra* note 122, at 6–9 (citing ANES and feeling thermometer research).

129. "The percentage of Americans expressing affective polarization—a marked difference in warmth towards co-partisans as opposed to the opposing partisans—has dramatically risen since the late 1970s." Joseph Phillips, *Affective Polarization: Over Time, Through the Generations, and During the Lifespan*, 44 POL. BEHAV. 1483, 1483 (2022).

130. LEVENDUSKY, *supra* note 122, at 6–9 ("Over time, we have constant same-party ratings, and declining other-party ratings, so the gap in how people feel toward the parties has grown considerably.").

Scholars have also used partisan cues to test participants in behavioral games (e.g., experimental games that entail the splitting of money among participants). Here too, they find differences that are best explained by partisan affect. These studies additionally demonstrate a stronger distaste for members of out-groups as compared with warmth towards members of one's in-groups.¹³¹

Buttressing the ANES findings, Shanto Iyengar and Sean Westwood have developed an implicit association tool that analyzes implicit bias for or against partisans. Their tool not only finds politically mediated bias, but it finds that this bias is stronger than the implicit racial bias identified by similar tools.¹³²

In sum, affective polarization is a robust phenomenon, distinct from, but still connected to, its ideological cousin.¹³³ The relevant in-groups and out-groups revolve around partisan political parties, but the positive and negative “affect” that arises in their members cuts much deeper than instrumental arguments about statutes and policies. Finally, we know that affective polarization—although it has grown substantially in the past three decades—waxes and wanes with certain priming events. Political campaigns for office, for example, amplify affective polarization by making political cleavages more salient.¹³⁴ People become more aware of their allegiances (and their hostilities) during an election year.

Because it is a species of motivated reasoning, affective polarization may shade the ways in which individuals interpret and remember events, how they consume and digest information, and how they respond to crises and other challenges.¹³⁵

131. “The standard definition of an *outgroup* is a group to which a person does not belong, whereas an *ingroup* is a group to which a person does belong.” Iyengar & Westwood, *supra* note 13, at 691.

132. *Id.* at 695–96.

133. On the complementary and symbiotic nature between the two forms of polarization, see Jost et al., *supra* note 21, at 562 (“A major conclusion of our Review is that these different types of polarization can become mutually reinforcing.”).

134. Shanto Iyengar, *Fear and Loathing in American Politics: A Review of Affective Polarisation*, in THE CAMBRIDGE HANDBOOK OF POLITICAL PSYCHOLOGY 399, 401 (Danny Osborne & Chris G. Sibley eds., 2022) (citing increase in polarization during the lead-up to national elections).

135. Affective polarization fuels motivated reasoning. “Depending on our prior experiences, we pay attention to, remember, and credit different things.” Jennifer K. Robbennolt, *Political Polarization: Psychological Explanations and Potential Solutions*, 23 NEV. L.J. 323, 331 (2023) (analyzing polarization’s overlap with motivated reasoning); see Miles T. Armaly & Adam M. Enders, *Filling in the Gaps: False Memories and Partisan Bias*, 44 POL. PSYCH. 281, 287 (2022) (citing literature indicating that individuals are more likely to recall “events that paint the outgroup in a negative light”); *id.* at 295–96 (concluding from experiments that “false memories seem to behave like a form of partisan bias”); see also Alberto Alesina et al., *The Polarization of Reality*, 110 AEA PAPERS & PROC. 324, 324

Because they “otherize” those on the other side, partisans instinctively distrust their opponents—even in situations that are not overtly political.¹³⁶ They also reportedly state that they prefer not to intermarry, live in the same places, attend the same schools, or work for the same employers.¹³⁷ Such siloing, in turn, increases the degree and likelihood of further affective polarization. So long as we live in different spaces and work for different firms, we are likely to continue to dislike and distrust each other.

The root causes of affective polarization remain unclear. Social sorting plays a role, as does the emergence of ideologically homogenized political parties. Segmented news, social media, and other features of our contemporary lifestyles may also contribute, as may the desire for certainty or “cognitive closure.”¹³⁸ Whatever the cause, partisans dislike their opponents and also tend to perceive their opponents as more extreme than they actually are.¹³⁹

C. *From Deliberation to Extremism*

The preceding Sections describe phenomena that intertwine, at least initially, with macro-level political and social debates. One might call these “big P” polarization concepts. They have been studied extensively by political psychologists and have begun to attract the attention of other fields.¹⁴⁰

One should note that there exists, however, a more universal, “little p” version of polarization that focuses on the tendency of group-deliberation to propel decisions in extreme (and often costly) directions. Across numerous experimental and real-world settings, scholars have identified instances where “members of a social group [arrive] at a consensus (through group discussion and other forms of social interaction) that is more extreme but in the same direction as the average of their initial opinions on a given issue.”¹⁴¹ In other words, group-deliberation makes the decision-makers more

(2020) (“Evidence is growing that Americans are polarized not only in their views on policy issues . . . but also in their *perceptions* of the same factual reality.”).

136. Iyengar & Westwood, *supra* note 13, at 703 (reporting on a behavior game in which partisans remained “more punitive and untrusting” of opponents even when the game incorporated observable iterative interactions and had nothing outwardly to do with politics).

137. *Id.* at 691–92.

138. LUTTIG, *supra* note 103, at 11.

139. See FIORINA, *supra* note 102, at 30–31 (citing survey research in which respondents’ answers display “systematic exaggeration of polarization: the positions actually held by Republicans, for example, are not as extreme as Democrats think they are, and vice versa”).

140. See, e.g., Iyengar & Westwood, *supra* note 13.

141. Jost et al., *supra* note 21.

homogeneous in outlook, more confident in their opinions, and ultimately more “extreme” relative to their pre-deliberation views.¹⁴²

According to Professors Sunstein and Glaeser, four dynamics fuel this dynamic. Prior to deliberation, individuals are more unsure of their views and therefore adopt moderate views: “[I]ndividuals with access only to their own private information will recognize their ignorance and hew towards the center.”¹⁴³

After conferring with others, extremism sets in. Group members inaccurately conclude they have learned “new” information from the group and become more confident in their beliefs. It may *seem* like the group has conveyed new knowledge, but in reality, “little or nothing has been learned.”¹⁴⁴ Even worse, decision-makers fail to realize that their fellow members are drawing conclusions from the same well of information; that their group is an unrepresentative sample; that members feel constrained by conformity norms to agree with everyone else; and that some members harbor private incentives to mislead.¹⁴⁵

Over the long run, polarized thinking exposes the group to failure because its extremism leads it in the direction of inaccurate decision-making.

D. *The Scope of the Problem*

If one were to construct a typology of the various types of polarization, one would quickly conclude that the lines between each “type” blur fairly easily. *Ideological* polarization seems to be a precursor to the kinds of sectarian thinking that produces *affective* polarization. Moreover, both types of polarization seem to have something to do with the kind of social and political sorting that results in sticky, singular “mega-identities” that generate hostility towards “others” and a heightened desire to remain within one’s in-group. And finally, underlying these macro-level national developments is a universal decision-making phenomenon that propels groups towards extreme and often incorrect opinions.

Each of these developments would pose a challenge for certain companies, but perhaps not for compliance as a whole if they

142. “It is well known that when like-minded groups deliberate, they tend to polarize, in the sense that they generally end up in a more extreme position in line with their predeliberation tendencies.” Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 66 (2014) [hereinafter *More Speech*]; Edward L. Glaeser & Cass R. Sunstein, *Extremism and Social Learning*, 1 J. LEGAL ANALYSIS 263, 263–64 (2009) [hereinafter *Social Learning*] (setting forth theory of “Credulous Bayesians” who become more extreme after deliberating on a given issue with a group). For popular audiences, see CASS R. SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* (2009).

143. *Social Learning*, *supra* note 142, at 264.

144. *Id.* at 265.

145. *Id.*

remained modest and uncorrelated. Unfortunately, what we know so far is the opposite: affective polarization and political sectarianism are on the rise; ideological polarization among elites has increased; and group polarization is a commonly recognized problem. For all those reasons, one can easily imagine a cascade of challenges for the compliance network.

III. PATHOLOGIES OF POLARIZED COMPLIANCE

Part I theorized compliance as a relational network whose dual functions are to deter bad behavior and channel information. Part II introduced the concept of polarization and surveyed its different manifestations.

The present Section examines polarization's impact on corporate compliance. Compliance has always hinged on how much underlying wrongdoing exists, and how well the network responds to and discourages it. Accordingly, the discussion begins with an analysis of polarization's influence on the incidence of wrongdoing and proceeds to identify several pathologies likely to manifest in both employer-employee relations and corporate-government relationships.

A. *Incidence of Wrongdoing*

Donald Cressey's mid-twentieth-century study of corporate embezzlers provides a helpful starting point for understanding polarization's impact on corporate wrongdoing.¹⁴⁶ Cressey's insights, combined with those other criminologists, were eventually expressed as the "fraud triangle," a concept dubbed and popularized by the American Institute of Certified Public Accountants.¹⁴⁷ According to the fraud triangle, opportunity, pressure, and rationalizations are the three factors that combine to make fraud more likely in corporate settings.¹⁴⁸ Thus, individuals feel private *pressure* to perform, they

146. DONALD R. CRESSEY, *OTHER PEOPLE'S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT* 12–13 (1953). Although the triangle was originally derived from Cressey's interviews with embezzlers, others have expanded the concept to apply more broadly to fraud, regulatory crimes, and bribery. See, e.g., EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MINDS OF WHITE-COLLAR CRIMINALS* 85–86 (2016) (citing Cressey's work and examining criminal behavior across several white-collar contexts). On the triangle's application to "venture-backed startups," see Elizabeth Pollman, *Private Company Lies*, 109 GEO. L.J. 353, 378–79 (2020).

147. "[T]he current factors are generally understood to be those described in American Institute of Certified Public Accountants ('AICPA') and international auditing standards . . ." Leandra Lederman, *The Fraud Triangle and Tax Evasion*, 106 IOWA L. REV. 1153, 1156 (2021). On the fraud triangle's history and its historically complicated relationship with Cressey's work, see *id.* at 1159–62.

148. *Id.* at 1182 (describing the three factors as "(1) an incentive or perceived (usually financial) pressure; (2) a perceived opportunity to cheat; and (3) rationalization of the planned action").

engage in certain *rationalizations* to relieve themselves of internal guilt, and they then seize on an *opportunity* to carry out their illicit scheme.¹⁴⁹

Much of the criminology literature describes the fraud triangle's three legs in apolitical terms. For example, the "pressure to perform" might arise from steep competition and workplace demands.¹⁵⁰ Rationalizations and opportunity are also curiously devoid of sectarian content. The corporation that leaves a supervisor with too much discretion over a bank account creates the opportunity for that supervisor to bribe local officials in exchange for advantageous treatment. And the company that demands performance at any cost and exacts retribution by firing employees who fail to measure up is said to create exactly the kind of culture that encourages employees to rationalize their behavior as only slightly over the line.¹⁵¹ To be clear, the resulting problem—corporate crime—might well become an issue for politicians. But there is nothing outwardly *partisan* in any of the triangle's three legs.

Now, consider the triangle in a politically and affectively polarized world. *Pressure* is no longer solely the product of unrealistic performance goals. It arises as well from working with people (including supervisors) who may be members of a different social or political group and who may view their opponents as committed to harming them *solely because of their political and social affiliations*.¹⁵²

Concededly, political affiliation is not always observable, and often will be less observable than one's race. Nevertheless, one's alignment with a group can be inferred through other traits or activities. One need not announce to one's peers that that they are a Democrat (or a liberal, progressive, or whatever category finds

149. Scholars have since adapted the model to include a fourth factor, the individual's *capacity* to take advantage of the opportunity to engage in wrongdoing. David T. Wolfe & Dana R. Hermanson, *The Fraud Diamond: Considering the Four Elements of Fraud*, 74 CPA J. 38, 38–42 (2004) (arguing that the would-be fraudster must also possess the requisite skillset necessary to take advantage of opportunities to commit fraud).

150. "Some individuals may be opportunistic, but many others commit wrongdoing because they feel pressured by their respective organizations to meet certain performance targets." Baer, *supra* note 6, at 1617 (describing employees who resort to "innovative" solutions when objectives are not met" (citing Sally S. Simpson & Nicole Leeper Piquero, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 LAW & SOC'Y REV. 509, 510 (2002))).

151. See Haugh, *supra* note 69, at 1218–22 (highlighting "eight of the most prominent rationalizations used by white collar criminals" including the offender's "claim of relative acceptability" wherein the offender compares his misbehavior to others and concludes that it is either "normal" or not far from a baseline of acceptability).

152. Iyengar & Westwood, *supra* note 13, at 691 (reasoning that workplace discussions can provide partisan cues).

relevance). Their colleagues will infer the underlying identity from my other, more visible attachments, such as religion, children's schools, or where an individual chooses to live.¹⁵³ Ironically, the more sectarian a society becomes, the more easily an acquaintance can infer someone's political and personal attachments.

When an employee holds a political identity that is different from that of her coworkers, she may feel greater pressure to perform. More importantly, she may feel even greater pressure to hide her workplace failures, as she may fear that her colleagues will use those failures as ammunition in future tournaments or disputes.¹⁵⁴

Lest this sound overly paranoid, readers should consider the findings of Professors Fos, Kempf and Toutsoura, finance professors who found that among high-level corporate teams, those occupying a different political party were more likely to depart the firm when they were in the minority.¹⁵⁵ In other words, misalignment as judged by voter registration eventually led to greater exit and turnover at the firm's highest level of management.

Of even more interest was the subsequent effect on the firm: According to the study, the firm's equity value, post-exit, decreased, notwithstanding the fact that its resulting team was now more perfectly aligned in terms of political orientation.¹⁵⁶ The study's authors declined to offer causal explanations for the reduction in stock price. From the polarization literature, however, one might infer that misalignment, when strong enough to encourage someone's exit, correlates with higher rates of pre-exit dysfunction and therefore

153. *Id.* at 691 (“[F]or a large portion of the electorate, information on individuals’ political affiliations is conveniently accessible.”).

154. On the impact of corporate promotion tournaments and their capacity to impact negatively the corporation’s compliance with law, see 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, 288–89 (2004) (warning that internal controls may be deficient if they fail to anticipate the cognitive errors and personality traits for which tournaments are apt to reinforce and prefer).

155. “Combining Execucomp data on top executives in U.S. S&P 500 firms with voter registration records, we show executive teams became more partisan between 2008 and 2020.” Vyacheslav Fos, Elisabeth Kempf & Margarita Tsoutsoura, *The Political Polarization of Corporate America* 1–2 (Harv. Bus. Sch. Working Paper 23-003, 2023), <https://perma.cc/D9Q3-CPM3>. According to the authors, 61% of this increase “is driven by an increased tendency of executives to match with other executives who share their political views.” *Id.* at 2. As for those who fail to align with their teams, the researchers find that those “executives . . . have an elevated propensity to leave the firm compared to aligned executives.” *Id.* at 25. “We also find evidence that departures of misaligned CEOs are more likely to be involuntary.” *Id.* at 3.

156. *Id.* at 27. The drop in price may well reflect concerns with group polarization and tendency of like-minded groups to drive deliberating bodies to extremes. See *Social Learning*, *supra* note 142, at 283.

higher rates of undisclosed wrongdoing. (Then again, as the authors point out, if the dysfunction were visible, it should already be baked into the stock price.)¹⁵⁷ Accordingly, when a high-level manager departs from a misaligned team, sophisticated investors might take that as a cue that dysfunction (or worse) has been the rule for some time, *or* that hyper-alignment and extremist thinking of the type described in Section II.C will damage the firm in the future.

Fos et al.'s study focuses on corporate leaders at the highest level of the firm, who can exit teams that are politically misaligned and presumably land on their feet somewhere else.¹⁵⁸ Among rank-and-file and mid-level managers, however, exit is less plausible. Many employees will find themselves stuck working for their employer, at least temporarily.¹⁵⁹ Thus, for this group, performance pressure will be quite strong.

Notice, then, the issues that arise when an employee knows she cannot perform as requested, but also wishes to avoid being fired. Instead of taking her chances with revealing her subpar performance, she may well choose the well-trod path of cover-ups, regulatory shortcuts, and fraud. This is hardly a new story; indeed, it is very much an *old* story insofar as it arises from shortfalls in performance.¹⁶⁰ But a backdrop described by extreme and pervasive polarization *is* new and deserving of further attention. Unforgiving demands for performance already define much of corporate life. Polarization, however, could be the catalyst that transforms these risks into full-blown violations of law.

Consider as well affective polarization's impact on the fraud triangle's third leg, rationalizations. The danger of a rationalization is that it neutralizes or disables the individual's instinct to abide by

157. Fos et al., *supra* note 155, at 27.

158. *Id.* at 3.

159. "Only those high-end workers with mobility and economic choice can look for companies that suit their preferred orthodoxy." Leo E. Strine, Jr., *Good Corporate Citizenship We Can All Get Behind? Toward A Principled, Non-Ideological Approach to Making Money the Right Way*, 78 BUS. LAW. 329, 356 (2023).

160. "If authentic performance is impossible or extremely difficult to achieve, employees will search for substitutes—including illegal behavior—and they will rationalize this behavior as 'necessary' or 'deserved' because the firm has saddled them with the obligation to achieve such unrealistic targets." Baer, *supra* note 6, at 1619 (citing Lisa D. Ordóñez et al., *Goals Gone Wild: The Systematic Side Effects of Overprescribing Goal Setting*, 23 ACAD. MGMT. PERSPS. 6, 7 (2009)) (discussing the dangers of setting unrealistic productivity targets for employees); *see also* Armour et al., *supra* note 45, at 18 (describing drawbacks of focusing on "metrics to the exclusion of other considerations" and the potential to "trigger failures in other valuable dimensions of performance, such as safety measures or compliance with law").

the rules.¹⁶¹ Rationalizations enable us to break laws while still perceiving ourselves as law-abiding “ethical” individuals.¹⁶² Many of these rationalizations aim to *minimize* one’s conduct. Thus, we might minimize our behavior (“it’s only a small step”), the harms we are causing (“no one will get hurt”), or the clarity or importance of the laws we are transgressing (“these rules are unclear” and “no one follows them anyway”).¹⁶³

Polarization elevates this type of self-deception to a higher level. Instead of entertaining familiar delusions that our behavior is “not that bad,” or something we can eventually fix, it propels us to reach the more pernicious conclusion that our behavior—including behavior that openly harms others—is *justified*. As polarization grows more extreme and more affect-based, citizens dehumanize and place less trust in anyone who is perceived to be a member of an out-group.¹⁶⁴ Thus, when affective polarization is high, rationalizations not only multiply, but they are apt to be stickier and more difficult to dislodge. The wrongdoer’s internal script will no longer be the soothing canard that a particular statement isn’t really a lie, or if it is, it is a rather small lie and immaterial, and even then, it can be easily fixed or updated in the future. Instead, the polarized employee will *justify* the misconduct as something she ought to do anyway since her managers (or the government itself, or any other member of a supposed out-group) *would harm her if the shoe were on the other foot*.

161. As Todd Haugh explains, “Rationalizations are a key component in the psychological process necessary for the commission of white collar crime.” Haugh, *supra* note 69, at 1196. Under the fraud triangle framework, the offender relies on a rationalization *before* he commits a given offense. “Offenders employ them in different degrees, combine them with other rationalizations, and use them at different times.” *Id.* at 1222.

162. *See id.* at 1221–22.

163. For a taxonomy of white-collar neutralizations, see Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 *FORDHAM L. REV.* 3143, 3165–67 (2014) (describing narratives that criminals relay to themselves to justify their wrongdoing). On neutralizations generally and their relationship to criminological research, see Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, in 32 *CRIME AND JUSTICE* 221, 221–300 (Michael Tonry eds., 2005).

164. On distrust of out-groups, see Iyengar & Westwood, *supra* note 13, at 703 (describing behavioral game in which opponents distrust each other). On dehumanization, see James L. Martherus et al., *Party Animals? Extreme Partisan Polarization and Dehumanization*, 43 *POL. BEHAV.* 517, 521 (2021). Purely ideological or “policy-based” polarization (as compared with the sectarian and affective variants) may generate more ambiguous trust effects. *See* Maman et al., *supra* note 17, at 7–8 (finding, unexpectedly, that political extremism does not uniformly correlate with weakened trust in authorities or other people, and that left-extremism functions differently from right-extremism). Maman, Feldman, and Tyler’s findings, it should be noted, were limited to ideological (and not affective) polarization.

To put it another way: Animus begets a sense that one is “justified” in engaging in wrongdoing, which is very bad news for an already embattled compliance network.

B. Firm-Level Pathologies

Compliance cannot succeed unless its underlying relationships flourish. People—both inside and outside the firm—must trust each other enough to share information and enable enforcement activity. Inside the firm, the company’s compliance department relies heavily on employees and supervisors to internalize compliance lessons, investigate red-flag behavior, and report suspected wrongdoing to supervisors, compliance departments, and designated hotlines.¹⁶⁵

Outside the firm, government enforcement officials rely on intermediaries including journalists, corporate boards, and employee-whistleblowers to report information pertaining to wrongdoing.¹⁶⁶ Corporate managers, meanwhile, rely on intermediaries (read: lawyers) and government officials to convey valuable information as well, from the alerts to specific types of schemes, to clarifications of laws and enforcement policies.¹⁶⁷

In sum, compliance is relational; it requires people to talk to each other, even when they disagree with or dislike each other.

No one trusts their adversary completely. That is why regulators and regulated entities play out the tit-for-tat games modeled long ago by Professors Braithwaite and Ayers.¹⁶⁸ Repeated interaction and self-interest is what eventually forces each party to convey information. Signaling and third-party intermediaries play a helpful role as well.¹⁶⁹

Polarization distorts this process. It makes opponents less likely to speak civilly with each other in the first place, and it changes the identity and purpose of intermediaries. Accordingly, even if polarization leaves the underlying incidence of wrongdoing

165. See generally *supra* Section I.A.

166. See Platt, *supra* note 39, at 700; see also Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010).

167. See, e.g., Omari Scott Simmons, *Forgotten Gatekeepers: Executive Search Firms and Corporate Governance*, 54 WAKE FOREST L. REV. 807, 815–20 (2019).

168. IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 86–87 (Donald R. Harris et al. eds., 1992).

169. “Apart from legal liability, using third-party experts has become synonymous with good governance.” Simmons, *supra* note 167, at 817. Intermediaries form a core component of healthy social networks. Granovetter, *The Strength of Weak Ties*, *supra* note 92, at 1374 (hypothesizing that “whether a person trusts a given leader depends heavily on whether there exist intermediary personal contacts who can . . . if necessary, intercede with the leader or his lieutenants on his behalf”).

untouched, it can still impair the compliance network's *response* to such wrongdoing.

I analyze these pathologies in greater detail below.

1. *Misalignment*

Let's start with a workplace where some of the employees are Democrats, and whichever additional identities bundle with that label, and some are Republicans, which also bundles additional identities. Let's also assume that the distribution of those identities is uneven (there are more Republicans than Democrats or vice versa) and relatively random. Which pathologies would we expect to encounter in a politically heterogeneous workplace?

Silence might be the first pathology we encounter. That is, we might expect employees to say less about themselves, to remain socially distant, to keep their interactions pleasant but refrain from moving beyond a certain level of familiarity. Keeping a low profile, after all, is how one might protect oneself from inadvertently revealing one's out-group status. Indeed, these feelings might partially explain the continued demand for remote work arrangements post-Covid.¹⁷⁰

Second, where in- and out- group status is known or presumed, we might expect employees to consult each other less often, to place less trust in each other, and to shy away from disclosing information that casts oneself in a negative light.¹⁷¹ And, the reason for such silence would be that misaligned coworkers are both uncertain and pessimistic in how they expect coworkers and supervisors to handle negative information.

To be sure, some degree of self-censorship is endemic and valuable. Not everything that everyone has to say is useful, and not all deliberation leads to better decision-making. But, silence is problematic insofar as it enables supervisors to set unattainable goals with no pushback; adopt faulty systems with no challenge; ignore nascent risks with no accountability; and reason away noticeable flaws and red flags. "Voice" is what compliance has long relied upon, both to identify wrongdoing and to prevent the very situations that lead to wrongdoing in the first place.¹⁷² Accordingly, a corporate

170. "[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." *Achilles Heel*, *supra* note 8, at 795.

171. One might say this is the exact opposite of the "voice" option that Albert Hirschman referred to in his classic tome on organizational life. See HIRSCHMAN, *supra* note 100, at 30.

172. See Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1185 (2010) (discussing the interaction

culture in which everyone instinctively embraces silence as the dominant strategy is rightfully feared to become one that acquiesces in and hides noncompliance.¹⁷³

Some will argue that pathological self-censorship arises in only extremely polarized settings, and may reason that most workplaces will happily fall short of that level. That may be true, and we need far more empirical research to determine polarization's tipping point. Nevertheless, the research that already exists is worrisome.

For example, we know that individuals are already prone to overstate a polity's level of polarization *and* the extremeness of positions undertaken by members of the opposing party.¹⁷⁴ Thus, even if my coworkers and I overlap on multiple issues, I may nevertheless perceive them as more extreme than they are. Accordingly, I may decide to adopt a "silence" strategy even when it is unwarranted.

Second, apart from silence, we might encounter a related but distinct pathology, best described as differentiation. Here, instead of remaining silent, the individual reflexively differentiates herself—that is, adopts the opposing viewpoint—from the person or persons she believes to be members of a political out-group.¹⁷⁵ To some degree the effort is performative, reflecting the individual's desire to openly communicate to others that she is "different" from a perceived outsider.

Thus, if you argue that we should conduct five audits, I might argue we should conduct just two—or ten! *I* might insist my opposition to your suggestion is genuine and backed by evidence, but social identity theorists might respond that it is in fact fueled primarily by my desire to differentiate myself from you—or more importantly—your perceived out-group. And the best way to accomplish that is to noisily disagree with you on just about anything.

Notice, just as silence can be valuable, so too can differentiation. We ordinarily *want* employees to speak up and use their voices to challenge faulty premises, conclusions, or policies. This is what we mean when we imagine healthy deliberation and debate. But not all

of social norms, firm level supports, and internal reporting to compliance programs).

173. A culture of conformity and silence was widely cited as one of the causes of the General Motors scandal involving fatal design defects in its Saturn cars. See Gretchen Gavett, *Can GM Make it Safe for Employees to Speak Up?*, HARV. BUS. REV. (June 5, 2014), <https://perma.cc/Q9SG-K6ZL>; Marianne M. Jennings & Lawrence J. Trautman, *Ethical Culture and Legal Liability: The GM Switch Crisis and Lessons in Governance*, 22 B.U. J. SCI. & TECH. L. 187, 203 (2016) ("The ignition switch was an illustration that the efforts to get information from employees who were aware of problems to those who could and would do something were not taking hold.").

174. FIORINA, *supra* note 102, at 30–33.

175. "When out-party animosity is strong, partisans are motivated to distinguish themselves from the out-party (by, for instance, holding opinions that are distinct from the out-party)." Rathje et al., *supra* note 103, at 2.

voices are helpful. Knee-jerk differentiation, driven primarily by a desire to show warmth towards one's in-group or (worse) animus toward one's out-group, does not improve the flow of information or reinforce trust.¹⁷⁶ If anything, it convinces bystander employees to stick to their first strategy: silence.

The third strategy is the one that has already been discussed: exiting the firm.¹⁷⁷ To this strategy we might add a corollary, which is the effort to create emotional and concrete distance when exit is unavailable. Not all of us can quit our jobs or jump to another employer. Distance and disengagement, however, have become far more feasible strategies in the wake of Covid-19, including the move to partial or total remote employment.¹⁷⁸ If distance is a proxy for disengagement and estrangement, we should worry further, since neither concept is congruent with developing law-abiding norms and behavior.

To that end, policymakers should take heed of a study of Microsoft employees who worked remotely during the Covid pandemic.¹⁷⁹ The authors found that remote work eroded the soft, informal "weak ties" that promote the valuable exchange of information and knowledge across networks.¹⁸⁰ Within organizations and networks, relational "ties" (weak or strong) play a salutary role in producing knowledge and covering structural holes.¹⁸¹ The Microsoft study found that remote work "caused business groups within Microsoft to become less interconnected."¹⁸² Weak ties were the first to erode and remote work also ossified the ties that already existed, causing employees to lose access to people and connections.¹⁸³

To be clear, the Microsoft study's authors were concerned primarily with remote work's impact on innovation and productivity, and their study focused on an all-remote workplace induced by a

176. See also *More Speech*, *supra* note 142, at 71–73; cf. Dan M. Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. RISK RSCH. 147, 147–74 (2011) (demonstrating similar dynamic for facts relating to climate change, but tracing the dynamic to an individual's cultural viewpoint and its impact on cognition).

177. Regarding exit in high-level corporate teams, see Fos et al., *supra* note 155, at 4.

178. Remote work itself is unevenly distributed. See generally Fabian Braesemann et al., *The Global Polarisation of Remote Work*, 17 PLOS ONE 1 (2022), <https://perma.cc/25MM-SNLA> (identifying differences in availability of remote work depending on location and skillset).

179. Yang et al., *supra* note 93, at 43. Several of the authors are Microsoft employees who worked in concert on this study with Berkeley and MIT scholars and received "no specific funding" for their work. *Id.* at 54.

180. *Id.* at 43.

181. *Id.*

182. *Id.*

183. *Id.* at 43–44.

worldwide pandemic.¹⁸⁴ Nevertheless, their study of network erosion should be of keen interest to compliance scholars.

Not everyone can or will disengage. Some will fight the good fight and others will exit their workplaces in search of better aligned options. Exit in the abstract might be salutary insofar as it forces a firm to adopt healthier processes and policies.¹⁸⁵ Politically mediated exit, however, is far less valuable; it fuels employee turnover unrelated to either the firm's profit horizon or the employee's professional development. More importantly, *too much* turnover within the firm creates chaos, and chaos is the spark that breeds and catalyzes corporate wrongdoing.

2. *Sectarianism*

In the preceding Section, I described several pathologies likely to occur within a politically misaligned workplace. Individuals who were already in an out-group or feared being seen as part of said out-group would choose from a series of self-preservative strategies. Silence and self-censorship, knee-jerk differentiation, and exit and distance are all strategies we should expect from a politically misaligned workplace. None are likely to improve compliance.

In response to this thesis, one might wonder how the perfectly aligned firm fares. If everyone is a “copartisan,” do we really have to worry about workplace pathologies? Might we find multiple firms whose working units are characterized by those who belong to the same political tribe?

Several responses are in order. First, even within a superficially politically aligned team, cleavages can surface. Several scholars have studied the phenomena of *intraparty* polarization, wherein subgroups of a single political party eventually develop hostility to each other in response to some issue or event.¹⁸⁶ Thus, even in a workplace whose employees uniformly categorize themselves as “Democrats” or “Republicans” or “progressives” or “conservatives,” those labels may well paper over differences that eventually drive ideological or affective polarization.

Second, even if everyone *within* the firm remains on the same political team, other pathologies undermine compliance's success,

184. *Id.* at 50–51.

185. On the ways in which exit can improve organizations, see HIRSCHMAN, *supra* note 100, at 21–25.

186. Gordon M. Friedrichs, Abstract, *Polarized We Trade? Interparty polarization and US Trade Policy*, 59 INT'L POL. 956, 956 (2022) (“[P]olarization has led to an increasing dispersion between moderate and more extreme voters within both parties.”). See generally Eric Groenendyk et al., *Intraparty Polarization in American Politics*, 82 J. POL. 1616 (2020).

including the phenomena discussed in Section II.C.¹⁸⁷ Herd behavior is a well-known challenge to group decision-making, as is motivated cognition and the extremism that results from group deliberation.¹⁸⁸ If all group members are copartisans, they will be subject to the same motivated reasoning, the same conclusions about ambiguous facts, and the same presumptions about government policies and enforcement actions. Moreover, if a group's members are all on the same political team, they will develop fewer "weak" ties with information-holders *outside* their political and cultural teams, and they will be less inclined to credit whatever information those outsiders provide.¹⁸⁹ As a result, the organization may make less well-informed decisions about its present and future.

C. *Network-Level Pathologies*

Because compliance depends so heavily on its network, it is important to recognize polarization's impact on the network as well as the singular firm. This Section previews two potential consequences of a polarized network: the crowding out of the corporation's early disclosure strategy, and the emergence of a "noble obstruction" norm among intransigent actors.

1. *Sorting Strategies and Waste*

In the compliance world, one of the most established methods of information exchange is the leniency policy the federal government deploys for corporations suspected of federal crimes. Although agency policies have evolved and become more specific, the underlying theory remains the same: Companies that detect and voluntarily report internal wrongdoing will be spared harsher punishments.¹⁹⁰ Thus, under the framework that has existed for decades, the dominant strategy for any corporation has been hiring a competent white-collar defense attorney and promptly seeking leniency by volunteering

187. See Jost et al., *supra* note 21, at 563–65 (categorizing the various "cognitive-motivational mechanisms" that individuals engage to process information in a way that preserves their social identity).

188. For more on peer effects generally and their impact on policy, see Meirav Furth-Matzkin & Cass R. Sunstein, *Social Influences on Policy Preferences: Conformity and Reactance*, 102 MINN. L. REV. 1339, 1346 (2018). On herd behavior in corporate settings, see Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting Corporate Law's "Duty of Care As Responsibility for Systems,"* 31 J. CORP. L. 949, 968 (2006) (describing such behavior as "looking around at what peers are doing and conforming so as not to stand out as a tempting liability target").

189. See *More Speech*, *supra* note 142, at 71–73 (explaining why members of polarized groups are unlikely to change their positions when they receive information from outsiders).

190. See discussion *supra* Section I.B.2.

evidence of wrongdoing.¹⁹¹ As a shorthand, one might call this the *early disclosure strategy*. It arises from a series of laws, legal policies, and doctrines that have slowly evolved over the years.¹⁹² To be sure, some company managers will reject this strategy, either due to their arrogance or to protect against their personal exposure. Nevertheless, if *most* intermediaries believe leniency is the preferred outcome, early disclosure becomes the dominant strategy.

Now, consider a different strategy. Superficially, it resembles the early disclosure strategy in that the company monitors its employees, discovers wrongdoing, hires an attorney and well-known law firm to approach the government, and seeks leniency in exchange for prompt, voluntary disclosure. But now, let's add one change: Instead of seeking leniency solely on the quality and celerity of one's disclosures, the firm also engages in a *matching* strategy, whereby it seeks an intermediary whose presence will signal that the firm is a reliable member of the government's political in-group.¹⁹³ This is the strategy that Professor Brian Feinstein and several other researchers identified in their analysis of two decades of corporate settlements under the FCPA.¹⁹⁴

According to Feinstein et al., an examination of a dataset spanning from 2001 through 2019 (encompassing numerous presidential administrations) revealed that corporate defendants were more likely to hire Democratic attorneys during a Democratic presidential administration and more likely to hire Republican defense counsel during a Republican presidential administration to represent them in FCPA prosecutions.¹⁹⁵ The authors concluded that this choice evinced an attempt by corporations to obtain the spoils of in-group political favoritism and secure more favorable settlements.¹⁹⁶

Facially, the matching strategy revealed by Feinstein's study is concerning, as it reinforces the public's intuition that leniency rests

191. Arguably, it is the implementation of a mixed or "composite" liability system that promotes this strategy. See Arlen & Kraakman, *supra* note 42, at 745–46.

192. See discussion *supra* Section I.B.2 and accompanying notes.

193. Feinstein et al., *supra* note 51, at 5, 8.

194. The study examined nearly two decades' worth of settlements between the government and corporate defendants prosecuted for violations of the FCPA. *Id.* at 9.

195. *Id.* at 10 ("These findings suggest that corporate defendants strategically select counsel based on perceived political or personal connections with government prosecutors.").

196. *Id.* at 9; see also *id.* at 29 ("We theorize that companies subject to potential FCPA enforcement actions will engage attorneys who are aligned with prosecutors because they hope to exploit these shared political leanings, or related socio-cultural ties that are closely connected to political orientation, to elicit positive attitudes among prosecutors.").

on little more than one set of elites currying favor with another.¹⁹⁷ Nonetheless, it is unclear how far outside the FCPA context this political matching effort extends.¹⁹⁸ More importantly, it is also unclear that *in-group* favoritism is in fact the phenomenon's driving force. To the contrary, it may be that avoiding *out-group* animus is in fact the animating desire for hiring a politically connected law firm. After all, out-group animus casts a much longer shadow than in-group loyalty.¹⁹⁹ Accordingly, when a corporate target hires a Republican lawyer to negotiate a settlement with a Republican administration's enforcement agency, the aim might not be to capture a cozy "special deal," but rather, to avoid the hostility that would ensue from hiring an opposition law firm.²⁰⁰

Notice the implications of this point. If the corporation is seeking unwarranted "favoritism" by hiring a politically connected law firm, many of us rightfully see that behavior as an effort to corruptly manipulate the justice system—to stretch the rules for one's benefit, even if the effort itself violates no specific law. If, on the other hand, the corporation's hire reflects a desire to avoid partisan animus, it is not clear that many of us would view that behavior as inherently immoral. Why *shouldn't* a corporation, run by loyal officers and board members, do everything in its power to immunize itself against government animus? Doesn't the responsible board member owe the organization and its shareholders a fiduciary duty to avoid such animus when licit options—such as hiring a politically "correct" law firm—are available?²⁰¹

197. Cf. Cindy R. Alexander & Yoon-Ho Alex Lee, *Non-Prosecution of Corporations: Toward a Model of Cooperation and Leniency*, 96 N.C. L. Rev. 859, 862 (2018); *Promise and Perils*, *supra* note 58, at 157–58 (explaining how an improperly designed DPA not only reduces deterrence, but also may "weaken the public's faith in the criminal justice system").

198. One of the reasons the authors chose the FCPA context is that it involves a self-contained set of prosecutors and defense lawyers. On FCPA enforcement generally, see Feinstein et al., *supra* note 51, at 19–27 (emphasizing the "relational ties" between prosecutors and corporate defense counsel).

199. "Affect toward copartisans has remained relatively stable in American National Election Survey (ANES) data, whereas affect toward opposing partisans has dramatically decreased." Iyengar & Westwood, *supra* note 13, at 702. Experimental work with behavior games similarly demonstrates deeper penalties on opponents than rewards to copartisans. *Id.* at 703 (finding penalty to be almost twice as large as copartisan bonus).

200. The second Trump administration's latest attack on several major law firms underscores this concern. See David Thomas, *US Law Firm Paul Weiss Fired by Client over Trump Executive Order*, REUTERS (Mar. 19, 2025), <https://perma.cc/24XG-PCC8> (reporting that corporate executive accused in bribery prosecution had fired Paul Weiss in light of the President's executive order suspending the firm's security clearances).

201. The behavior may still be socially undesirable, but that is simply an argument for government independence. It is not, in and of itself, evidence of corporate corruption.

To be sure, both narratives are concerning insofar as they suggest a breakdown in an enforcement agency's political independence and a far more concerning breakdown in the rule of law. Moreover, regardless of motive, *any* matching strategy is inherently inefficient. That corporations waste their energy choosing intermediaries most apt to "match" a given government official's political identity suggests a world of distorted and skewed incentives.

Finally, as matching becomes a dominant strategy, we might worry that political alignment and corresponding loyalties will crowd out the features that make lawyers uniquely valuable in corporate compliance situations. Amid a compliance crisis, we want lawyers to draw on their analytical abilities, their skepticism, and their ethical judgment. Lawyers already have trouble meeting these goals; they certainly won't do a better job if their firms or clients hire them solely because of whom they know and which political parties they support.

2. "Noble" Obstruction

Imagine a corporation's compliance department becomes aware of several material violations of federal law by the company. Imagine further that instead of following an early disclosure strategy, the corporation hires a law firm with the express intention of *obstructing* the government's investigation.

To be clear, the "obstruction" envisioned could consist solely of aggressive but legal behavior, or it could also extend to illegal acts such as perjury and the destruction of documents.²⁰² Nevertheless, assume the corporation's board and managers hire outside counsel to represent the corporation and then say: "We want you to do whatever it takes to make sure the government learns nothing." Assume both the outside counsel and the corporation's board understand that *no* activity is off the table; the law firm may go so far as to destroy documents or suborn perjury. Clearly, much (maybe all) of this behavior would be illegal. It would trigger criminal exposure for anyone who agreed and conspired to conceal or destroy evidence. Few would even come close to considering such behavior, let alone openly discussing it.

How does polarization change this story? Let us start with the recognition that some corporations (and even some law firms) *already* obstruct the administration of justice. Indeed, one can find, with only a moderate amount of internet sleuthing, prosecutions of corporate managers who have destroyed documents, provided or schemed to

202. Regarding detection avoidance, see Jacob Nussim & Avraham D. Tabbach, *Deterrence and Avoidance*, 29 INT'L REV. L. & ECON. 314, 318–19 (2009); Arun Malik, *Avoidance, Screening and Optimum Enforcement*, 3 RAND J. ECON. 341, 351–52 (1990) (earliest formal account). See generally Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331 (2006).

provide perjured testimony, or have made false statements to government investigators.²⁰³

Thankfully, widescale and overt obstruction remains relatively uncommon. We have yet to witness corporate officers destroying their data and documents in open rebellion of court orders and subpoenas. Instead, a useful equilibrium has developed, wherein a few employees *secretly* destroy data and documents, but many *other* disgusted coworkers report such destruction to the authorities. That latter willingness is what enables the government to enforce the law. So long as society perceives obstructive behavior as selfish and wrongful, wrongdoers must make efforts to limit and hide their obstructive behavior, and that itself represents a cost to the wrongdoer. Under this equilibrium, obstruction remains a problem, but an enforceable and manageable one.

Now, consider a world where the obstructive conduct is driven by something other than one's selfish desire to avoid punishment. Imagine that employees, managers, officers—and even attorneys—rationalize obstructive behavior on political grounds. That is, imagine that those who withhold information from a government agency do so because they are “certain” that the agency is overrun by members of an evil, political out-group—and being members of the out-group, those government officials cannot possibly be trusted to view the information objectively. Obstruction no longer takes on the narrative frame of a cheater covering her tracks; instead, the behavior appears more justifiable and understandable . . . or perhaps *noble*.²⁰⁴

“Ordinary” obstruction functions quite differently from “noble” obstruction. Ordinary obstruction is nothing more than the manifestation of an individual's desire to avoid punishment. Thus, the standard remedy is to punish the conduct, separate and apart

203. See Meghan Morris, *McKinsey Advised Drug Companies on How to 'Turbocharge' Opioid Sales. Now It's Under Criminal Investigation.*, BUS. INSIDER (Apr. 24, 2024), <https://perma.cc/X66T-89QZ> (reporting on potential obstruction by McKinsey employees regarding the government's investigation of its alleged role in advising the opioid industry); see also Press Release, U.S. Dep't of Just., Pharmaceutical Company Lawyer Charged with Obstruction and Making False Statements (Nov. 9, 2010), <https://perma.cc/RG4S-PWRY>; Audrey Strauss, *Company Counsel as Agents of Obstruction*, N.Y. L.J., July 1, 2004, at 27.

204. The concept of “noble obstruction” introduced here bares some similarity to the established concept of “noble cause corruption” that scholars have used to explain false and fraudulent policing activity. See Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 154 (2012) (defining “noble cause corruption” as an instance in which police officers “subscribe to the view that it is appropriate to manufacture evidence against a suspect because ‘he is clearly guilty anyway’”).

from the underlying crime.²⁰⁵ If obstruction remains somewhat detectable and becomes costly, would-be wrongdoers will forego the strategy.

Now, compare noble obstruction. In an initial period, both sets of conduct look identical, but their rationales differ. The noble obstructor declares she is justified in her conduct because the legal system no longer functions fairly or predictably. As a result, obstruction is likely to rest heavily on the expected identities of the investigator and prosecuting agency relative to the identity of the target. And it rests on a polarized prediction of how the government will respond to a target's lawful production of information. In sum, as polarization alters the corporate actor's view of the government, it changes the actor's view of obstruction. Destroying documents and suborning perjury no longer appear to be selfish, illicit actions one takes to protect oneself from legal accountability. Instead, obstruction is a justified variation of political *self-defense*.

If polarization becomes prevalent and extreme enough, this "noble" narrative not only becomes more plausible, but also more prevalent. Even worse, its incidence will rise and fall on the *perception* of polarization. This, in turn, is bad news because "partisans exaggerate—often dramatically—the divergence between the parties."²⁰⁶ Moreover, "selfish" obstruction (the desire to avoid punishment for one's wrongdoing) can prosper alongside noble obstruction. If Corporation Alpha destroys documents because it sincerely distrusts the government, Corporation Beta can selfishly do the same thing, regardless of its true viewpoint.

Noble obstruction is more concerning than the matching strategy described in the previous Section; indeed, it illuminates the matching strategy's limitations. In a highly polarized environment, certain corporate targets will find it increasingly difficult to hire government-friendly attorneys. If our society becomes polarized enough, and certain cues become prevalent enough, the attorney or law firm that wishes to remain in the government's good graces will assiduously avoid the corporate defendant whose officers and employees trigger animus in the ruling administration. Eventually, some companies may find themselves "priced out" of hiring a politically preferred intermediary. When they reach that point, what should we expect them to do?

Call it the animus premium. To reduce the government's hostility, the company must pay an additional amount of money to an

205. See, e.g., Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 32 (2005) (identifying the moral norms "that are potentially violated by one who engages in obstruction of justice, perjury, and the like").

206. LEVENDUSKY, *supra* note 122, at 4 ("This is not just true of their issue positions; they also overestimate the degree of dissimilarity in terms of political interest, values, willingness to compromise, demographics, and many other factors.").

outside law firm or intermediary (what some might call “tribute”). When polarization is high, we should expect the animus premium to increase for at least some companies and some industries (since those who are out of favor will be out of favor by a stronger degree), and for some companies, this increase will place the government-aligned law firm beyond the price they can pay. *That* is when we might expect a company to embrace noble obstruction, and once *one* company engages in noble obstruction, we might find *more* companies engaging in similar conduct.

IV. REFRAMING COMPLIANCE: NEW IDENTITIES AND NEW CHALLENGES

Part I opened this Article by depicting a compliance network that is as valuable as it is reliant on relationships. Part II introduced the polarization literature, and Part III examined several pathologies likely to arise within a polarized compliance network. The aim of this final Part is to initiate discussion of the various ways the compliance network can best respond to an increasingly polarized world.

Polarization is an unhealthy phenomenon. It widens the space between citizens. It encourages elected officials to preserve their positions by catering to solely those individuals who are politically aligned.²⁰⁷ It generates intense negative feelings towards others, causes people to forego constructive conversations, and at its very worst, primes individuals for violence.²⁰⁸ Polarization undermines

207. Finkel et al., *supra* note 26, at 535 (“Political sectarianism compromises the core government function of representation. Because sectarian partisans almost never vote for the opposition, politicians lack the incentive to represent all of their constituents.”).

208. On the connection between the convergence of identities, affective polarization, and the capacity for extreme emotional reactions, including violence, see Lilliana Mason, *A Cross-Cutting Calm: How Social Sorting Drives Affective Polarization*, 80 PUB. OP. Q. 351, 352–53 (2016) (“I argue here that the effect of a ‘sorted’ set of social and partisan identities is to increase the volatility of emotional reactions to partisan messaging—further reinforcing the affective aspect of polarization that has been observed elsewhere.”). Mason’s argument is that the “convergence” of political, social, and religious identities into a single “mega” identity increases the stakes for individuals, causing them to experience greater emotional swings when their party wins or loses. *Id.* Along with much of the affective polarization canon, Mason’s work is grounded in social identity theory. *Id.* at 354; see, e.g., Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in PSYCHOLOGY OF INTERGROUP RELATIONS 7, 9–10 (William G. Austin & Stephen Worchel eds., 1986). For helpful distillation of the social identity literature, see Robbennolt, *supra* note 135, at 328–30; S. Alexander Haslam & Stephen D. Reicher, *50 Years of “Obedience to Authority”: From Blind Conformity to Engaged Followership*, 13 ANN. REV. L. & SOC. SCI. 59, 67–68 (2017) (explaining how social identity theory explains in-group reactions and the success of different leaders).

bureaucratic institutions and threatens democracy. It makes us worse off, and it makes many of us feel bad at the same time.²⁰⁹

It is also bad for compliance. As Part III explained, it distorts compliance's processes and worsens its outcomes. The government obtains less information, and it obtains it less quickly. In an extremely polarized world, where facts are pliable and groups view each other as enemies, the incentive to follow the law weakens, as does the willingness to share information.

What can the compliance network do to protect itself? One promising response set forth by Matthew Levendusky is to emphasize transcendent or "superordinate" identities.²¹⁰ Polarization is, after all, a story of animus that forces us to view each other as *partisans*. If compliance policymakers can emphasize approaches that de-emphasize this us-versus-them thinking, they can play a small but important role in de-escalating polarized thinking. A less partisan population maintains and repairs its relationships. Those relationships, in turn, promote a stronger, more effective compliance network.

In the pages that follow, I discuss proposals to professionalize compliance; to empower private unions and collective bargaining laws; and to lean more heavily on corporate branding as a means of reducing wrongdoing. Putting aside their merits and plausibility, these proposals are worthy of serious consideration as they may *also* play a role in constructing the types of superordinate identities that reduce polarization.

To be clear, all of these new identities can easily generate their own divides (e.g., professionals versus non-professionals in the compliance space). Nevertheless, there exists a huge difference between *cross-cutting* identities that integrate members of different

209. LEVENDUSKY, *supra* note 122, at 4–5 (“The danger is when, as at the present moment, [partisan] animosity reaches a point where it damages our social and political lives.”). On polarization’s democratic threats, see CAMPBELL, *supra* note 101, at 226–41 (including the decline of pluralism, productive lawmaking, and civil discourse as several of polarization’s negative consequences).

210. LEVENDUSKY, *supra* note 122, at 50–78 (introducing “common identity hypothesis” and examining potential bridging identities such as sports fandom and generalized American loyalty). For a more recent argument, see Timothy L. Fort, *With America so Divided, How Do We Move Past ‘Us vs. Them’?*, CHI. SUN-TIMES (July 5, 2024), <https://perma.cc/3VQU-6GA8> (explaining that the bridging identity, “makes for a space where [partisans] can civilly *talk* about their differences”). See also Ouziel, *supra* note 21, at 1113 (advising prosecutors to “seek to prime superordinate identity” by avoiding partisan rhetoric). One might conclude that the emphasis on “bridging identities” reflects an effort to reintroduce the “cross-cutting” loyalties that previously allowed for greater fluidity and negotiation between groups on matters of policy. See Mason, *supra* note 208, at 355 (explaining how “cross-cutting cleavages” mitigate social conflict” in that they reduce overall partisanship).

sects, and *correlated* identities that simply amplify pre-existing socio-political divisions. In the pages that follow, this Part hypothesizes pathways poised to provide more of the former and less of the latter.

A. *Professionalizing Compliance*

In a recent article examining the status of the corporate compliance officer, Professor James Fanto argues that the compliance occupation has followed a “standard” professionalism trajectory, in that its members have developed specific expertise and knowledge and interact in trade groups and organizations.²¹¹ This transformation, however, is “incomplete,” Professor Fanto argues, because compliance lacks the benefit of a state-sanctioned monopoly that determines who can become a compliance officer.²¹²

According to Professor Fanto, compliance’s uncertain status is a weakness, causing it to labor under the legal profession’s shadow.²¹³ If compliance were to become a standalone profession, Fanto reasons, it would gain more clout and its officers would therefore exercise greater power and discretion within the corporation.²¹⁴ Compliance officers wouldn’t be seen as the *para*-professional subordinates of the company’s lawyers. Nor would they be treated as quasi-government agents by federal prosecutors and regulators.²¹⁵ They would instead become independent, respected professionals, and be able to exercise their own discretion and judgment, honed by their years of training in universities and graduate schools.²¹⁶

211. Fanto, *supra* note 3, at 185–86 (“Those working in the compliance field recognize that they are engaged in a special activity and have formed organizations of compliance practitioners to share their specialized knowledge and practices.”).

212. *Id.* at 186 (“[T]his professional ascendancy of compliance remains incomplete in a critical respect: compliance practitioners have not received from state governments the licensing monopoly of their occupation that is the hallmark of established professions in the United States.”).

213. *Id.* at 227–28 (“[C]ompliance officers will be more effective in organizations if they are members of a strong, independent profession, rather than being subprofessionals operating at the periphery and under the authority of the legal profession, deputies of a government agency, or technology specialists.”).

214. *Id.* at 186–87.

215. *Id.* at 188 (“[C]ompliance officers will be more effective if they are recognized professionals, rather than assistants to the legal department, deputies of a federal government agency, or technocrats of some kind.”). Notwithstanding their uncredentialed status, chief compliance officers have already attained prestige and substantial remuneration in some sectors. See Jennifer M. Pacella, *The Conundrum of Compliance Officer Liability*, 21 BERKELEY BUS. L.J. 249, 237 (2024) (observing growth in pay packages for chief compliance officers).

216. Fanto, *supra* note 3, at 229–30.

Fanto's article focuses on compliance's effectiveness, as adjudged by the compliance officer's status and power. His article says nothing directly about polarization. Nevertheless, by delineating professionalization's benefits, Professor Fanto inadvertently highlights some of the features we might find helpful in neutralizing polarization.

For example, Fanto stresses that the compliance officer is at least partially professionalized because she is engaged in a particularized, discrete activity and has learned a common language.²¹⁷ She likely conceptualizes herself as a professional in the exercise of compliance activities. Most importantly, her professional status forms part of her social and economic identity.²¹⁸

If polarization distorts thinking and drives people apart, professionalization could be salutary because it teaches individuals specific skills, conveys highly specialized knowledge, and, most importantly, draws them together in a common mission. You may be a Republican, and I may be a Democrat, but together, we are both compliance professionals engaged in the same specialized activity. We have mastered the same skills and core language; we have built our careers by seeking the same degrees and besting the same licensing exams (assuming they exist); and we have sought and successfully achieved membership, and later service, in the same trade groups. However strongly our other identities might shape us, our newly professionalized "compliance identity," reinforced and signaled by our membership within a respected profession, neutralizes polarization's worst features. Moreover, it places us in the same classrooms and induces us to meet each other

That's the happy version of the story. The more skeptical frame reveals the incompleteness of this approach. *First*, as Part I made clear, the compliance network consists of many actors outside and inside the firm. Thus, the professionalization of the specific activity known as "compliance work" can affect only a narrow slice of the network.

Second, we know from our experience with the legal profession, that professionalization is hardly a compliance panacea. To be sure,

217. *Id.* at 189 ("[C]ompliance practitioners have a group identity of engaging in a common mission that is exemplified by their membership in professional organizations and by their engaging in projects of sharing their knowledge and practices."). To be sure, Fanto also points out the ways in which this process is "imperfect" or overshadowed by the legal profession. *Id.* at 210–11.

218. *Id.* at 211 (observing that compliance officers "increasingly [behave like they] have a professional social identity"). On the interaction of professionalism and identity formation, see *id.* at 206 ("The consciousness and identity generally emerge from the shared professional formation in the university-based professional schools and are further supported and promoted by societies and organizations devoted to standardizing, advancing, and sharing professional knowledge and practices, which professionals customarily join.").

lawyers are professionals: To become a practicing lawyer, an individual ordinarily must attend law school, pass a bar examination, and eventually take an oath to uphold the rule of law and act professionally. Moreover, lawyers can be disbarred when they act unethically or demonstrate insufficient character and fitness for the bar.²¹⁹ These constraints, however, have not entirely shielded the profession from polarization or from noncompliance.

Concededly, it *does* appear to be the case that members of the judiciary frequently approach legal issues (particularly technical ones) in a dispassionate, apolitical manner, as contrasted with laypersons.²²⁰ But professionalization's positive effect on judges has not been felt or sustained across all levels of the judiciary, much less in all areas of legal practice.²²¹ The Supreme Court has tracked the nation's trajectory in political sorting, wherein judicial ideology and political party now neatly coincide.²²² Appellate and Supreme Court practices within the top law firms have begun to sort along political lines and are apt to become even more sectarian if regulatory and enforcement practices become more polarized.²²³

The legal profession, in other words, has enjoyed at best, only incomplete success in reducing polarization.²²⁴ Recent experiences in

219. *E.g.*, Philp Marcelo, *Giuliani Is Disbarred in New York as Court Finds He Repeatedly Lied About Trump's 2020 Election Loss*, ASSOCIATED PRESS (July 2, 2024), <https://perma.cc/7HLN-2RK4>.

220. "This form of professional judgment, however, does not furnish lawyers or judges with any special immunity to the reason-disturbing effects of identity-protective cognition outside of the domain of their own expertise." Dan M. Kahan et al., "Ideology" or "Situation Sense"? *An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 355 (2016). "The idea is simple but powerful: even if judges have ideological preferences and methodological differences that continue to separate them from one another, partisan loyalties fade away after investiture to reveal a judiciary of men and women bound together by collegiality norms and the rule of law." Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1375 (2021).

221. Devins and Larsen find evidence of partisan behavior at the federal appellate court level. *Id.* ("[A] team mentality could be emerging in the courts of appeals and it is a dynamic most visible when the judges sit all together in something called en banc review.").

222. "Before 2010, the Court never had clear ideological blocs that coincided with party lines." Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (explaining partisan sorting's impact on the Supreme Court).

223. Patrick Smith, *Law Firms are Getting Pushed into 'Red' or 'Blue' Corners*, AM. LAW. (Oct. 7, 2022), <https://perma.cc/W7CC-QA38>; Adam Bonica et al., *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 307–09, 315–20 (2016).

224. The exception to this trend may be found in the Delaware courts, where judicial nonpartisanship is required and achieved through a politically balanced

higher education provide even greater reason for being skeptical of the legal profession's depolarizing qualities.²²⁵ Nevertheless, professionalism is at least a start and one that compliance proponents should take more seriously.

B. *Organized Labor*

At first blush, organized labor is a surprising choice among possible sources of depolarization. Unions, after all, have historically aligned with political parties and specific ideologies.²²⁶ They have also, at times, played a role in corporate and organized crime, giving birth to statutes, such as the Hobbs Act,²²⁷ that the federal government currently relies upon to punish fraud and bribery, as well as other protective statutes.²²⁸ One would therefore not expect organized labor to depolarize the electorate, much less the corporate industries that spar with unions.

More practically, today's unions are, in many respects, too small and too impotent to unilaterally protect corporate compliance from polarization.²²⁹ While compliance and polarization have been on the

judiciary. See Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 181 (2023).

225. For an overview of polarization's impact on legal education, see Eric Segall, *Political Polarization, Legal Education, and a Few Modest but Serious Proposals*, DORF ON L. (May 4, 2023), <https://perma.cc/6P86-GGU6>.

226. Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1780 (2001) (discussing labor's historic relationship with socialism). Labor's current relationship with the Democratic party is complicated. For an overview, see David Leonhardt, *Why Unions Matter So Much*, N.Y. TIMES (Mar. 10, 2023), <https://www.nytimes.com/2023/03/10/briefing/labor-unions-democratic-party-right-to-work.html>.

227. 18 U.S.C. § 1951.

228. See, e.g., JAMES B. JACOBS ET AL., *GOUGH UNBOUND: HOW NEW YORK CITY WAS LIBERATED FROM THE GRIP OF ORGANIZED CRIME* 122–28, 224–33 (1999) (tracing organized crime's relationship to local unions). Aneil Kovvali & Jonathan R. Macey, *Toward A "Tender Offer" Market for Labor Representation*, 63 B.C. L. REV. 2111, 2164 (2022) ("[W]orkers historically have supported union leaders who were arguably corrupt or authoritarian because those leaders delivered meaningful economic benefits."). On the Hobbs Act's relationship with organized labor and union racketeering, see *United States v. Culbert*, 435 U.S. 371, 377 (1978) ("The primary focus in the Hobbs Act debates was on whether the bill was designed as an attack on organized labor."). For examples of other laws Congress enacted in response to union-driven corruption, see David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106, 2123 (2014) (citing "widespread corruption and racketeering inside labor unions like the Teamsters, which included the looting of union-controlled employee benefit funds" as one of the driving forces underlying ERISA's duty of loyalty).

229. Less than a decade ago, Benjamin Levin bluntly declared, "Labor law is dead, or at least so say the labor law scholars." Benjamin Levin, *Criminal Labor Law*, 37 BERKELEY J. EMP. & LAB. L. 43, 44 (2016). Levin blamed organized labor's demise on federal criminal statutes and their enforcement: "Through a set of

rise, organized labor—as measured by national union membership—has waned, falling to just 6 percent of the workplace.²³⁰ Public sector unions continue to wield some political and economic power, but private sector unions today enjoy far less influence than they did just a half-century ago.

From a different lens, organized labor's fortunes appear to be on the upswing. Unions have recently enjoyed a rebirth of public encouragement. The Gallup organization reports that 67 percent of those queried in 2023 voiced general support for unions.²³¹ That support, in turn, has translated into some very notable and tangible achievements. In 2022 and 2023, employees overcame managerial opposition to successfully unionize their respective workplaces within Starbucks and Amazon.²³² More importantly, well-established unions such as the United Auto Workers and the Writers' and Actors' Guilds of America secured gains in 2023 through selective adverse actions and strikes, actions that were popular and produced concrete benefits for their members.²³³

Labor's re-emergence *could* theoretically be a good story for polarization and compliance. A union draws its members together in a singular, communal, and highly practical purpose, such as bargaining for better wages, more meaningful benefits, and safer working conditions.²³⁴ These bread-and-butter goals, promoted by the union and its organization, can create the very superordinate identity that Matthew Levendusky has heralded in his work on polarization.²³⁵ A union powerfully reminds its members of the mission that binds them together: seeking better economic outcomes and a voice in how the workplace is governed.²³⁶ These are practical

controversial, quasi-criminal statutory mechanisms, opponents of organized labor have harnessed criminal statutes and criminal law principles as a means of fighting unionization campaigns." *Id.* at 47.

230. Andrea Hsu, *Union Membership Grew Last Year, but Only 10% of US Workers Belong to a Union*, NPR (Jan. 23, 2024), <https://perma.cc/5BVV-F2F2> (citing the 6% figure for private workers).

231. Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way*, GALLUP (Aug. 30, 2023), <https://perma.cc/LUN4-2PZF>.

232. "The Amazon workers, without affiliation with any existing union, pulled off a stunning win." *Amazon, Starbucks Election Spur Unions*, NLRB, 19 No. 9 FED. EMP. L. INSIDER 1, 1 (2022).

233. Camila Domonoske, *The UAW Won Big in the Auto Strike—But What Does It Mean for the Rest of Us?*, NPR (Nov. 12, 2023), <https://perma.cc/CH45-4RY5>; Alissa Wilkinson & Emily Stewart, *The Hollywood Writers' Strike Is Over—and They Won Big*, VOX (Sept. 28, 2023), <https://perma.cc/JJ2N-Z4FY>.

234. Kovvali & Macey, *supra* note 228, at 2114 ("By acting collectively through unions, workers *are supposed to* be able to demand higher wages and better working conditions.").

235. LEVENDUSKY, *supra* note 122, at 35–36.

236. "Labor law could be understood as an effort to inject democratic processes and values into everyday working life, in the hope of increasing the dignity and

goals that can eclipse left-right political fights.²³⁷ And, just like the professional guild and the vaunted sports team, the local union can serve as one of those “superordinate” identities that reduces polarization.

That being said, much hinges on how politically oriented a union chooses to be. As others have recognized, organized labor does not move in lockstep. Some union leaders (and some unions) will deliberately wade into ideological and political debates, aligning themselves with partisans on either side of political disputes that are far less easy to bridge than concrete issues such as workplace safety and health insurance premiums.²³⁸ Still, to ignore labor’s potentially positive role in tamping down polarization is to blind oneself to one of the many tools that might be helpful in reducing hostility and distrust in the workplace. For that very reason, compliance scholars, who have long focused on ways to reduce wrongdoing within the workplace, should pay greater attention to the ways in which organized labor might fruitfully contribute to the compliance network’s trust-building and information-based missions.

C. *Building Out Brands*

Professionalization and collective bargaining are similar in that they both rely on a legal framework to implement their members’ rights and carry out certain powers responsibly. Professionalization grants a professional trade group the legal right to determine and regulate its membership. Organized labor laws endow unions with the right to collectively bargain on behalf of their members for a safer workplace and for better wages and benefits.

The third and final strategy is based in private ordering, wherein corporations place differing levels of emphasis on their corporate brands and related personas. Like a union or a profession, a corporate employer *can* theoretically draw different groups together under its broad umbrella. Moreover, organizational scholars have emphasized the ways in which a corporate “brand” can positively reinforce law-abiding norms, corporate ethics, and internal compliance.²³⁹ This Section aims to tie these two concepts together.

agency of working people and enriching political democracy.” Kovvali & Macey, *supra* note 228, at 2163 (identifying different theories of organized labor).

237. I am admittedly channeling a form of “business unionism” that focuses on concrete business gains and eschews political and ideological challenges to capitalism. See Crain & Matheny, *supra* note 226, at 1780 (describing and charting the growth of “business unionism” in the AFL and CIO labor unions).

238. Labor’s political activism has, in the past, played a role in the demise of certain unions. See *id.* at 1773 (providing historical account of unions in the late 1800s and early 1900s whose open political affiliations and embrace of radical actions led to a loss of public support and the eventual demise of those unions).

239. “[B]rands have provided a tool of identification and individuation for millennia.” W. Robert Thomas & Milhailis E. Diamantis, *Branding Corporate*

Branding can easily convey information about a corporation's goods or services, or about its employees and how they work. Branding can also send signals about compliance. Corporations—if they are inclined to do so—can ensure that behaving ethically and in compliance with the law is embedded throughout the corporation's processes and intertwined with the corporation's persona.²⁴⁰ To a degree, the Environmental Social Governance (ESG) framework reflects the degree to which corporations can adopt and further their pro-social personas.²⁴¹ Indeed, at least a few scholars have recognized a potentially fruitful relationship between ESG and corporate compliance.²⁴²

Practically speaking, the brand identity approach is easier to implement than the other two approaches. Using the company's brand identity to redress polarization requires no statutory legislation, other than the broad permission that states already grant businesses to organize as corporations. State charters *already* vest corporations with legal personhood.²⁴³ The corporation, through its managers and board, expresses that personhood at a practical level by, among other things, developing a brand with the company's clients, customers, investors, and its employees.²⁴⁴

As Margaret Blair has argued, the legal chartering mechanism facilitates the company's development of its brand and "persona":

Criminals, 92 FORDHAM L. REV. 2629, 2643 (2024) (arguing for a more brand-conscious approach to corporate enforcement and its punishment).

240. "Companies who adopt [corporate social responsibility] initiatives to improve their performance beyond what regulations require may find favor with environmentally conscious consumers by creating an environmentally friendly corporate brand, thus helping 'the companies' bottom lines." Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?*, 21 FORDHAM ENV'T L. REV. 1, 37 (2010). This too, is thought to appeal to various investors. "Many investors, the theory goes, believe they can do well by doing good." Quinn Curtis et al., *Green Bonds, Empty Promises*, 102 N.C. L. REV. 131, 133 (2023).

241. "ESG criteria are a set of nonfinancial standards, which socially conscious investors apply to company operations, that paint a more accurate picture of a company's risks and opportunities than simply analyzing financial statements." Ashley E. Jaramillo, Note, *Hippies in the Boardroom: A Historical Critique of Addressing Stakeholder Interests Through Private Ordering*, 96 N.Y.U. L. REV. 2213, 2222–23 (2021).

242. "ESG narrows down a company's social risk by subjecting every aspect of its operations to a test of moral rectitude and social equitableness." Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1415 (2020).

243. See generally Stephen M. Bainbridge, *Why We Should Keep Teaching Dodge v. Ford Motor Co.*, 48 J. CORP. L. 77, 82–83 (2022) (discussing the nineteenth century's evolution in favor of permissive corporate enabling statutes).

244. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 798 (2013).

The idea that a corporation has its own name and is able to act in that name also means that it can take on an identity that is separate from any of its individual participants, an identity I refer to as the corporation's persona.²⁴⁵

According to Blair, corporate branding did not come about by happenstance. Instead, it arose as a bonding mechanism to ensure customers that a given product, manufactured by strangers and shipped from far away, maintained a certain level of quality:

As corporations emerged to organize large scale manufacturing, transportation, and wholesale and retail trade, . . . [t]he scale of the market meant that customers no longer had personal relationships with the people who produced the goods. How could a customer be sure that a product would be well-made, or that the producer or seller would stand behind the product? One solution to this problem turned out to be the development of the idea of "branded" goods, such as Coca-Cola and Quaker Oats. The brand, then, became a key part of the corporate persona.²⁴⁶

Brands do more than assure skittish customers that the cereal they are buying is safe and tastes good. They also bind people together who might otherwise have been polarized into separate partisan camps. Just as team fandom can bring disparate groups together in cheering for a local team, so too can other goods and services.²⁴⁷

Some corporations already care deeply about building and emphasizing a strong brand, along with the consumer loyalty and market response it delivers. Others may find little interest in developing a reputation beyond the insular group of businesses with which it trades. The point I wish to raise here is that in a polarized world, *all* corporations may find it helpful to build and emphasize a company brand that consciously envelops the corporation's employees and managers.

Human resources managers often speak of the benefits of "community building" programs for morale and productivity.²⁴⁸ Organizational theorists might extend this analysis, not just to easily trackable matters like revenues, absenteeism, and retention, but also to questions of polarization. Might we find that highly brand-oriented companies are not just more productive but also less polarized? And might that reduction in polarization translate into just a bit less

245. *Id.*

246. *Id.* at 810.

247. LEVENDUSKY, *supra* note 122, at 35–36 (citing the importance of "superordinate identities," such as support for the same sports team, in lessening partisan animosity).

248. See, e.g., Saila Saraniemi, *Exploring How to Build a Strong Internal Brand Community and Its Role in Corporate Brand Co-Creation*, in THE ROUTLEDGE COMPANION TO CORPORATE BRANDING 459, 463–64 (Iglesias et al. eds., 2022).

noncompliance every year?²⁴⁹ These are questions that merit additional attention, of both scholars and compliance practitioners.

Not all brands are the same, and some companies will choose to enter political fights, even those that facially have nothing to do with their products and services.²⁵⁰ I leave the legal and economic debates over such activity to other scholars. For our purposes, it is important to acknowledge corporate politicking's flaw: When a corporation becomes known more for its activism than its generic, anodyne qualities, such activism is apt to amplify polarization.²⁵¹ When polarization erodes law-abiding norms, it further undermines compliance.

D. *Towards a Brave New Network*

The preceding Sections describe three strategic responses to polarization. Professionalization, organized labor, and corporate personas may well reinforce the kinds of healthier, superordinate, and cross-cutting identities that mitigate political sectarianism. At the same time, we should anticipate and admit their shortcomings. Each of these strategies can cause unintended consequences, promote new cleavages, and fall short of securing expected benefits.

Nevertheless, theorizing superordinate identities prompts us to imagine a different compliance network than the one we currently have. It offers a new gloss on existing policy proposals and debates. And finally, it allows us to predict the emergence of new actors, ones who may play different and stronger roles within tomorrow's compliance network.

Until now, "compliance" has often been construed as a conventional, triangular relationship between: (a) the corporate board, (b) the company's rank-and-file employees, and (c) the government's regulators and enforcers.²⁵² More recent work recognizes the emerging value of intermediaries and middle managers.²⁵³

249. I am, in essence, making a "value" claim about polarization and compliance. On the ways in which companies and researchers can properly determine the value of corporate compliance, see Haugh & Bedi, *supra* note 19, at 560.

250. On the wisdom of corporate politicking, see *supra* note 13.

251. See, e.g., W.C. Bunting, *Against Corporate Activism: Examining the Use of Corporate Speech to Promote Corporate Social Responsibility*, 74 OKLA. L. REV. 245, 248 (2022) (arguing that corporate political advocacy "is often *not* in the best interests of the company's shareholders").

252. Buell, *supra* note 86, at 1614, 1670.

253. On the importance of compliance intermediaries, see Eckstein & Shapira, *supra* note 89, at 473. Regarding middle managers, see Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1622 (2004) (arguing for further analysis of middle managers because "much of the real work of the organization occurs there"); see also Christopher R. Leslie, *High Prices and*

In our future world, the compliance network may eventually de-emphasize outside lawyers and prosecutors. Instead, it may focus greater attention on compliance workers who have been trained and vested with a professional credential. Those compliance professionals, in turn, may find new allies in an organized labor committed to supporting legally compliant workplace conditions, and a new generation of corporate managers invested in forging corporate identities that embrace responsible behavior but sidestep the most divisive political battles.

CONCLUSION

Compliance is more than an occupation or activity. Indeed, it is far more than a corporate governance function; it is an amalgamation of relationships that rely on high-level managers and board members, on lower-level supervisors and rank-and-file employees, and on a vast array of intermediaries and government agents to form a fluid, intricate network. That network pursues two essential missions: modifying behavior and ensuring information's efficient and smooth flow.

Numerous pathologies have threatened the network in the past, but none may be as difficult to disarm as polarization. Polarization causes us to see the world differently, to see each other differently, and to perceive ambiguous facts differently. It would be shocking if polarization *didn't* impact the compliance network, which is why compliance practitioners and scholars alike should join in confronting its weighty challenge.

Whether we focus solely on the corporation or widen our lens to include the corporation's intermediaries and government agencies, the conclusion is the same: Polarization is apt to wreak havoc on the compliance network if we do nothing about it. Pathological silence and conformity, reflexive differentiation and exit, and numerous other pathologies become more likely and more difficult to dislodge when polarization infiltrates the workplace.

If compliance is to successfully reframe itself for a polarized world, it must locate and champion those strategies that tamp down partisanship. Professionalization, collective bargaining, and the amplification of a corporate brand identity are all salutary insofar as they generate transcendent superordinate identities. This hypothesis is far from proven and deserves further research and analysis. Nevertheless, it serves as a useful starting point for finding ways to reduce polarization. Short of that lofty goal, it may help us reposition the compliance network to withstand a more partisan, distrusting world.

Low-Level Conspirators, 100 TEX. L. REV. 839, 840 (2022) (observing that “price-fixing cartels often depend on the work of middle managers and ordinary salespeople” who violate the law).